RESOLVING DEADLOCKS:
THE PUBLIC RESPONSE

Report of the Consultative Group
on Constitutional Change

March 2004
Resolving deadlocks: The public response

This report was developed for the Commonwealth by the Consultative Group on Constitutional Change. It draws on information, opinions and advice provided by a variety of individuals and organisations during the period of consultation. This report does not necessarily reflect the views of the Commonwealth or indicate its commitment to a particular course of action.

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This paper is available online through the Department’s home page: www.pmc.gov.au. Copies of this paper are also available by request to (02) 6271 5530.
March 2004

The Hon John Howard MP
Prime Minister of Australia
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

The members of the Consultative Group on Constitutional Change are pleased to provide you with the attached report on our public consultations regarding proposed reform of section 57 of the Australian Constitution.

The responses received by way of public meetings, written submissions and private discussions, leave the Group in no doubt that the issues raised in the government’s discussion paper, *Resolving deadlocks, A discussion paper on section 57 of the Australian Constitution*, are of public importance. Nevertheless, as the conclusions stated in the report show, the Group is of the opinion that the proposals contained in the discussion paper would not be carried in the event of a referendum. They do, however, merit serious debate in the event of further consideration of the role of section 57 in this second century of Federation.

We trust that this report will be of assistance to you. We would also like to express our appreciation of the opportunity given to us to be involved in this important matter.

Yours sincerely

Hon NA Brown QC
Chairman

Prof Jack E Richardson AO
Member

Hon MH Lavarch
Member
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CHAPTER ONE: INTRODUCTION

1. The relationship between the House of Representatives and the Senate is pivotal to the workings of the national Parliament and the broader system of government in Australia. Given that the two houses enjoy equal powers (except to a limited extent dealing with financial matters), it is inevitable and probably highly desirable that there will be a tension between the chambers. It is in the best interests of the nation that this tension is creative and not destructive.

2. Section 57 of the Australian Constitution provides the constitutional mechanisms to resolve deadlocks between the House of Representatives and the Senate. It allows the Governor-General to dissolve both houses and bring on a double dissolution where a bill has been twice passed by the House of Representatives but rejected by the Senate. The provision requires particular threshold points to be reached before the trigger of a dissolution of the Parliament can take place.

3. The deadlock might then be resolved by the result of the double dissolution election, for instance through the defeat of the government sponsoring the disputed legislation. If not resolved by the election itself, the Governor-General on the advice of the Prime Minister is able to convene a joint sitting of both houses if the bill is again deadlocked in the new Parliament, where the deadlock will be resolved one way or the other by a vote of the total number of senators and members of the House of Representatives.

4. On 8 October 2003, the Prime Minister released a discussion paper on possible reforms to section 57 of the Constitution entitled ‘Resolving deadlocks: A discussion paper on section 57 of the Australian Constitution’.

5. The Prime Minister announced when he released the discussion paper that a Consultative Group on Constitutional Change was being formed to encourage debate and, to that end, it would visit each capital city to support and focus the debate. The Prime Minister also indicated that the Group would hold public meetings where Australians would have an opportunity to have their say on the issues and to raise related issues.
6. The Group was not involved in the writing of the government’s discussion paper and was not asked to advocate any or all of the conclusions set out in the document.

7. Rather, the Group saw its role as being independent, particularly of the government, and as having a responsibility to stimulate debate and to assess public reaction to the proposals in the discussion paper.

8. The Group has held meetings in each capital city and considered numerous written submissions and engaged in discussion with experts. The Group feels that it has discharged the Prime Minister’s request to support and focus the public debate. This has been done at the public meetings by explaining the various issues and by guiding discussion around these issues. The Group is confident that no-one who wanted to speak at a public meeting was denied the opportunity to do so. The Group believes that it allowed wide-ranging discussion of related issues that persons wished to raise, even when the subject under discussion had only a remote connection with the principal issues.

9. The release of the discussion paper is but the latest contribution in a long debate about the effectiveness and desirability of the section 57 mechanism – though this is the first occasion on which a process for constitutional reform has begun by consulting members of the public at public meetings. The question of legislative deadlocks was a time consuming issue before the Constitutional Conventions which debated and framed the Australian Constitution in the 1890s. The section was also considered as part of constitutional review processes undertaken:

- in 1950 by a Senate Select Committee;
- between 1957 and 1959 by a parliamentary Joint Committee on Constitutional Review;
- between 1973 and 1985 by the Australian Constitutional Convention, particularly the 1976 and 1983 sessions; and
10. Like the current discussion paper, each of the previous reviews concluded that there should be some manner of change to section 57, but there was no consensus from previous reviews about what and how extensive the change should be.

11. The discussion paper argues that the present section 57 is not an adequate mechanism to resolve the type of legislative deadlocks that have occurred during the tenure of the present and previous governments.

12. The paper argues that proportional representation, the increase in the number of senators elected in each state from five to six at a half Senate election and the consequent presence of independents and senators from minor parties have changed the way the Senate operates.

13. It is said that the Senate now delays, amends and even vetoes government legislation with damaging regularity. It is further said that such actions by the Senate extend to legislation that the government announced at the previous election and for which it claims a mandate.

14. A prime example relied on in support of this argument is the proposal to exempt small business from the unfair dismissal legislation. That legislation has been rejected by the Senate, although the government claims to have secured a mandate at successive elections to have it enacted.

15. The contrary view has been put that all of this is an exaggeration, that the Senate rejects few government bills and does so for good reason and well within the limits of responsible conduct by an upper house and indeed in accordance with the responsibility that senators have to those who elected them.

16. To this the government replies that, if most government legislation is passed, it is because most legislation is uncontroversial and the rejected bills deal with matters of high principle even if they are few in number.
17. In any event, it is clear from this concise statement of the argument that the government established the Group because it wished to see if there was public support for a better constitutional method than section 57 for resolving legislative deadlocks between the House of Representatives and the Senate.

18. The discussion paper advances two options which it suggests are different and better methods of resolving such deadlocks.

19. It should be emphasised, however, that both options are proposed as being additions to, and not as substitutes for, section 57, which it is proposed would be retained in its present form. The double dissolution and joint sitting would therefore still be available to a government faced with the rejection of its legislation in addition to Option One or Option Two if either should eventually be incorporated into the Constitution.

20. The first option would allow the Prime Minister to ask the Governor-General to convene a joint sitting of both houses to consider a bill originating in the House of Representatives which the Senate had rejected or failed to pass. The bill must have been put before the two houses twice during the life of the parliament with a three months interval between each attempt to gain Senate approval.

21. In other words, the first option removes the requirement for the parliament to be dissolved and an election held to resolve the deadlock. Rather, it would be possible to move to the joint sitting after the trigger events have been reached.

22. The second option would allow the Prime Minister to ask the Governor-General to convene a joint sitting following an election in order to consider a bill that was the subject of disagreement between the two houses on two separate occasions in the previous parliament and was again disagreed in the new parliament. In other words, an option for a joint sitting becomes a standard feature following each general election of the House of Representatives and half the Senate or the House of Representatives alone.
23. The Group is not convinced that the constitutional mechanism provided by section 57 is the best way of resolving legislative deadlocks. The Group considers that there is certainly a case for trying to find a better method.

24. However, the immediate question on which the government sought the Group’s assessment is whether there is a reasonable prospect of gaining sufficient community support for either of the options for change advanced in the discussion paper to warrant the holding of a referendum. The Group concludes that there is no reasonable prospect of such support at the present. The Group has set out in this report its reasons for reaching that conclusion, and has made some recommendations.

25. The Group recommends that this report be made available to the public. This is because the Group believes there is a case for ongoing examination of the constitutional mechanism for resolving legislative deadlocks and it is important for the public to know and understand the reasons leading to that conclusion.

26. The Group further recommends that the written submissions in response to the discussion paper also be made available to the public because they contain valuable and stimulating material which will assist in any ongoing public debate on this issue.
CHAPTER TWO: CONCLUSIONS

27. The Consultative Group has reached the following conclusions as a result of its work.

(i) Both proposals would fail if put to a referendum now

28. The public meetings, written submissions and private discussions with persons and groups with specialised knowledge and experience have failed to produce any substantial measure of support for either of the two options presented in the discussion paper.

29. Attendance at the public meetings was minimal and the lack of any positive community response suggests that there is at least widespread public indifference to the government’s proposals.

30. The Group has concluded that voter support for either option, with or without modifications, would fail to obtain the levels necessary to secure their passage at a referendum either now or in the near future.

(ii) The public has not been convinced of the need for constitutional change

31. The Group considers, from the experience of past constitutional debates, that an almost irrefutable case has to be made out in order to convince the Australian community to approve any constitutional change. The Group considers from its consultations that the community does not believe a sufficiently strong case to amend section 57 has been made at this time.

(iii) Option One attracted virtually no support

32. Option One received a rough passage in most of the Group’s consultations. The clear prevailing body of opinion was that the option would increase executive governmental power at the expense of the Senate and render the Senate far less effective in performing its function of review. The Group concludes that the
option would have virtually no chance of community acceptance either now or in
the foreseeable future.

(iv) **Option Two may have prospects of success in the long term**

33. The Group detected limited support for Option Two in the form presented in the
discussion paper. Many persons in the consultation process did not differentiate
between Options One and Two in terms of their general mistrust of the political
process or their concern about implications for the current system of government.
However, other persons saw Option Two as at least preferable to Option One and
were open to discussing its merits, particularly when combined with other
constitutional reforms such as fixed parliamentary terms. For these reasons, the
Group considers that Option Two would have greater potential for success in the
longer term, particularly if the government were willing to consider some
modification of the option.

(v) **If change to section 57 is to be achieved in the longer term, a comprehensive
programme of consultation and education will be required**

34. The Group considers that there is a case for ongoing study and public debate on
section 57 itself and an equally strong case for studying and debating whether
some alternative provision should be made in the Constitution for resolving
legislative deadlocks.

35. If the government is minded to pursue reform, the Group considers that there
should be a wider programme of consultation with the community, and more
attention given to educating the public about the Australian Constitution and how
it operates in practice. The government may wish to consider assigning
responsibility for consultation and education on constitutional matters to a
particular body, whether it be a government department, an existing, expanded or
newly-created statutory or non-statutory public authority, or a suitable non-
government entity such as an academic institution. The establishment of a
parliamentary committee to consider these issues might also be considered.
CHAPTER THREE: ORIGIN AND MEANING OF SECTION 57

36. The starting point is to understand the place of section 57 in the Constitution.

Convention debates in the 1890s

37. It was without argument during the Convention debates in 1891 and 1897-1898 that the federal legislature should be bicameral with the Senate being designed to protect the interests of the six Australian colonies as equal partners in the Federation irrespective of their representation in the House of Representatives. Further, it was readily accepted that the Senate should be able to review bills passed by the lower house. After much debate the influence of the small colonies was such that the Senate was given power to reject any bill submitted to it by the House of Representatives, even budget measures, which the Convention acknowledged, however, should originate in the House of Representatives where governments were formed.

38. The Senate’s role as a house of review was further strengthened by giving senators fixed six year terms with half retiring every three years. Further, if the House of Representative was to increase in size, the Senate had to be increased as well, on an overall two to one ratio. At Federation there were six senators for each state. Now there are 12, including Tasmania which still has only five members in the House of Representatives.

39. Sir Henry Parkes, who was the leader of the first Convention in 1891, saw the Senate’s power of review being exercised by independently minded senators. When the Convention debates resumed in 1897 Edmund Barton, the Convention’s leader, impressed upon the assembled gathering the significance of the Senate as a States’ Assembly and few were prepared to dissent from that view. The ensuing debate was dominated by his states’ house concept.

40. As the debates proceeded, more and more delegates became aware that given the unusually broad legislative powers of the upper house something would have to be done if inter house disagreements were to occur, as seemed possible,
especially in budgetary legislation which the Senate could reject although not amend. There was a history of such conflicts in the bicameral legislatures of all the colonies.

41. The search for a deadlocks clause took much more time during the debates of 1897-1898 than any other subject in the entire series of discussions. The major debate occupies some 400 pages of the 1100 pages of the official record of the Sydney Convention proceedings. Various proposals foundered before section 57 emerged victorious after the assembly appeared at times to be itself deadlocked on the subject.

42. The conclusion is inescapable that most of the Founders created a Senate without any awareness that its adumbrated dual role would be overtaken by the rapid growth in matters of national interest in the federal parliament. Nor did most of them foresee that political parties would emerge as the dominant forces in the Senate as well as the House of Representatives. Because of its state-based composition and extensive legislative powers, irrespective of the original conceptions, the Senate has always sustained itself as a formidable component of the Australian federal parliament.

Sharing legislative power

43. Section 53 of the Constitution deals with the allocation of legislative power between the Senate and the House of Representatives. It recognises that proposed laws appropriating revenue or money or imposing taxation, known as money bills, must originate in the House of Representatives. It states that though the Senate may suggest amendments it may not amend proposed laws imposing taxation or appropriating revenue or monies for the ordinary annual services of the government. But the section concludes by saying that, except as provided in the section, the Senate should have equal power with the House of Representatives in respect of all proposed laws.

44. It seems beyond argument that the last paragraph of the section accords to the Senate full power to pass or reject any bill, including a money bill, transmitted to
it from the House of Representatives. The Senate has always acted on that assumption without any formal challenge from the House of Representatives and it is perfectly plain from the Convention debates in the 1890s that this was the Founders’ intention.

Disagreements between the houses – section 57

45. During the Convention debates it took some time for participants to appreciate that the power given to reject measures passed by the House of Representatives could give rise to irreconcilable differences between the two houses. In the upshot, section 57 was written into the Constitution to provide a means of resolving deadlocks by resort to a simultaneous dissolution of both houses.

46. Section 57 is the third longest section in the Constitution. It was not made for easy reading. In general terms it provides that if the Senate, with an interval of three months intervening, twice rejects a proposed law or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve both houses simultaneously. A double dissolution cannot occur within the last six months of the term of the House of Representatives. If the disagreement persists after the election of a new parliament the Governor-General may convene a joint session of the two houses to vote on the proposed law. If it is passed by an absolute majority of the total number of members of both houses it becomes law after receiving royal assent.

Section 57 in practice

47. Governments have invoked the section on six occasions, five of them occurring since the introduction of proportional representation for the election of senators in 1948.

48. The following observations can be made about the section.
i. In the elections following double dissolutions the particular rejected bills triggering the deadlock have usually been of little consequence in determining the outcome.

ii. The section is subject to judicial review as to its meaning and, for the most part, its application. There remains uncertainty as to how it applies in particular situations, for example, the precise role of the Governor-General and the meaning of the expression ‘fails to pass’.

iii. The political use of section 57 and the consequences to which it can give rise encourage the expression of disparate views about its worthiness. The different views which the respective clerks of the Senate and House of Representatives have expressed, as described in Chapter 7 of this report, provide a good illustration.

49. Before 1948 there was only one double dissolution but there were other instances when it could have taken place. Since 1948 the conditions of deadlock have arisen on a good many occasions without resort to section 57. As the then Leader of the Opposition, the Hon Simon Crean MP, observed in parliament on 8 October 2003, for 37 of the last 42 years the government of the day has not had a majority in the Senate. Thus the potential for deadlocks to occur remains unabated. The Group’s inquiries and this report are concerned with the most appropriate method of resolving such deadlocks.
CHAPTER FOUR: THE CONSULTATIVE GROUP

Formation of the Group

50. On 8 October 2003 the Prime Minister announced in parliament the release by the government of the discussion paper ‘Resolving deadlocks: A discussion paper on section 57 of the Australian Constitution’ dealing with possible changes to section 57 of the Constitution and outlining two possible options for change. Mr Howard said that the government would engage in three months of consultation and if at the end of that time there was a reasonable prospect of community support, the government would consider holding a referendum on the issue in conjunction with the next election. On the same date the Prime Minister announced the appointment of the members of the Consultative Group on Constitutional Change, to encourage public debate around the country. The members were then provided with copies of the discussion paper. The Prime Minister said that his department would take submissions from interested parties.

Distribution of the discussion paper

51. The Department of the Prime Minister and Cabinet was responsible for the distribution of the discussion paper. Shortly after its launch, the Prime Minister and the department sent copies to state and territory premiers and chief ministers, along with targeted interest groups and other public figures, as well as to members of the public on request. Copies of the discussion paper were available at the eight public meetings and it was also available on the department’s website.

The submissions process

52. The discussion paper and newspaper advertisements invited members of the public to make written submissions by email or post in response to the issues raised in the paper. The closing date for submissions was 31 December 2003.
Publicising the consultation process

53. Efforts by the Consultative Group and the department to advertise the public consultation process and to stimulate public debate included:

- advertisements in major metropolitan newspapers on 9 October 2003 announcing the release of the discussion paper and calling for public submissions;
- advertisements in major weekend newspapers in each city publicising the public meeting arrangements in that city;
- additional advertisements in Sydney and Melbourne newspapers on the day of the public meetings in those cities;
- engagement of a public relations consultant to distribute media releases and consult directly with key interest groups prior to the public meetings;
- distribution of fliers to university law and political science schools in each city prior to the public meetings;
- letters to state and territory premiers, chief ministers and opposition leaders advising them of the public meeting dates in their cities and encouraging their participation; and
- publication of information on the entire consultation process, including the arrangements for public meetings, on the department’s website.

54. In addition, the Chairman of the Group gave radio and press interviews in capital cities prior to the public meetings in those cities. Opinion pieces written by the Chairman were published in *The Herald Sun* on 20 November 2003, *The Courier-Mail* on 25 November 2003 and *The Australian* on 1 December 2003.

Role of the Consultative Group

55. As announced, the primary role of the Group has been to encourage debate around the country by visits to each capital city to support and focus public debate and, in particular, to hold meetings giving Australians a chance to have their say on the issues raised by the discussion paper and related issues.
56. In furtherance of the government’s overall objective of maximising public participation in the debate and to gain a wider perception of the state of public opinion, the Group has held private discussions with persons having specific expertise on or knowledge of the issues at stake. A list of private meetings held by the Group, including dates and locations, is contained in Appendix B.

57. The Group has also considered the written submissions made to the department in response to the Prime Minister’s public invitation. The Group is indebted to the department for its assistance in this, as in all other parts of the consultative and report writing process.
CHAPTER FIVE: ATTITUDES OF PARLIAMENTARY REPRESENTATIVES TO CHANGING SECTION 57

58. At the outset it was relevant to the Group’s role to take note of the attitudes of the non-government parties and senators to what the government proposed. This is because the attitudes of political leaders shape the public debate and the history of constitutional referendums indicates the decisive influence of political parties and individual parliamentarians.

**Australian Labor Party statement**

59. In October 2003 Mr Crean told the House of Representatives that the Australian Labor Party welcomed the release of the discussion paper. He advised that Labor rejected the first option but that the second option deserved further consideration. He argued that the option should be accompanied by the removal of the power of the Senate to block supply and the introduction of fixed four year terms for both houses. He considered that government claims of Senate obstructionism had been overstated. The office of the current Labor leader, Mr Mark Latham MP, has advised that Mr Crean’s views remained Labor’s position.

**Australian Democrats’ proposal**

60. In a document dated October 2003 the Australian Democrats argued that the Senate worked well and as intended in the Constitution but parliament could be made to work better.

61. The Democrats proposed that conflicts between the two houses should be resolved by putting the measure in dispute to the Australian people for a binding yes/no vote.

62. Besides advocating a binding plebiscite, the Democrats’ document urged fixed parliamentary terms of four years for the House of Representatives and eight
years for the Senate. The Constitution should also be amended to eliminate the Senate’s power to block supply of the ordinary annual services of government.

63. The document offered no support for either of the government’s options and also advocated the adoption of proportional representation in the House of Representatives, which, of course, does not require a constitutional amendment.

**The Australian Greens**

64. The Greens also issued a discussion paper in October 2003 advocating the introduction of proportional representation in the House of Representatives on a whole of state basis and guided by the principles of the single transferable vote in the Hare-Spence-Clark system of voting.

65. The paper rejected outright the government’s proposed reforms as being undemocratic and asserted that no government could claim a mandate for particular legislation if it gained less than 50 per cent of first preference votes.

66. The paper also stated that the Senate passed almost all bills coming to it from the House of Representatives and, further, legislation could only be blocked with the support of one of the major parties.

**Senator Harradine**

67. The Senator’s submission observed that the Senate had passed more than 95 per cent of the government’s bills since the last election. The Australian parliament was in need of reform but the government’s proposals were not the right way of going about it.

68. Senator Harradine wrote:

> [t]he system that I propose would have fixed three-year terms for the House of Representatives, with half Senate elections every election. A government could hold a joint sitting of parliament after a fixed term election to vote on legislation which has (1) originally been detailed in the government’s election manifesto, (2)
subsequently been introduced to the parliament within the first year of the
government’s three-year term, (3) been “rejected” twice under the current
requirements for the trigger, (4) been put to the people again at the election and
(5) the post-election parliamentary procedures would then follow those outlined in
Section 57.

69. Unlike the options presented in the government’s discussion paper,
Senator Harradine’s model anticipates the removal of the existing section 57.

Senator Harris

70. The One Nation Senator stated that if there were to be any reform of the Senate at
all, One Nation would support the implementation of an anti-deadlock process
which consults the people. The dispute should be submitted to a referendum for
the people to pass judgement on it.

Consequences of the parliamentary representatives’ views for the consultative
process

71. This analysis shows that, although there are a variety of opinions held by the
political parties and independents, there is no consensus in favour of either
Option One or Option Two. Yet, there is some common ground between the
government, the Labor Party and Senator Harradine on the merits of Option Two,
although not on Option One.

72. However, the public meetings did not appear to be attended by any significant
number of persons supporting the Liberal, National or Labor parties. It was
therefore difficult to ascertain the likely level of support for either option
amongst the traditional voters of these major parties.

73. As election results show, the Greens and Democrats have recognisable voter
support. On the basis of these parties’ policy pronouncements, it is reasonable to
infer that many of their supporters would vote against either option at a
referendum.
74. Clearly, therefore, there was a pre-existing body of public opinion unfavourable to the government’s proposals before the commencement of the public consultations. As it eventuated, proportional representation for the House of Representatives and submission of disputed bills to a popular plebiscite were prominently advanced at some of the public meetings.

75. Past experience indicates that there is virtually no prospect of success for any constitutional referendum unless there is a consensus amongst major political leaders and parties.
CHAPTER SIX: THE PUBLIC MEETINGS

76. The Group convened public meetings in every capital city in Australia during October, November and December 2003. Total attendance was only an estimated 237 persons; of those, 133 people took the opportunity to address the meetings. Details of meeting dates, locations and number of attendees appear in Appendix B.

77. The Group’s aim in each public meeting was to give those in attendance an opportunity to express their opinions, and not to persuade them of the merits or otherwise of particular options. Members of the Group took turns to open the meetings by, variously, explaining Australia’s system of government and the constitutional history and role of section 57 and by outlining the options in the discussion paper. The openings were sometimes accompanied by visual presentations. The Chairman opened the meeting for comments and questions, either generally or on particular issues. Members of the Group offered their own views on particular issues from time to time, but the meetings usually proceeded as a series of statements from the floor rather than as a debate.

78. Whilst attendance at the public meetings was low, the Group appreciated the time and effort of those who came and their contributions to the discussion.

79. Contributions by members of the public at the meetings did not always address in depth the particular merits of the two options raised by the discussion paper. In some instances, the meetings did little more than provide a forum for expressions of antagonism to the government on this issue and the advocacy of changes in the Australian parliamentary system not related to section 57 of the Constitution.

80. As an adjunct to the public meetings, the Group held private meetings with selected individuals and groups. State and Territory premiers, chief ministers and opposition leaders were invited to attend these meetings, as were key interest groups such as law societies, bar associations, think tanks and selected academics. Some, but not many, organisations and individuals responded to these invitations. A list of private meetings held by the Group, including dates
and locations, appears in Appendix B. These meetings were a most useful addition to the public meetings, and the Group appreciated the time and effort taken by those who attended. A number were followed up by written submissions, which the Group also appreciated.

Public meeting details

81. The following paragraphs report on features of the eight public meetings. Subsequent chapters report on recurrent issues raised in consultations and submissions and responses to Options One and Two.

Canberra

82. The first meeting was held in Canberra on 21 October 2003, shortly after the public programme was announced, and this could possibly have contributed to the fact that only 15 persons attended.

83. From those who came there were complaints about the venue, the composition of the Group and the degree to which the meeting was publicly advertised. However, criticism of the content of the discussion paper and the motives of the government in putting forward the proposals became the major focus of the meeting.

Perth

84. Most of the 30 members of the public who attended the meeting took the opportunity to express their views. It soon became apparent that there was almost no support for either option but for a variety of different reasons.

85. Two speakers with some audible support from the floor advocated the settlement of deadlocks by popular plebiscite. Others proposed proportional representation for House of Representatives elections. Opposition to the discussion paper from these speakers was on the basis that a government claiming a general mandate to govern could not expect that mandate to require acceptance of all of its legislative programme, especially when governments usually hold office after receiving less than 50 per cent of the primary votes.
86. A prevailing theme of the meeting was that politicians as a class, whether state or federal, did not enjoy public trust. A sense of disconnection between political events in Canberra and the state of Western Australia was apparent.

Adelaide

87. The occasion received more advance publicity than the Perth meeting but only 14 persons attended. There were nine speakers in a friendly atmosphere. Those present apparently disliked Option One, but saw no objection in principle to the second option – while not being convinced by the discussion paper that there should be any departure from the status quo.

88. Former Senator the Hon Chris Schacht argued there would be no need for constitutional change if the major parties agreed to change the legislation which introduced proportional representation for the election of senators in 1948.

89. The prevailing, and probably majority, view was that if a change were to occur it should be to refer disputed measures to a popular plebiscite.

Darwin

90. 14 persons attended. Several of those present were more concerned about statehood for the Northern Territory than constitutional changes canvassed in the discussion paper.

91. There was support for a popular plebiscite, but preservation of the status quo was the preference of the majority of those speaking. Option Two received two supporters. Option One lacked any support.
Hobart

92. 26 persons attended, including Senator Harradine, who said there was a need for some reform to improve the processes and accountability in parliament without damage to the Senate. He outlined to the meeting his proposal to amend section 57, which is not inconsistent with aspects of Option Two, coupled, however, with a fixed term of three years for the House of Representatives. The Senator’s remarks did not receive any appreciable approbation.

93. By show of hands those present indicated they did not consider there was need for any constitutional change. There was no support for Option One, but Option Two received a single vote in support.

94. A frequent remark at the meetings has been that electors commonly and deliberately voted differently for the Senate than for the House of Representatives. The Hobart meeting was firmly of this view. A speaker said plurality of representation would be best achieved by introducing proportional representation in the House of Representatives. Judging from the applause her remarks received, this was the change most in contemplation when 15 attendees voted in favour of some (but not specified) change.

Melbourne

95. An estimated 60 people attended the meeting. Although there were no speakers in favour of Option One or Option Two, there was no shortage of advocates of proportional representation for House of Representatives elections and the meeting was dominated by that issue. There was also a good measure of support for resolving deadlocks by popular plebiscite.

96. The leader of the Democrats, Senator Andrew Bartlett, spoke to the Democrats’ submission. In the course of his presentation, he expressed a personal view that multiple options, including Option Two, could reasonably be put to the people.
97. In a meeting attended by 43 persons there was no demonstrable support for either option or discussion of them on the merits. The meeting also exhibited distrust of the government’s motives in putting forward these options. Much of the discussion was of a political nature and was highly critical of the consultation process, which, it was said, did not sufficiently involve the community. As in other meetings there was a general suspicion of the government’s motives in advancing its proposals.

98. Further discussion centred on claims that the Senate has as much mandate to reject particular bills as the government possessed to have them passed in the House of Representatives.

Brisbane

99. 35 people attended, 25 of whom chose to speak. Of the 25 speakers, 15 were in favour of the status quo, three supported popular plebiscites to resolve deadlocks and two wanted the Senate abolished. Conversely, 16 of the 35 in attendance wanted to have a Queensland upper house re-installed. In the course of their remarks, some supported the idea of a fixed term for the House of Representatives.

100. A show of hands indicated majority support for the status quo. The two options together attracted five votes – three for Option One and two for a modified version of Option Two.

Media interest

101. The Chairman gave several interviews on radio, including some on talk back programmes, in those cities where public meetings were held. Mr Lavarch also undertook some radio interviews.
102. Press interest in the community consultation process was otherwise less than overwhelming. There was an initial period of media interest after the release of the discussion paper. However, after that period, media coverage of public meetings and the issues surrounding section 57 was limited. In some capital cities the major newspapers published short reports of the meeting; the Chairman’s opinion pieces in *The Courier Mail* and *The Australian* carried a notice of the time and place of the Brisbane and Sydney meetings respectively.

**Assessment of the public meetings**

103. In the light of the public meetings, the Group offers the following observations and conclusions.

i. If it were to be assumed that attendance at the meetings was representative of public opinion, either option would be overwhelmingly defeated at a referendum.

ii. In spite of the efforts of the department to bring meetings to public notice, comments at the meetings raise serious doubts as to how many members of the public were aware of the consultative process.

iii. A set of meetings with a total attendance of less than 250 from a voting public of some eleven million could not be regarded as representative of public opinion, so the outcomes of these meetings cannot be treated as conclusive.

iv. The meetings held in Western Australia, South Australia, Queensland and Tasmania merit particular comment given the voting procedure at any referendum. When constitutional change is at stake, attitudes of majorities in the smaller states can be determinative. For example, in 1946 separate proposals to give the Commonwealth parliament legislative power over marketing and over industrial employment received an overall affirmative vote, but a ‘yes’ vote in only three states; Queensland, South Australia and Tasmania voted ‘no’. In 1977, a proposed law to have simultaneous
elections for the Senate and the House of Representatives also received an overall majority, but the referendum failed because voters in Queensland, Western Australia and Tasmania rejected it.

In Perth, distrust of all politicians and the disconnection seen between political affairs in Canberra and Western Australia probably, in the Group’s opinion, comes closer to a reflection of public opinion than the meetings in Melbourne or Sydney.

In Adelaide, there was a decided lack of conviction about the need for constitutional change, even if a case could be made out that the two options would improve the federal parliamentary process. It is not unlikely that a good measure of public opinion would share similar misgivings.

At the Queensland meeting, the settlement of deadlocks by a popular plebiscite was preferred to either option and the continuation of the bicameral system was favoured. The Group cannot say more than that there may be less than popular enthusiasm for any change.

The meeting in Hobart reflected the view that Tasmania enjoys substantial advantages from the existing constitutional and parliamentary processes, and hence the adoption of either option would be to the detriment of the state. The Group believes that the attitudes displayed at the meeting would be taken up more broadly by the Tasmanian community as a whole.

**Concluding observations about public meetings**

104. Whilst attendance at the meetings was no doubt affected by the levels of advertising and relatively short notice periods, there was also a poor response from quarters normally expected to have an interest in the subject, which received particular notice of the meetings, for example, law societies and university law schools and political science schools.
105. The Group suspects that public meetings may now have limited value as a forum for public consultation. Australians may no longer be in the habit of expressing their views on issues by attending public meetings unless they involve matters of immediate and serious concern to them.

106. It has to be said that the subject of the Group’s brief has little popular appeal amid a community in which day to day living for the most part is not seen to be affected by the outcomes of disputes between the Senate and the House of Representatives in Canberra. The Group believes there is substantial public indifference to constitutional reform generally and section 57 in particular. In this respect, the Commonwealth is not alone. Advice received in Victoria and South Australia indicated that there were only small attendances at public meetings convened by the Victorian and South Australian governments in constitutional forums held in recent years to debate extensive changes to the parliamentary systems in each state.

107. Apart from indifference, there may also be substantial lack of knowledge on these matters. Past surveys have suggested that as much as 47 per cent of electors were not aware that there was a written Australian Constitution. The extensive debates which preceded the referendum in 1998 seeking to establish an Australian republic may have created greater awareness, but the Group is of no doubt that in a substantial segment of our society there is a lack of knowledge and confidence to express informed views on constitutional questions. In these circumstances, past experience indicates it is difficult for the advocates of constitutional change to succeed in a referendum.
CHAPTER SEVEN: THE WRITTEN SUBMISSIONS

108. There was greater response to the call for written submissions than to the invitation to attend public meetings. The department received 293, all of which it brought to the notice of the Group for assessment. The Group understands that non-confidential submissions will be made publicly available by the department in due course. The Group has appreciated the efforts of individuals and organisations who went to the trouble of communicating their views.

109. At the outset the Group notes that many submissions presented thoughtful views on a range of constitutional questions. Because of the breadth of the subject, some of these submissions necessarily went beyond the precise issue of section 57 and the Group found these submissions very helpful. Prominent among submissions received were those from the Centre for Comparative Constitutional Studies at the University of Melbourne, Professor Greg Craven of the University of Notre Dame Australia, Mr Douglas Graham QC, Professor George Williams of the University of New South Wales, Mr Graeme Orr and Dr Tom Round of Griffith University, the Business Council of Australia and the Premiers of New South Wales and Victoria and the Chief Minister of the Australian Capital Territory. In the event of the government wishing to institute a continuing constitutional reform process it would be well to ensure that such submissions be presented for further study.

110. Not surprisingly, views expressed in written submissions reflected a divergence of views about section 57 and other fundamental issues regarding Australia’s democracy. Two submissions highlighting this divergence of opinion, which attracted attention because of the official positions held by their authors and the opposing views they held, were from the Clerk of the House of Representatives, Mr Ian Harris, and the Clerk of the Senate, Mr Harry Evans.

111. Mr Evans’ submission at some length encapsulated much of what was said in the public meetings by opponents of the government’s proposals, including, in particular, the advocates of proportional representation and the resolution of issues if need be by referendum on individual bills. In his opinion the Senate’s
position should be maintained because Prime Ministers exercise autocratic power in the House of Representatives. He rejects both options, noting that governments now normally win office with only 40 odd per cent of the primary vote.

112. Mr Harris, Clerk of the House of Representatives, on the other hand, stated in his submission that the deadlock provisions needed to be reconsidered because the Senate was now a house of political parties and not the States’ chamber on which it was based. The concept of responsible government was being severely diluted by the Senate’s ability to frustrate the legislative process. Either option was better than the existing system but Option Two was to be preferred because it allowed an element of voter input.

113. Statistically speaking, as with at the public meetings, the overwhelming majority of correspondents did not support either option. There were 121 voicing opposition, for various reasons, to any change in the status quo. Option One gained 12 supporters and Option Two only nine, although a further segment expressed support for a modified version of it. There was a good level of support for proportional representation for elections to the House of Representatives and 37 wrote in favour of the resolution of deadlocks by a popular plebiscite.

114. There was a marked difference between the results of the two methods of consultation. In the case of the written submissions, the number of proponents of proportional representation or of resolving deadlocks by plebiscite was not as large as the number of those in favour of the status quo. However, in the case of the public meetings there was a stronger body of opinion in favour of proportional representation and plebiscite than simply maintaining the status quo.

115. The Group notes that most submissions emanated from individuals. A handful were received from recognised non-party organisations such as the University of New South Wales Council for Civil Liberties, the Business Council of Australia and the HR Nicholls Society.
116. The inescapable conclusion the Group reaches from the written submissions is that although they express a broad range of views, they do not offer the level of popular support the Prime Minister would require before being satisfied that either option should be put to a referendum.

117. The remainder of the Group’s report will turn to a more detailed discussion of the ideas and attitudes which emerged from both written submissions and public and private meetings. This will include a broader discussion of the public reaction to the options outlined in the government’s discussion paper.
CHAPTER EIGHT: RECURRENT ISSUES

118. Over the course of the consultation process, the Group saw the emergence of several recurrent issues in public debate. Some relate more broadly to Australia’s system of representative democracy than to section 57 specifically. However, because they underpinned many public contributions, it is worth outlining them before discussing responses to the options for change in more detail.

The roles of the two houses

119. The role of the Senate in the Australian system of government received strong support in public and private meetings, and in written submissions.

120. The Senate was variously praised as a crucial check on the power of the executive government and a means to review and improve legislation, even if it sometimes operated imperfectly. The Law Council of Australia provided some direct comments as to the meaning and operation of section 57. It emphasised that in the Australian bicameral federal system created by the founders, section 57 is crucial to the Senate’s ability to provide effective checks and balances in the bicameral system. The Council stated that any change to section 57 should be assessed in that context.

121. Other persons and organisations saw the Senate, owing to the method of election by proportional representation, as providing a diversity of views that was not available in the House of Representatives. Some pointed out that voting statistics in Australia showed growing support for minor parties and independents in the Senate. Several persons stated that voters vote for different parties in elections for the two houses with the tactical aim of ensuring that the government does not have a majority in the Senate.

122. Others suggested that the Senate still had a role in representing state-based interests. For example, in Tasmania it was suggested that support for minor parties and independents was particularly strong and that Senator Brian Harradine, in particular, is seen as having secured financial gains
for Tasmania as a result of his role in the Senate. In these circumstances Tasmanians would be likely to resist attempts to weaken their interests in the Senate.

123. Resistance was particularly strong when persons believed that the changes to the Senate would increase the power of executive government, which was seen to have increased steadily, particularly in the second half of the twentieth century.

124. On the reverse side, some contributions were less than enthusiastic about the Senate. Comments included the following:

- The Senate was undemocratic. It should be elected on a one vote/one value basis and a full Senate election should be held with every House of Representatives election.
- The voting system should be reformed to provide for minimum quotas in the election of senators.
- The Senate was being abused by single interest groups and individuals who do not respect the choice of the people.
- There were too many senators.

It has to be emphasised that these were minority views.

**Differing views regarding the concept of mandate**

125. The idea of mandate is the subject of much debate in academic and political circles and, not surprisingly, generated significant comment during the consultation process.

126. The Group encountered considerable resistance to the underlying assumption in the discussion paper that governments have a mandate to implement by legislation the policies they espoused when elected. Several persons repeated the proposition, expounded for example by the Australian Greens, that governments are now commonly elected with less than 50 per cent of the primary vote and could not therefore claim an unfettered mandate. The further view was that the
Senate as a democratically elected house had a competing mandate which it was entitled to exercise and when it did this by combination of political parties it was not an expression of government by minority as claimed in the discussion paper.

127. Many persons took issue with the statement on page 6 of the discussion paper that ‘[i]n practice, the minority has assumed a permanent and absolute veto over the majority’, at both public meetings and in written submissions. These contributors stressed that government legislation can only be blocked when minor parties or independents join with the Opposition in the Senate, and that in these cases, such action reflects the will of a majority in the Senate.

128. The restricted meaning assigned to the discussion paper’s conception of a mandate in the foregoing paragraphs does not of course encapsulate the whole debate about mandates and the Group is aware of counter arguments.

129. A significant contribution in this regard was contained in a response from the Premier of Victoria, the Hon Steve Bracks MP, drawing attention to significant changes made to the Victorian Constitution in 2003 adjusting the relationships between the two houses of the state parliament. The constitutional amendment enunciates as a statement of principle that the Legislative Council should ‘recognise the right and obligation of the current Government to implement the Government’s specific mandate’ (the policies, promises and initiatives which were publicly released by or on behalf of the Government during the last election campaign) and ‘the Government’s general mandate’ (to govern for and on behalf of the people of Victoria) (Constitution (Parliamentary Reform) Act 2003 (Vic)).

130. An individual’s view on section 57 was often strongly influenced by his or her view on the concept of mandate.
Balancing efficiency and compromise

131. Another debate that frequently arose during the consultation process surrounded the benefits of efficient government versus the benefits of discussion and compromise.

132. Some persons put a premium on the concept of effective government. Professor Michael Pryles, for example, who provided a copy of his article in *The Australian Financial Review* on section 57 to the department, argued that ‘[r]equiring that a government of the day must secure the consent of the opposition or a minor party to enact legislation constitutes a significant restraint on the flexibility and freedom that modern government requires.’

133. Other persons stressed the importance of other constitutional principles in producing better and more democratic outcomes. For example, one person in a written submission stated that ‘[d]emocracy is not meant to be smooth or efficient. It is meant as a system that maximises community participation and achieves the best outcome for the public through discussion and compromise’ (name withheld).

134. Such persons saw section 57 as it stands as encouraging political negotiation to reach a compromise. This process, rather than a constitutional process, was argued as the principal means through which legislative deadlocks should be resolved.

Cynicism regarding the motives for pursuing reform

135. A constant theme through the consultation process was the degree of mistrust regarding the political process and the motives of governments, whatever their colour, when pursuing constitutional change.

136. The atmosphere at some of the public meetings, notably those in Sydney and Melbourne, bordered on hostile, with persons questioning the motives of the Prime Minister and the government and even those of the Group.
137. In other cases, there was clearly a feeling of disengagement from the political process, and a belief that politicians are too far removed from the day to day concerns of the public.

138. In these circumstances, many persons in the consultations did not engage in a discussion of the merits of change at all, dismissing the proposals as an attempt to increase the power of governments. Consequently, if the government were to put any proposal to a referendum, it would be particularly important to provide sufficient information to ensure that any proposal was judged fairly on its merits.

**The need for a strong case for change**

139. Consequently the need for a strong case for change is apparent. The Group detected a strong sense that the majority of persons were not yet convinced.

140. As noted in Chapter 7, of the 293 written submissions received by the Department, 121 were expressly in favour of the current constitutional arrangements. Of the 133 people who spoke at public meetings, 67 spoke in favour of the current arrangements.

141. Amongst those in favour of the current arrangements, a number argued that section 57 already works well. However, others claimed that they simply remained to be convinced that there was a problem with the current arrangements that justified change. Several persons pointed to the fact, acknowledged in the discussion paper, that the Senate passes the majority of legislation proposed by the government. Others disputed the suggestion in the discussion paper that section 57 has failed to resolve deadlocks in the past because it has rarely resulted in the eventual passage of the disputed legislation. Hence a common view colouring many contributions was that further evidence of the need for change would be required before they would support any particular option.
CHAPTER NINE: COMMUNITY RESPONSE TO THE DISCUSSION PAPER OPTIONS

Outline of the options

142. The government’s discussion paper, to recap, outlined two options in detail and the Group considered it part of its role to gauge public opinion in relation to each option.

143. Option One provides that if a conflict remains between the two houses over a bill which the House of Representatives has twice submitted to the Senate with an interval of three months intervening, the Governor-General may, on the request of the Prime Minister, convene a joint sitting of the two houses. If an absolute majority of members and senators support the bill at the joint sitting it will become law after receiving royal assent. The outstanding feature of this option is that the conflict between the houses would be resolved without any resort to an election.

144. Option Two also creates conditions equivalent to a deadlock if the two houses remain in conflict after the House of Representatives has twice submitted a bill to the Senate with an intervening interval of three months. When this occurs there are no immediate steps to be taken to resolve the conflict. Instead, after a general election of the House of Representatives alone, or that House and a half Senate election, the House of Representatives may again pass and submit the disputed bill to the Senate. If the Senate remains unmoved in its objection to the bill the Prime Minister may then ask the Governor-General to convene a joint sitting.

145. As in the case of Option One and as currently provided in section 57, if an absolute majority of members and senators vote in favour of the measure at the joint sitting it will become law after receiving the required royal assent. The outstanding feature of the proposal is that the electors would become involved in the process to the extent that in voting at the election they would be cognisant of the intentions of the outgoing government if it should be returned to office.
146. It should be noted that in either case section 57 would also be retained in its current form. Hence the options supplement, rather than replace, the existing mechanism. Tables explaining the steps involved in Options One and Two have been extracted from the government’s discussion paper and inserted at Appendix C.

Community response to Option One

147. The response to Option One in both written submissions and at public meetings was overwhelmingly negative. Of the 133 people who spoke at public meetings, only six spoke in favour of Option One and the majority spoke against it. Of the written submissions that expressed a clear view on the proposals in the discussion paper, only 12 supported Option One in the form presented in the discussion paper. A further seven supported a modified version of Option One. There was also little support for Option One expressed in the Group’s private meetings with academic, legal and political figures.

148. Amongst the minority who did support Option One, it was seen as providing a fast and less costly solution to legislative deadlocks and as promoting more efficient government. For example in its written submission the Business Council of Australia expressed support for both options in preference to the current mechanism, but expressed particularly strong support for Option One on the basis that the most important and emotive bills are being increasingly blocked by the Senate.

149. The majority who opposed Option One were concerned that, by making it far easier for the government to pass legislation blocked by the Senate, it would reduce the role of the Senate and give too much power to the executive government, undermining other democratic values in the process. For example, the Centre for Comparative Constitutional Studies said that Option One ‘may allow the government to force through its legislation without significant review or check at all’. They went on to say that Option One ‘also removes the possibility of the government’s legislative agenda and claims for a mandate to be tested at an election’.
150. Most people who commented on this option considered that it would significantly reduce the power of the Senate – converting its power to block legislation into a mere power to delay legislation – and thereby remove an important check on the executive government. For example, one contributor said in a written submission that Option One would ‘make the whole of the Parliament subservient to the legislative plans of the Executive government. After the passing of three months, any Senate obstacles to legislation would be washed away in a joint sitting’ (Chris Maltby, NSW).

151. Other concerns expressed by persons in the consultation process were that:

- Option One was undemocratic because it did not require an election as a step in the process for resolving deadlocks; and
- by making it easier for the government to pass its legislation through the parliament, it would reduce the incentive to compromise on legislation, leading to poorer legislative outcomes.

Community response to Option Two

152. Of those who spoke at public meetings, five were in favour of Option Two as presented in the discussion paper, and a further number spoke in favour of modified versions of the option. Of the written submissions which expressed a clear view on the government’s proposals, nine supported Option Two in the form presented in the discussion paper. A further eight expressed support for a modified version of the option.

153. Amongst the few who expressed support for Option Two, it was seen as having greater democratic credentials than Option One because it retained the need for an election as a step in resolving a deadlocks.
154. Of those who opposed Option Two, some raised the following types of issues:

- a concern that an election may not be an ideal way to test voters’ views on particular bills, either because, prior to voting, voters may not be aware of the possibility that a joint sitting could pass the deadlocked legislation, or because the deadlocked legislation may be overshadowed by other issues; and
- a belief that all members and senators should be required to face an election on the deadlocked bill, and not just members of the House or members and half of the Senate.

Possible modifications to Option Two

155. One notable feature of the response to Option Two was that, while it attracted little support in the form presented in the discussion paper, some members of the public saw it as preferable to Option One and were willing to suggest modifications to make it more acceptable. For example, Professor Greg Craven, though not supporting either option, considered that the case for Option Two would be enhanced if it were accompanied by safeguards, for example, ‘[t]he process only would apply to legislative proposals formally identified by political parties that subsequently formed government as key elements of their governmental programme’.

156. Other persons agreed that a joint sitting should be capable of passing legislation after an intervening ordinary election. However, they suggested significant adaptations to the reform proposals such as the incorporation of fixed parliamentary terms, election manifestos detailing deadlocked bills or other detailed notice requirements prior to the intervening election.

157. It is difficult to estimate the level of support for any specific modification to Option Two. There was no consensus in relation to any particular model and discussion of many possible modifications was minimal. However, the Group
considers that the following contributions are particularly noteworthy in this context.

**Australian Labor Party**

158. As noted in Chapter 5, the Labor Party has indicated that it would be prepared to consult on and consider Option Two, but only if it were accompanied by the removal of the power of the Senate to block supply and the introduction of fixed four year terms for both houses of parliament. Several speakers at public meetings spoke in favour of this type of proposal, usually on the basis that:

- Option Two, when included in a package with the additional measures, would not unduly weaken the role of the Senate in reviewing and scrutinising legislation; and
- the reforms would constrain the power of the Prime Minister by denying him or her the absolute right to determine when elections would be held.

**Senator Harradine**

159. As outlined in Chapter 5, Senator Harradine proposes a comprehensive model with a similar structure to Option Two, but with several additional features and preconditions to a joint sitting, including fixed parliamentary terms and the detailing of policy in the government’s election manifesto.

**The Premier of Victoria**

160. The Premier of Victoria’s submission suggested that constitutional reforms which were enacted in Victoria in 2003 provided a good model for Commonwealth reform. This followed a private meeting the Group had with representatives of the Premier’s department.
161. The Group notes that the Victorian reforms are similar to Option Two in some respects, but also incorporate fixed four year terms for both houses. The Victorian model operates as follows:

- a Dispute Resolution Committee, with representation from both houses, is established after every general election;
- bills not passed by the upper house are referred to the Committee;
- the Committee attempts to resolve differences and, if successful, the bill is resubmitted to each house for passage;
- if differences are not resolved, an election may be held for both houses, or the Premier can withdraw the bill and hold it over until after the next fixed term election; and
- if the upper house fails to pass the resubmitted bill after the next election, the Governor, again acting on the advice of the Premier, can call a joint sitting to consider the bill, where it can be passed with a majority of the total number of members of both houses.

162. The Group considers that these reforms merit particular attention as a set of reforms which have actually been implemented, following community consultation and parliamentary debate.

**Other responses to discussion paper options**

163. Many persons in expressing their opposition to the discussion paper options did not differentiate at all between Options One and Two. They thought that both government proposals amounted to converting the Senate, and indeed the parliament, into a rubber stamp of the executive. This sentiment was also evidenced by strong support for the status quo, as discussed in Chapter 10.
Prospects of community acceptance

164. Option One attracted virtually no support and received a rough passage in most of the Group’s consultations. The Group concludes that the option would have virtually no chance of community acceptance either now or in the foreseeable future.

165. The Group further considers that there is little prospect of community support for Option Two in the form presented in the discussion paper in the short to medium term.

166. The Group’s experience from its consultations is that there is some willingness at least to engage in a discussion of the merits of Option Two and to consider modifications that would make it more acceptable. In light of the views expressed by the Labor Party and Senator Harradine, further consideration of the option and appropriate modifications is not out of the question.
CHAPTER TEN: OTHER SIGNIFICANT ISSUES

167. The public consultation process has raised some other significant matters worthy of comment.

168. Many persons supported the status quo. Others used the opportunity to discuss other reforms such as the method of election for the two houses and the Senate’s power to reject supply. Since the Group’s primary role was to assess public opinion about section 57 and not to pursue these other issues, our comments on some of these matters will necessarily be brief.

The status quo

169. As noted in chapters 6 and 7, objection to any change to section 57 was strong at both public meetings and in written submissions.

170. Some took the approach that there was not a sufficiently strong case for change of any kind. Others who opposed change did so because of specific objections to the content of the proposals.

171. Reasons given in submissions for objecting to change included the following.

- The Senate still operates as a states’ house in protecting the interests of the smaller states.
- Option One, in particular, would render the Senate ineffective and Option Two offers no apparent benefit.
- The Senate is the more representative of the two houses of the people’s will and should not, therefore, be weakened in any way.
- Section 57 as it stands promotes negotiation and compromise.
- The government has sufficient power. The proposals would give it too much power.
• The minor parties, when backed by the major opposition party in the Senate, have a mandate to reject legislation and the options reduce the effectiveness of that mandate.
• The options promote the desire for effective government at the expense of responsible government.

A referendum or plebiscite on deadlocked legislation

172. As outlined in chapters 6 and 7, many written submissions and speakers at public meetings advocated the introduction of binding plebiscites or referenda as a means of resolving deadlocks. One participant even suggested a national referendum day, on which deadlocked legislation would be put directly to the people at a binding plebiscite.

173. The reason most often given by supporters of referenda or plebiscites was that these mechanisms give the people a more direct role in resolving deadlocks.

174. However, support for this option was certainly not universal. Some people raised concerns about these options. For example, Professor Geoffrey Lindell of the University of South Australia observed that the use of plebiscites detracted from principles of representative democracy. Professor Lindell expressed concern that this principle would be further eroded if this were seen as the first step in introducing citizen initiated referenda. He also raised the issue of whether governments should be bound by the results of such referenda, an issue that the Group notes could become difficult if a new government, which does not support the deadlocked legislation, is elected, or the government is returned but its legislative proposals were defeated.

175. Similar submissions were made to the Group noting that Australia has a system of elected parliamentary representatives to determine what should become law and what should not. Introducing the notion of regular referenda and plebiscites into the law-making process, it was said, must therefore inevitably reduce the power and proper function of those elected representatives.
176. Similarly, it was observed that though it may not be a ground by itself for rejecting the proposal, it is a ground for recognising that it is a very substantial departure from established processes and that its implications should therefore be given very careful study.

Proportional representation for the House of Representatives

177. In Chapter 5 of this report, the Australian Greens policy advocating proportional representation for the House of Representatives is expressed. Support for the Greens policy of proportional representation for House of Representatives elections was clearly evident, both in the public meetings and the written submissions.

178. However, since the question does not involve any amendment of section 57, but can be dealt with by parliament itself under section 9 of the Constitution, no further comment is necessary.

Power to reject supply

179. Section 57 does not distinguish between money bills and other bills. All may be the subject of a double dissolution under section 57. Option One creates an alternative procedure and in the case of money bills it would offer a possibility of a more expeditious resolution of an impasse because no dissolution is involved, but only where the government has sufficient numbers to pass legislation at a joint sitting. The timeframe for the application of Option Two has more in common with section 57 since it involves a general election for the House of Representatives to be followed, if necessary, by a joint sitting in a new parliament. Accordingly, under Option Two the capacity of the Senate to block supply remains a live and contentious issue.

180. At the public meetings, and in various submissions, including the Labor Party’s statement, there was some support for the removal of the Senate’s power under section 53 of the Constitution to block supply, with only occasional opponents.
It was common ground that a refusal by the Senate to approve the supply of monies to meet the cost of providing the ordinary annual services of the government could throw the government into chaos and neither section 57, nor Option Two, offers the possibility of a prompt solution to an emergency situation. It could not be assumed that such a crisis would not arise in the future.

181. It is to be noted that a recent amendment to the Victorian Constitution also provides that where an annual appropriation bill is not passed by the upper house within one month of passing the lower house, the bill is deemed to have passed the parliament and must be presented to the Governor for formal assent. A similar mechanism exists in New South Wales.

182. The Group considers that if constitutional change regarding the deadlock provisions is further contemplated, it should be recognised that there is still interest in whether the Senate should have the power to reject supply and that this issue will presumably be pursued in future debates.
CHAPTER ELEVEN: NEED FOR A COMPREHENSIVE PROGRAMME OF EDUCATION AND CONSULTATION

183. The Group considers that the discussion paper and the consultation processes have provided a starting point for engaging the wider community on constitutional questions such as those to which section 57 gives rise. The Group believes, however, that the current levels of public lack of knowledge, indifference and general cynicism about constitutional change, as well as suspicion about the motives of politicians in seeking changes which the Group encountered, constitute significant obstacles to change at this juncture.

184. It would be all too easy to say that the existing mechanism for settling deadlocks is not in need of any change. This is not so, as is apparent from the Group’s deliberation, from many of the comments and written submission received and from scholarly observations that have been made.

185. Accordingly, there is at least a case for ongoing study and public debate on section 57 itself and an equally strong case for studying and debating whether some additional provision should be made in the Constitution for resolving legislative deadlocks.

186. If the government is minded to pursue reform, the Group considers that there should be a wider programme of consultation with the community, and more attention given to educating the public about the Australian Constitution and how it operates in practice. The Group is aware of several education initiatives at the federal and state levels in recent years, including the Discovering Democracy programme for schools, the Constitutional Centenary Foundation and the Constitutional Centre of Western Australia, but further investment will be required. The government may wish to consider assigning responsibility for consultation and education on constitutional matters to a particular body, whether it be a government department, an existing, expanded or newly-created statutory or non-statutory public authority, or a suitable non-government entity such as an academic institution. The establishment of a parliamentary committee to consider these issues might also be considered.
APPENDIX A – LIST OF WRITTEN SUBMISSIONS

This list of written submissions does not include those submissions where contributors have indicated that they would like their names to remain confidential.

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APPENDIX B – LIST OF MEETINGS

Public meetings

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<td>‘The Shine Dome’ (premises of the Australian Academy of Science)</td>
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<td>Perth</td>
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<td>28 October 2003</td>
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<td>Adelaide</td>
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<td>Darwin</td>
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<td>11 November 2003</td>
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<td>Hobart</td>
<td>Corus Hotel</td>
<td>18 November 2003</td>
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* Numbers do not include Consultative Group members or notetakers

Private meetings

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<tr>
<th>Venue for Consultation</th>
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| Perth Commonwealth     | 29 October 2003 | Mr Jeremy Buxton, policy adviser to Western Australia Deputy Opposition Leader  
| Parliamentary Offices  |                 | Professor Greg Craven, University of Notre Dame Australia  
|                        |                 | Mr Phil Paterson, member of the Liberal Party Western Australia  
| Parliament of South Australia | 30 October 2003 | The Hon Rob Lucas MP, Leader of the Opposition in the Legislative Council, South Australia  
|                        |                 | The Hon Robert Lawson MP, Shadow Attorney-General, South Australia  
| Parliament of Tasmania | 18 November 2003 | Mr Will Hodgman MHA, Deputy Leader of the Opposition, Tasmania  
|                        |                 | Mr Jonathan Payton, Chief of Staff to Mr Hodgman  
|                        |                 | The Hon Michael Hodgman QC MHA, Shadow Attorney-General, Tasmania  
| Law Institute of Victoria | 20 November 2003 | Mr Douglas Graham QC, former Victorian  

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Solicitor-General
Mr David Forbes, Barrister

The University of Melbourne 20 November 2003
Professor Cheryl Saunders, Director, Centre for Comparative Constitutional Studies (CCCS)
Professor Michael Crommelin, Dean, Melbourne Law School
Dr Simon Evans, Deputy Director, CCCS
Ms Kristin Walker, Deputy Director, CCCS
Dr Carolyn Walker, CCCS

Department of the Premier and Cabinet, Victoria 20 November 2003
Ms Jenny Duran, Adviser to the Premier of Victoria
Mr Ian Killey, Legal Section, Department of Premier and Cabinet

Griffith University 26 November 2003
Professor Charles Sampford, Director, Key Centre for Ethics, Law, Justice and Ethics
Dr Tom Round
Mr Graeme Orr
Professor Pat Weller

Mr Kevin Martin, Chief of Staff to the Leader of the Opposition

Selbourne Chambers Common Room, Sydney 3 December 2003
Members of the Australian Constitutional Lawyers Association, including:
Mr Patrick Keyzer
Dr Helen Irving
Mr Geoffrey Holland
Mr Geoffrey Walker
Mr Alastair Heneskens
Mr Mark Gaverson

ACT Legislative Assembly 15 December 2003
Mr Greg Friedenwald, Chief of Staff to the Chief Minister

ACT Legislative Assembly 15 December 2003
Mr Brendan Smyth, Leader of the Opposition

Telephone Conference 15 December 2003
Professor Geoffrey Lindell, The University of South Australia.

* Attendees do not include Consultative Group members or notetakers
Option One – Table extracted from government discussion paper

The House of Representatives passes a bill

The Senate rejects the bill, fails to pass the bill or passes the bill with amendments to which the House does not agree

At least three months after the date the Senate acted (or failed to act), the House of Representatives passes the bill again

The Senate rejects the bill, fails to pass the bill or passes the bill with amendments to which the House does not agree

The Prime Minister asks the Governor-General to convene a joint sitting of the House of Representatives and the Senate

If an absolute majority of members and senators support the bill at the joint sitting, it can receive royal assent and become law
Option Two – Table extracted from government discussion paper

The House of Representatives passes a bill

The Senate rejects the bill, fails to pass the bill or passes the bill with amendments to which the House does not agree

At least three months after the date the Senate acted (or failed to act), the House of Representatives passes the bill again

The Senate rejects the bill, fails to pass the bill or passes the bill with amendments to which the House does not agree

There is a general election for either the House of Representatives alone, or the House of Representatives and the Senate

The House of Representatives passes the bill

The Senate rejects the bill, fails to pass the bill or passes the bill with amendments to which the House does not agree

The Prime Minister asks the Governor-General to convene a joint sitting of the House of Representatives and the Senate

If an absolute majority of members and senators support the bill at the joint sitting, it can receive royal assent and become law
APPENDIX D – COMMENTS FROM INDIVIDUAL GROUP MEMBERS

Additional comments by the Hon NA Brown QC

Introduction

1. As the Chairman of the Consultative Group and being ultimately responsible for the consultative process, I think it is desirable to give my personal opinion about the whole process and its result.

2. As will have been seen, the consultative process did not result in a great upsurge of public support for reform of the mechanism under section 57 of the Constitution for the resolution of legislative deadlocks.

3. However, I believe on all of the evidence that this was so because of the very nature of the subject and the difficulty of getting the public to focus on any such complex issue and especially one which itself baffled for so long those who actually drew the Constitution.

4. There is no doubt that every reasonable effort was made to bring the consultative process to the notice of the public and that my colleagues, together with those assisting us in the Department of Prime Minister and Cabinet and those who attended the public meetings, made written submissions and consulted with us, all approached their respective tasks conscientiously and did everything possible to stimulate public interest in the reform of section 57.

5. The result of their labours is that there is as yet no demonstrated, popular demand for reform. The case for reform has, however, been made out, debate on the subject has undoubtedly been opened up and the foundations have been laid for further work. That work, in my view, should certainly be undertaken.


Summary

i. Our Inquiry has been useful and the Government has succeeded in focusing attention on the case for reform of section 57 by publishing its discussion paper and by establishing the Consultative Group.

ii. Option One has merit and deserves more study and attention.

iii. Option Two has the further mechanism of a general election built into it and the ultimate objective of the joint sitting is therefore achieved by this Option. But it is unnecessarily complicated and uncertain in its operation.

Comments in Detail

The conduct of the consultative process and its value

6. In our report we recommended that there should be established a comprehensive programme of consultation and education on constitutional reform.

7. Indeed, without such a programme it is hard to see how reform of section 57, or for that matter reform of any other provision of the Constitution will ever be achieved.

8. Fortunately, in one sense, that consultative and educational programme has already commenced, for the current government has focused attention on the issue by the publication of its discussion paper and the establishment of the Consultative Group itself.

9. There was, as we have said in our report, criticism of the government's discussion paper, but it must be said that the paper served its purpose in galvanizing attention on the issue, at least amongst those usually interested in such matters. It also set out the issues for debate.
10. I should add, as one who has referred to the discussion paper frequently during the consultations, that I found it presented all of the issues in an accurate, useful and stimulating manner.

11. The public and private meetings, written submissions and media coverage also contributed to making a significant start on the consultative process.

12. Attendance at the public meetings was low, as the subject itself is clearly not one which impinges on the lives and concerns of most citizens or one which is inherently interesting to them.

13. Nor does it seem that attending public meetings to discuss constitutional and governmental reform is a favourite pastime for large numbers of Australians.

14. For example, it would be hard to think of a constitutional subject with more public interest and differences of opinion than the proposed Republic; and yet the Republic Advisory Committee attracted only 60 people to its meeting in Adelaide, 120 in Melbourne and 180 in Sydney, much smaller attendances at other meetings and an average attendance of 67.

15. The consultative process on the Defence White Paper, again a subject of great importance, seems to have attracted an average of just over 70 people to its public meetings.

16. In the area of constitutional review it has also apparently been difficult to encourage the public to take part in consultative processes that are set up as part of those reviews. For example, in South Australia a broad-ranging Constitutional Convention was planned for August 2003. In preparation for the Convention, 10 Community Discussion Meetings were held with an average of 69 people attending.

17. The Queensland Constitutional Review Commission conducted an extensive review of the Queensland Constitution and other governmental matters in 1999-
2000. It advertised for public submissions, but received only 15, whereupon it gave an extension of time. Despite that, it received a total of only 34 submissions, although 5 of them were second or third submissions from the same correspondent. As a last attempt to encourage interest, the Commission held public meetings. Its report does not reveal how many people attended, but it does say: “To the Commission's regret, very few persons attended the meetings.”

18. The Constitution Commission Victoria in its review of the Legislative Council in 2001 held a series of ‘visits’, the purpose of which was ‘to give the public an opportunity to discuss the issues raised in the Discussion Paper’. The Commission’s report does not reveal how many people availed themselves of this opportunity, but it does state that ‘...seminars, public and other consultation processes involved over 600 people’.

19. The Victorian Commission’s report also notes that, in the United Kingdom, the Royal Commission on the Reform of the House of Lords was able to muster the attendance of only 1026 people to its meetings, which figure, when adjusted for population to make the figures ‘comparable to the Victorian response’, is the equivalent of only 84 people. It would seem therefore that the difficulty of encouraging the public to attend meetings on constitutional reform is not confined to Australia.

20. Given that the subject of reform to section 57 of the Australian Constitution must be one of the most abstruse subjects ever made available for public discussion, the attendance at the public meetings shows that there is at least some interest in the subject and that at least some people are prepared to engage in debate on the subject.

21. Furthermore, no matter what the numbers of persons attending, I found it valuable to hear the opinions of those who attended the meetings and it should be clearly understood that they all contributed to the work and deliberations of the Group.
22. Moreover, I am certain that those who attended the meetings learned a lot about the constitutional and governmental processes of their country. This was also a good, although small, start to the educative process.

23. In addition, the written submissions we received show that the consultative process has stimulated even more debate on this issue. We received 293 written submissions, most of which were from individual Australians and some of which were from bodies and organisations, including the NSW Government, the ACT Government, the Victorian Government, the Law Council of Australia, the Centre for Comparative Constitutional Studies, the Electoral Reform Society of South Australia, the Business Council of Australia, Women With Disabilities (Australia), the Humanist Society of Victoria, the Law Society of Western Australia, the Progressive Labour Party, the University of NSW Council for Civil Liberties, the HR Nicholls Society, the Combined Pensioners’ and Superannuants’ Association of NSW and several political parties and organisations.

24. Anyone who doubts that the consultative process generated a lot of interest should read these and some of the other written submissions we received.

25. As I have said above, the Queensland Commission received 34 submissions. The Victorian Commission received 196, although it points out that, adjusted for population, the Royal Commission on the Reform of the House of Lords received only 142.

26. I mention here the 293 written submissions we received and those who made them to show that our consultative process has actually encouraged a lot of intellectual effort and policy formulation on these issues and that it should be recognized.

27. Nor should it be forgotten that a further 31 people from universities, government and the professions attended the private meetings that we held. No doubt the work that went into these discussions has also stimulated a lot of thinking on the
issues in academic, governmental and legal circles and it has provided a base to build on.

28. My view, therefore, is that the public and private meetings, the written submissions, the media coverage of the debate and the intellectual work that all of this encouraged, have all been very worthwhile.

29. Furthermore, the result of the process has been that the government has in my view made out a case for the need for change. At the very least, it has made out the case for looking again at section 57 to see if it provides the best, most modern and most economical means of resolving the legislative deadlocks that are inevitable under our bicameral parliamentary system.

30. Even if it is felt by some that the government has not made out its case, it has at least revitalised and re-opened debate on the issue of legislative deadlocks. That has been worthwhile in itself.

31. Accordingly, our Inquiry has been useful and both the government and the Consultative Group have focused attention on the need for change and on possible ways of achieving it and have, in effect, started the programme of consultation and education that we have recommended.

Option One

32. Option One received little support in the inquiry, despite the fact that in my view it has intrinsic merit.

33. If the government does embark on the programme that we recommend, I trust that Option One will be given a fairer hearing and more thought than it has had so far.

34. It is a prompt and potentially effective method of resolving legislative deadlocks which does no damage to the democratic process and probably enhances it.
35. If more thought is given to it, it will be seen in time to have real merit.

36. As we have said in the report, Option One was widely opposed on the ground that, if rejected legislation could simply be put to a joint sitting of both houses of the parliament after it had been twice rejected by the Senate, then this would destroy any real involvement by the Senate in the lawmaking process.

37. It is said that it would turn the Senate into a rubber stamp.

38. It was also said that Option One was contrary to the intention of the draftsmen of the Constitution, as they intended to create and did create a bicameral or two-house parliament, with the Senate having virtually equal powers to those of the House.

39. In contrast, it was said that Option One was tantamount to turning this into a unicameral or one-house parliament, for it destroyed the power of the Senate and substituted the opinion of the House of Representatives for that of each of the two houses sitting separately.

40. I think that these criticisms were greatly exaggerated.

41. The intention of Option One is not to turn the Senate into a rubber stamp, diminish its status or dignity, destroy the bicameral system or make the decision of the House of Representatives on legislation paramount.

42. Its purpose is to find a reasonable solution to the problem created by the blocking of legislation in the Senate which is now becoming, wrongly in my view, more regular and being assumed more frequently to be the proper and legitimate role of the Senate.

43. In *Victoria v Commonwealth* (PMA Case) (1975)134 CLR 81 at 125, one of the High Court cases arising out of the 1974 double dissolution election, Barwick CJ said:
Further, the purpose of the joint sitting if the ‘deadlock’ continues is not to secure the will of the House of Representatives. It is to secure the view of the absolute majority of the total number of the members of the both Houses, which may or may not represent the will of the House of Representatives.

44. Gibbs J (as he then was) made similar observations in the same case.

45. Those observations were made about a joint sitting following on from a double dissolution, but in my opinion they are equally applicable to a joint sitting of the sort contemplated by Option One. They show that where there is a conflict between the two houses, it is only logical to seek the view of an absolute majority of the members of both of them.

46. Not only is it not the intention of Option One to make the Senate a rubber stamp, but it would not be the result of putting the Option into practice.

47. The effective terms of Option One commence to operate only after following through an exhaustive and exhausting legislative process.

48. Indeed, when one follows through the various stages set out in Option One and applies to that timetable what one knows of normal parliamentary procedures, one would be excused for thinking that the procedures provide for very extensive parliamentary examination and debate in both houses before the ultimate vote is taken in the joint sitting.

49. The procedure involves two series of debates in the House and the Senate sitting separately, presumably complete with committee examination and debates on amendments.

50. It is only then, after the whole of this exhaustive and extensive process of deliberation has been gone through, that the Prime Minister may ask the Governor-General for a joint sitting of both houses.
51. Even that step would not be the end of the parliamentary process, for there is then another debate at the joint sitting of both houses before the vote is taken.

52. If the bill is passed it means that a majority of all of the Federal elected representatives of the Australian people have voted for it. That, surely, is an enhancement of the democratic process.

53. Nor can the democratic credentials of Option One be tarnished by any notion that the vote on the joint sitting is a foregone conclusion. There is no guarantee that the government will get its way.

54. As Barwick CJ said in *Victoria v Commonwealth* in the passage just quoted, the result of the vote in the joint sitting ‘... may or may not...’ be the will of the House of Representatives. The result of Australian Federal elections is often close and a government that uses the mechanism under Option One is by no means guaranteed automatic success.

55. Option One is also democratic and has a very powerful sanction built into it; if a government has acted precipitately, used the process too often or in a cavalier fashion, built up a storehouse of bills without engaging the Senate in proper debate and negotiation or if it has used the process to pass undesirable legislation or even unpopular legislation, the people have the right to take and may well take their revenge on the government at the next election.

56. This will ensure that Option One, if it becomes part of the Constitution, will not be used improperly, but will be used sparingly by all governments.

57. Moreover, Option One does not diminish the standing of the Senate. We were continually being told during the hearings and in the written submissions that very few bills are in fact rejected by the Senate.

58. Accordingly, the Senate would continue to go about the overwhelming majority of its business entirely unaffected by the effect of Option One, except in that handful of cases where bills of great moment and principle are at stake and where
the government is prepared to chance its hand and its survival on proceeding to a joint sitting.

59. Finally, passing a bill at a joint sitting under Option One does no irreparable damage to the parliament as a whole. Laws are frequently repealed and statutory schemes regularly changed, as successive governments who claim to know better than their predecessors, bring their greater wisdom to bear. If a new government wished, it could repeal, even by using Option One, a law passed at a prior joint sitting.

60. I should add that I do not support any of the possible variations to Option One that are set out on page 40 of the discussion paper. They are all unnecessary compromises on an Option that has merit as it is.

61. So, Option One does have some merit and I trust that it gets a better hearing in the future than it has had so far.

Option Two

62. I doubt whether Option Two is much of an improvement on the mechanism already available under Section 57.

63. It does, however, contemplate a joint sitting, although after a general election. By this means, the government would be able to seek a vote from all members and senators on contentious legislation.

64. As will be seen from my comments on Option One, I believe that a government is entitled to seek such a vote on legislation that it regards as vital to its programme and which it will have put to the people at the preceding election.

65. But I do not believe that it should be necessary to wait until the next general election, as Option Two requires.
66. It seems to me to be excessively complicated and procrastinating to have a procedure under which the legislation goes through the entire parliamentary process twice, is then diverted into the maelstrom of a general election and is then sent off through the parliamentary process a third time before it even reaches the joint sitting.

67. There is also, for me, an air of unreality about a situation where the complaint is that the Senate has wrongly rejected legislation and yet the solution proposed by Option 2 is to have an election for the House of Representatives, at which none of the senators who rejected the legislation will even come before the voters for their judgment or, alternatively, an election for both of the House of Representatives and half of the Senate, where only half, rather than the whole of, the Senate will come before the people and perhaps not even those senators who voted against the legislation.

68. Indeed, because of the terms of section 13 of the Constitution and the vagaries of time, it must always be uncertain whether the election to occur under Option Two will be an election for the House of Representatives or an election for the House of Representatives and also for half of the Senate. To add such an uncertainty can hardly be an improvement.

69. As the issue is already sufficiently abstruse, it seems to me highly undesirable to complicate it any further, which is the consequence of Option Two.

70. Accordingly, I prefer Option One to Option Two or any of the variations that have been proposed to it.

71. The important thing, however, is that the debate on these and other options should proceed.
Additional comment by the Hon Michael Lavarch

The backdrop

1. The Australian Constitution is essentially a document about power. It divides power between the institutions of Australian government. It provides the framework for the restraint of the powers allocated between these institutions. It outlines how conflicts between the exercise of competing power are to be resolved.

2. The institutions of government which are dealt with are the great organs of government power:

   - the Commonwealth Parliament and the parliaments of the states;
   - the branches of government – the Parliament, the Executive and the Courts; and
   - the houses of Federal Parliament – the House of Representatives and the Senate.

3. Underpinning and explaining these structures of government and the power allocated to each of them are some key constitutional principles. Important for the current debate are the principles of representative democracy and federalism. Section 57 is a provision which comes at the crossroads of these two concepts and provides the constitutional mechanism to resolve the conflict of power between the chambers of the Parliament which were created to give life to representative democracy (the House of Representatives) and federalism (the Senate).

4. Equally important to how constitutional government actually works is an understanding of what is not found in the written Constitution. Much of the Constitution can only be understood by going beyond the text to the conventions, practices and politics which describe the day-to-day operation of government.
5. For instance, unwritten constitutional conventions, not the constitution’s text, explain the relationship between the Prime Minister and the Governor-General. Equally, while the powers allocated to Commonwealth are found in section 51, the real relationship between the states and the national government is revealed as much by financial capacity than these constitutional provisions.

6. Section 57 provides the constitutional mechanism to resolve legislative deadlocks between the houses of Parliament. It is, however, not the sole or even primary way which legislative conflict is resolved. The resolution of deadlocks occurs principally through political mechanisms. The formal constitutional mechanism is rarely called upon.

7. The debate about legislative deadlocks, commenced in its most recent manifestation by the Prime Minister in mid 2003, needs to be seen against this backdrop of, not only the formal expressions of power in the Constitution, but also how the real exercise of power operates within the political system.

The centralisation of power debate

8. Much of the debate generated by the discussion paper and the consultative process revolved around concerns that the two options would increase the power of the Federal Executive at the expense of the Senate. Implied in these concerns is that Federal Executive power has already increased inexorably since Federation and secondly, that further enhancement of the Executive would be a bad thing.

9. It is undeniable that the national Executive has become more powerful. This, however, is not a bad thing of itself as Australia could not have emerged as an independent and functioning Nation State unless the national government had gained legal and financial power. It also paints an incomplete picture to note only the growth of Federal Executive influence without recognising that there have emerged new institutions and individual legal entitlements which counter-balance to some extent Executive power.
10. For instance, regard should be had to:

- the establishment of the Commonwealth Ombudsman’s office;
- the extension of judicial review of administrative decisions;
- the enactment of freedom of information laws;
- the creation of the Human Rights and Equal Opportunity Commission and the enactment of anti-discrimination legislation; and
- the establishment of the Privacy Commission.

11. Also the Courts, particularly the High Court, have developed constitutional theory and the common law in a manner which understands the growth in Federal Executive power. Not every decision goes the way the Federal Government would like and important constraints on how power can be used have been established.

12. Equally, while it would be denying reality to say the Executive does not dominate the House of Representatives, it needs to be acknowledged that a far more elaborate committee system in the House has emerged in the last two decades. Important areas of public policy have been studied by these non-partisan committees and policy and legislative change have flowed as a result.

13. Each of these developments, together with the legislative review role of the Senate, provides a check on Executive power. While checks on untrammelled power are vital, Australia does need a national government that can govern with reasonable freedom of action. In many ways the Nation State is insufficiently powerful to deal alone with issues which are international in dimension, eg. global warming. Equally, the practical limitations on the Executive’s power to effectively regulate, for the public good, international corporations is also well recognised.

14. This is not an excuse to allow a government to legislate for anything it likes without reference to other opinion. But it is also misguided to view the power of the Executive in isolation of important checks and balances on the exercise of
that power and the need for the Federal Executive to have power to act in the
nation’s best interests.

**Analysing the options**

15. From my viewpoint, the key tests to judge the desirability of proposals to reform
the constitutional deadlock provisions are straightforward:

- how will the reform impact on the principles which underpin the structure of
government; and
- will the reform enhance the capacity of government to serve the public
interest?

16. Inevitably, these assessments are largely subjective. As reflected in the
submissions received, one person might place a premium on the ability of the
government to enact its legislative program and place less weight on the
Parliament’s role to review legislation. Another person (and this reflects the vast
majority of submissions) will place significant weight on the Senate’s ability to
check, review and amend legislation as an essential counter balance to Executive
power.

17. Option One in the discussion paper would significantly reduce the effective
power of the Senate to amend or reject legislation and oblige the Executive to
engage in political negotiation to secure passage of controversial measures. It
would impose a delay on the government’s legislative process, but clearly there
would be relatively little incentive for the government to change policy and
legislative proposals to meet objections raised in the Senate.

18. In my view, such a change would be detrimental both in terms of constitutional
principles of good governance and in its impact on the ability of government to
serve the public interest. The concept of federalism would be weakened by the
option, but more importantly, the potential benefit derived from political
negotiation improving the content of legislation would be significantly reduced.
19. In contrast, Option Two does preserve the effective power of the Senate to reject legislation during the life of a given Parliament. In this way, the principles of federalism are not weakened and the incentive for political negotiation as the means to resolve deadlocks remains in place, although lessened to some extent.

20. It means that the principle of representative democracy is given proper regard, as the government formed in the House of Representatives will ultimately prevail, but only after the intervention of an election, and the return of a government with a sufficient majority to prevail in the subsequent joint sitting of both Houses.

21. In short, Option One shifts the weight of resolving deadlocks to the constitutional mechanism and renders less important the political mechanism of negotiation. Option Two shifts more weight to the constitutional mechanism than is currently the case under Section 57, but most weight remains with the process of political negotiation between the government and the non-government representatives in the Senate.

Option Two needs improvement

22. In my view, the reforms implemented by the Victorian Parliament in 2003 provide an excellent model which can be recommended for the national level. The Victorian system, at its heart, is similar to the existing negotiation practices followed in the Federal Parliament with the addition of an improved form of Option Two.

23. The Victorian system requires that disputed legislation be subject to a process of negotiation which is formalised by means of a Dispute Resolution Committee. At the Federal level, disputed bills are also subject to a negotiation process between the government and the non-government parties and independents in the Senate. This is not a formalised process and occurs by way of practical necessity and political convention rather than as a constitutional or legal requirement.

24. In my opinion there is no need to formalise the political negotiation process by means of a Dispute Resolution Committee or similar body. Much of the Federal
governmental and parliamentary system operates by way of unwritten conventions. What is necessary is to ensure that the constitutional mechanisms which might be implemented through change to section 57 do not shift the balance of dispute resolution away from the political process to a constitutional process.

25. The Victorian system provides two constitutional mechanisms to resolve disputes unsettled by the negotiation process. The first is a double dissolution of the Parliament as permitted now by section 57 at the Federal level. The second is through a possible joint sitting after a normal election. The second component is similar to Option Two in the discussion paper, but there are critical differences. Firstly, the term of the Victorian Parliament is four years fixed as opposed to a three years non-fixed term for the House of Representatives. Secondly, both houses of Victorian Parliament are dissolved at a general election, as opposed to the House of Representatives and half the Senate at the Federal level.

26. The discussion paper Option Two would enable a government to make a tactical decision to either ‘wait out’ the Senate, or bring on an early election to avoid real negotiation with non-government representatives in the Senate. A fixed four year term would continue the emphasis on the political process rather than the constitutional mechanism to resolve deadlocks. It would also oblige all of the Senate to face the electorate and account for its performance during the life of the Parliament, not simply half the Senate.

27. Another feature of the Victorian system (similar arrangements apply in New South Wales) is that Annual Appropriation Bills are treated differently from other bills. With such bills, the upper house can delay passage for one month, but after that period the bills are deemed to have passed through the Parliament and can be given assent by the Governor.

28. This means that the politically sensitive issue of ‘supply’ is now resolved at the state level for most Australians (noting Queensland has no upper house and hence no issue of ‘blocking supply’ can arise). Neither option in the discussion
paper adequately deals with the 1975 style constitutional crisis and this in my view is a weakness of both options.

Conclusion

29. The resolution of legislative deadlocks is an important issue for Australia. However, like all constitutional debates, it can easily fall prey to short term political imperatives rather than long term considerations. There is merit in further debating the best means of resolving deadlocks and it is to be hoped that the government will continue to work through adoption of one of the mechanisms suggested in this report.
Additional comment by Professor Jack Richardson

Election of senators

1. It is not within the Consultative Group’s charter to consider whether alternative courses of action were possible to meet the objectives outlined in the government’s discussion paper without the need for constitutional change.

2. The following observations are made on the footing that the experience of the public meetings and the difficulties inherent in obtaining a constitutional change from a largely obnubilated body of electors may lead to the conclusion that the existing situation of repeated rejection by the Senate of bills coming from the House of Representatives will continue indefinitely.

3. Much of the criticism of the government’s proposals which emerged at the public meetings can be put to one side as being expressions of line-determined attitudes and, while the discussion paper is not without its blemishes, clearly it is necessary to look beyond the meetings in order to gain a definitive assessment of the strength of the case for a change in the existing arrangements for resolving disputes between the houses.

4. The response to the government’s proposals by way of written submissions has been more substantial. Some responses have been repetitive, often containing assertions made at the public meetings or reflecting policies of political parties, but some focus on the issues at stake and express a view one way or another and for this warrant more attention. We also had useful discussions in each state with persons and groups of persons who have a special interest in the constitutional question. Taking the written submissions and discussions together, there is a body of opinion which, for different reasons, advocates the maintenance of the status quo. Equally, there is a body of opinion that section 57 as it stands constitutes a barrier to responsible and effective government.
5. Concentration on constitutional amendments tends to obscure the fact that the situation described in the discussion paper is purely the result of the change made to the method of election of senators by amendment to the *Commonwealth Electoral Act* in 1948. The discussion paper accepts the present electoral system without qualification but I believe it should be widely understood that parliament determines the method of election of senators under section 9 of the Constitution. At times the current system was treated in our consultations as if it were fundamental and untouchable, whereas it is no more than the product of an ordinary law passed by parliament.

6. Before 1948 two earlier methods of electing senators had produced disproportionate results, for example in 1925 the Nationalist and Country Parties together won all the vacant Senate seats, making effective opposition impossible. Nevertheless, it is doubtful whether the Labor Government in 1948 was aware of the likely consequences of the change. In 1959 the all-party Constitution Review Committee of the Commonwealth Parliament correctly forecast that the occurrence of deadlocks would increase and could become a recurrent feature of future parliaments.

7. At present, the issue of constitutional change may be seen as a contest between a government voted into office under a general mandate to govern, warts and all, and the exercise of legal power in the hands of parties or interests which, by combination, lay claim to possess a rival Senate mandate.

8. The democratic ideal for all votes to be of equal value has no place in the election of senators. Tasmania provides the most striking example, but something of the same can be said of Western Australia and South Australia.

9. As the Group was informed, in Tasmania there is on average one senator for every 39,500 people. In New South Wales the figure is one senator for every 551,000. The disparity becomes greater as the size of the House of Representatives increases to meet the needs of a growing national population, since any increase must be accompanied by an increase in the number of senators on a two to one ratio.
10. The Founders were most concerned to enshrine representative government as a constitutional principle and, further, to make it clear that the formation of governments should be in the hands of the House of Representatives. It sits oddly with these principles that New South Wales has 12 senators and 50 members of the lower house whilst the number of Tasmanian senators has necessarily increased from the original six to 12, yet the state can still only muster its constitutional minimum of five members of the House of Representatives. Such may be the price of federation and thought to be worth the cost.

11. Nevertheless, the claim that the Senate may rightfully reject any proposed law coming to it from below, or that the Senate, through its proportional representation voting system, is more democratically elected than the House of Representatives, pays scant regard to the extremely qualified notion of representative government in the Senate which underlies contemporary conflicts between the two houses.

12. According to a written submission from Mr Jeremy Buxton of Western Australia, of the 22 minor party and independent senators elected in the last four Senate elections, only two polled the required 14.28 per cent quota of primary votes alone and six had less than half the quota. In a double dissolution election in 1987, when the quota became virtually halved (7.69 per cent), one candidate was elected with only 2.5 per cent of the primary vote. Such candidates owed their election to the distribution of preferences.

13. Moreover, the Senate’s power to review and veto is frequently not exercised with the kind of review the Founders had in mind, which was to hold the government to account for its actions. Instead it occurs because it affords opposition parties in the Senate an opportunity to bring the legislative proposals before the House more into line with their own policies.
14. If the position is seen as damaging to the maintenance of responsible national
government and constitutional amendment is not a practical course, as the
Group’s report concludes, further resort to section 9 is worth considering.

15. It is my view that the time is about ripe for the existing system of electing
senators to be critically assessed as objectively as possible and away from
flamboyant demonstrations in its favour. It is thoroughly consistent with
parliament’s power under section 9 of the Constitution for this to be done in the
light of the many political and constitutional developments since 1948.

16. One suggestion is that parliament should examine its powers under section 7 of
the Constitution to divide each state into separate Senate electorates. As
mentioned in the Group’s report, Victoria recently amended its Constitution Act.
One change was to introduce proportional representation for the elections for a
40 member Legislative Council. For this purpose, the state is to be divided into
eight electoral regions, each returning five members. Candidates will have to
obtain a quota of 16.6 per cent (compared with a quota of 14.28 per cent in the
case of the Senate).

17. Another suggestion is that Senate candidates should have to achieve a fixed
threshold vote, for example of the order of 10 per cent, before being eligible for
election. Various European electoral systems, including federal Germany, have
such provisions.