JOINT SELECT COMMITTEE ON THE REPUBLIC REFERENDUM

SUBMISSION OF THE

REFERENDUM TASKFORCE

25 June 1999

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1. INTRODUCTION

1.1 This submission has been prepared by the Referendum Taskforce on behalf of the Government to provide additional explanation of the approach adopted in the Constitution Alteration (Republic) 1999 and the Presidential Nominations Committee Bill 1999. The Bills were introduced by the Attorney-General in the House of Representatives on 10 June 1999.

1.2 The Bills are intended to provide the basis for a referendum on whether Australia should become a republic, following the commitment made by the Prime Minister at the close of the 1998 Constitutional Convention. The Government has announced that its preferred date for the referendum is 6 November this year.

1.3 The Constitution Alteration (Establishment of Republic) 1999 (the 'Republic Bill') sets out the proposed constitutional changes. These would need to be approved at a referendum before taking effect.

1.4 The Presidential Nominations Committee Bill 1999 (the 'Nominations Committee Bill') provides for the establishment, composition and functions of the Presidential Nominations Committee. It does not itself contain constitutional changes and would not form part of the referendum question.

1.5 This submission does not seek to set out in detail the policy underpinning the Bills, nor to explain the detailed operation of the Bills. This has been done in:

- the second reading speeches for the Bills; and
- the explanatory memorandums for the Bills.

1.6 Rather, the submission aims to provide explanatory comment on matters that are likely to be the subject of submissions to the Committee. In identifying these matters, the Taskforce has had regard to issues raised in response to the exposure drafts of the legislation. References to the explanatory memorandums and other relevant resource materials are included in the text.

1.7 The Taskforce would be happy to provide additional submissions on specific issues arising in submissions made to the committee if requested to do so.

2. BACKGROUND

Constitutional Convention

2.1 The 1998 Constitutional Convention[1] considered three questions:

- whether or not Australia should become a republic;
- which republic model should be put to the voters to consider against the current system of government; and
- in what timeframe and under what circumstances might any change be considered.

2.2 The model which attracted the greatest support at the Convention involves a President appointed by a two-thirds majority of the Commonwealth Parliament. The Convention resolutions are set out in a communique which is reproduced as an attachment to the explanatory memorandum for the Republic Bill. At the close of the Convention, the Prime Minister gave a commitment to put the Convention model to the Australian people at a referendum in 1999.

Referendum procedure under s.128 of the Constitution

2.3 The Constitution can be amended only with approval of the voters at a referendum. Section 128 of the Constitution provides for the following process:

- a 'proposed law' setting out changes to the Constitution is first considered by Parliament. The Republic Bill is such a proposed law. Normally, the proposal goes forward only if passed by an absolute majority of each House, but in some circumstances the proposal can go forward if it is passed on two separate occasions by only one House;
- the proposed law is then submitted to a referendum at least two months, and not more than six months, after it is passed by Parliament; and
- to take effect, the proposed law must be approved at the referendum by a 'double majority' – a national majority of electors in all States and Territories, and a majority of electors in a majority of States (ie, at least four of the six States).

2.4 The fifth paragraph of s.128 adds an additional requirement for approval of a proposed law which affects the provisions of the Constitution in relation to the limits of a State or levels of State representation in the Parliament. In addition to the normal

[1] See generally, Report of the Constitutional Convention, 1998, in four volumes.

'double majority', a proposed law to which the paragraph applies must be approved by a majority of electors in the affected State to become law.[2]

2.5 The Australian Electoral Commission is responsible for the administration of voting at referendums. The detail of the standard process for referendums is set out in the *Referendum (Machinery Provisions) Act 1984*. Voting in a referendum is compulsory.

Referendum Steering Group and Referendum Taskforce

2.6 In late 1998, the Prime Minister appointed a Steering Group comprising the Attorney-General (Chair), the Special Minister of State and a senior adviser representing the Prime Minister, to oversee the development of the referendum legislation and the administration of associated information programmes. The Referendum Taskforce was established in the Department of the Prime Minister and Cabinet to provide support for the Steering Group, drawing on staff from that Department and the Attorney-General's Department. The Taskforce has worked closely with the Attorney-General's Department, including the Constitutional Policy Unit, and with the Chief General Counsel, Deputy General Counsel and other officers of the Australian Government Solicitor.

Proposed information activities

2.7 The Convention[3] recommended:

> That prior to the referendum being put to the people, the Government undertake a public education programme directed to the constitutional and other issues relevant to the referendum.

2.8 The Government proposes information activities in three phases.

- neutral public education programme

2.9 The first phase will be a neutral public education programme on the republic issue, scheduled to be conducted in September, after consideration of the Bills in Parliament. This will involve the wide distribution of information about the referendum with an advertising campaign to let people know where they may obtain the information materials. The materials will cover, in plain english, the proposed republic model, the existing constitutional arrangements, the broad implications for State constitutions and the referendum processes. An expert panel consisting of Sir Ninian Stephen (Chair), Professor Cheryl Saunders, Professor Geoffrey Blainey, Dr John Hirst and Dr Colin Howard has been established to provide advice to the Government to ensure that the materials are accurate and balanced.

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[2] The extent of application of this provision is discussed in Constitutional Commission, *Final Report*, 1988, vol 2, paras 13.186-13.198.

[3] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 37, para 13.

- yes and no campaigns

2.10 A second 'campaign' phase will commence in October, following the neutral public education programme. Two committees, drawn from delegates to the Constitutional Convention, have been appointed by the Government to promote the arguments for and against the republic proposal to be put at the referendum. Each committee will have access to $7.5 million for its advertising campaign. They will develop advertisements to be run through media of their choice in the four weeks before the referendum. The Government's role will be limited to checking that each committee's proposed advertisements and placement strategy complies with published guidelines. These guidelines establish mechanisms to ensure there is proper accountability for the use of public funds and set basic standards for the campaigns. The funding will allow robust public debate on the arguments for and against the republic proposal.

- official printed yes and no cases

2.11 The third phase is the distribution of official yes and no cases and other information by the Australian Electoral Commission. As for previous referendums, the *Referendum (Machinery Provisions) Act 1984* provides for written arguments of up to 2000 words to be prepared by the Parliamentarians who voted for or against the referendum proposal.[4] The Act provides for these cases to be mailed to each voter with information setting out the proposed changes to the Constitution. Under the Act, the information is to be mailed to voters at least 14 days before the date of the referendum.

Referendum Legislation Amendment Act 1999

2.12 The *Referendum Legislation Amendment Act 1999* was enacted in the Autumn sittings this year. Among other things, the Act:

- removes a possible argument that Government spending on the proposed public information activities outlined above would be contrary to the *Referendum (Machinery Provisions) Act 1984*; and

- allows separate referendum questions put on the same day to be printed on separate pieces of paper of different colour. (This reflects the intention that a referendum question on a new preamble would be presented as independent of the question relating to change to a republic.)

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[4] *Referendum (Machinery Provisions) Act 1984*, s.11.

3. DRAFTING

Approach

- broad approach in developing the legislation

3.1 The proposed alterations to the Constitution have been drafted with the following objectives in mind:

- they should be an appropriate expression of the Convention model;
- they should not go beyond what is reasonably necessary to implement the Convention model; and
- the language should accord with the style and level of detail adopted in the existing provisions of the Constitution.

- Convention model

3.2 The starting point for the proposed changes has always been the recommendations of the Convention. However, in fleshing out the Convention model, it has been necessary to cover situations not dealt with explicitly by the Convention model. In such cases, the aim has been to provide for workable arrangements that are consistent with the current operation of our system of government and fit with the Convention model.

- no 'tidy-up'

3.3 The preparation of the Republic Bill has not been used as an opportunity to 'tidy-up' the Constitution. Spent constitutional provisions would be removed or altered only where they refer specifically to the monarchical elements in the current system of government. The Government's judgment was that to make changes beyond those necessary for the implementation of the Convention model would give rise to a range of separate issues and distract from the central issue.

- style and level of detail

3.4 The style adopted in the drafting of the new constitutional provisions reflects the style of existing provisions of the Constitution. The new provisions avoid unnecessary or inappropriate detail. While they are drafted in general terms adequate to cover all contingencies, they do not deal explicitly with remote possibilities or matters of operational detail. Like all constitutional provisions, the new provisions must be capable of meeting new and unforeseen issues as they arise for many years to come. The new provisions would entrench the essential elements of the new arrangements without entrenching matters of detail which may have unintended consequences in a changing social and political environment.

3.5 In some cases, scope is provided for additional provision in subsequent ordinary legislation. For example, proposed s.63 incorporates the phrase 'until the Parliament otherwise provides'. Existing sections of the Constitution that use this phrase include ss.48 and 65.

- numbering of proposed provisions

3.6 The provisions have been numbered to strike a balance between the maintenance of existing numbering and the use of spare places created by amendments. The aim has been to keep the Constitution, as it would look after the changes, as easy to follow as possible. An objective has also been to avoid alphanumeric numbering where possible, although one new alphanumeric section number (proposed s.70A) could not reasonably be avoided.

Consultation

3.7 In developing the Bills, the Government saw it as important to provide the States and Territories, the Opposition and other political parties, and interested groups and individuals with an opportunity to have a say.

- exposure drafts

3.8 On 9 March 1999, the Attorney-General and the Special Minister of State released exposure drafts of the Republic Bill and the Nominations Committee Bill for public comment. The release was announced publicly and the drafts were made available free to the public (on request to a freecall number) as well as being posted on the Internet. The period for comments on the Bills closed on 16 April 1999. Over 100 submissions on the Bills were received. The Bills have been revised in the light of the submissions.

- State involvement

3.9 At a meeting on 12 March 1999, the COAG Senior Officials Group (which is chaired by the Secretary of the Department of Prime Minister and Cabinet and includes heads of Premiers' departments) agreed to the establishment of a Referendum Working Group to consider the exposure drafts of the Bills, particularly the Commonwealth-State aspects. The Working Group comprised representatives from the Commonwealth, all States, the Northern Territory and Australian Capital Territory. It met in Melbourne on 25 March and discussed a number of issues which were the subject of ongoing consultation between the Commonwealth and the States and were taken into account in finalising the Bills. Consultation with the States on relevant provisions continued through the Working Group members until introduction of the Bills into Parliament. The main issue of concern to the States has been the approach to amending s.7 of the Australia Acts, which is discussed below in paragraphs 6.18-6.25.

Marked-up Constitution and Bills

3.10 Appendix 1 sets out the full Constitution as it would be altered by the Republic Bill.

3.11 Appendix 2 identifies the differences between the exposure drafts and the Bills as introduced.

4. LONG TITLE AND REFERENDUM QUESTION

4.1 The rules governing the form of referendum questions are set out in the *Referendum (Machinery Provisions) Act 1984*.[5] Under that Act, a referendum question must set out the title of the proposed law to change the Constitution and ask whether the voter approves the proposed law. The voter must mark the ballot-paper 'yes' or 'no'.[6] Referendum questions have usually been based on the long title rather than the short title.[7]

4.2 Generally, a long title should encompass the purpose of the Act.[8]

4.3 The long title of the Republic Bill is 'A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with a President chosen by a two-thirds majority of the members of the Commonwealth Parliament'. The Government considers this gives sufficient indication of the purpose of the Bill and its content without being unnecessarily long.

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5 See s.25 and Schedule 1. Note the amendments recently made to s.25 by the *Referendum Legislation Amendment Act 1999* to allow separate referendum questions to be printed on separate pieces of paper.

6 *Referendum (Machinery Provisions) Act 1984*, s.24.

7 A brief summary of the issues involved in each referendum since Federation, including the question asked, is included in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change: Select Sources on Constitutional Change in Australia 1901-1997*, 1997, pp 62-114.

8 Barlin, *House of Representatives Practice*, 3rd ed, 1997, pp 350-351.

5. THE PRESIDENT

Qualifications of the President

- proposed section 60

5.1 Proposed s.60, so far as relevant, provides (emphasis added):

> **60 The President**
>
> After considering the report of a committee established and operating as the Parliament provides to invite and consider nominations for appointment as President, the Prime Minister may, in a joint sitting of the members of the Senate and the House of Representatives, move that a named **Australian citizen** be chosen as the President.
>
> ...
>
> The qualifications of a person who may be chosen as President shall be as follows:
>
> (i) the person **must be** qualified to be, and capable of being chosen as, a member of the House of Representatives;
>
> (ii) the person **must not be** a member of the Commonwealth Parliament or a State Parliament or Territory legislature, or a member of a political party.
>
> The actions of a person otherwise duly chosen as President under this section are not invalidated only because the person was not qualified to be chosen as President.
>
> ...

5.2 Paragraphs 6.5-6.7 and 6.10-6.12 of the explanatory memorandum for the Republic Bill cover the qualifications of the President.

- what the Convention said

5.3 The Convention[9] resolved that, to be qualified for the office of President, a person should be an 'Australian citizen, qualified to be a member of the House of Representatives' (28).

5.4 References to the Convention communique in this submission include, in parenthesis, paragraph numbers as assigned in the copy of the communique appended to the explanatory memorandum for the Republic Bill.

5.5 The Convention[10] also resolved that:

> the Commonwealth Government and Commonwealth Parliament give consideration to the transitional and consequential matters which will need to be addressed (41) ... including:
>
> ...

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[9] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 39, para 28.

[10] See *ibid*, pp 41-42, paras 41, 54-57.

The head of state should be eligible to vote in an election for the Senate or House of Representatives at the time of nomination (54);

The head of state should not be a member of any political party (55);

The head of state should be subject to the same disqualifications as set out in section 44 of the Constitution in relation to members of Parliament (56); and

Any future amendments to section 44 of the Constitution should also apply to the head of state (57).

- qualifications

5.6 The requirement that the person chosen as President be qualified to be elected as a member of the House of Representatives imports all of the requirements of ss.34 and 44 of the Constitution that must be satisfied by a person who is elected to the Commonwealth Parliament. Any change to the requirements under ss.34 or 44 would flow through to the appointment of future Presidents.

5.7 It is extremely unlikely that an unqualified person would be chosen as President. In the unlikely event that an unqualified person was appointed, and proceeded to perform the duties of office, proposed s.60 would ensure that the actions taken by the appointee would continue to be valid. However, proposed s.60 would not prevent a Prime Minister removing an unqualified President who did not resign.

5.8 A President who was qualified at the time of appointment, but subsequently took action contrary to the qualification requirements (for example, joining a political party) would not be disqualified, but might be removed by the Prime Minister.

5.9 While the constitutional qualifications for members of parliament apply at all times they are members, the qualifications of a President would apply only at the time the President is chosen. It would be inappropriate to provide for the 'automatic' disqualification of the President, which might also require a judicial determination. Instead, the question whether grounds exist which render the President unsuitable to hold or continue in office is a matter for the Prime Minister to determine, under the proposed removal provision.

- Sue v Hill decision

5.10 The High Court's decision in *Sue v Hill*[11] has no direct implications for the proposed provisions. It simply confirms that United Kingdom citizens are foreign citizens for the purpose of s.44 of the Constitution. It does not alter the fact that proposed s.62 would import all of the requirements of s.44, or the fact that any change to those requirements would flow through to the appointment of future Presidents. The Attorney-General has indicated that the Government will take the High Court's decision into account in its ongoing consideration of the operation of s.44.

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[11] [1999] HCA 30.

Choosing the President

- proposed section 60

5.11 Proposed s.60, so far as relevant, provides:

> **60 The President**
>
> After considering the report of a committee established and operating as the Parliament provides to invite and consider nominations for appointment as President, the Prime Minister may, in a joint sitting of the members of the Senate and the House of Representatives, move that a named Australian citizen be chosen as the President.
>
> If the Prime Minister's motion is seconded by the leader of the Opposition in the House of Representatives, and affirmed by a two-thirds majority of the total number of the members of the Senate and the House of Representatives, the named Australian citizen is chosen as the President.
>
> ...

5.12 Paragraphs 6.3-6.4 and 6.9 of the explanatory memorandum for the Republic Bill cover choosing the President.

5.13 Further provision for the appointment of the President would be provided in ordinary legislation, the Nominations Committee Bill (as to which, see below).

- what the Convention said

5.14 The Convention[12] resolved as follows:

> Parliament shall establish a Committee which will have responsibility for considering the nominations for the position of President. The Committee shall report to the Prime Minister (19).
>
> ...
>
> Having taken into account the report of the Committee, the Prime Minister shall present a single nomination for the office of President, seconded by the Leader of the Opposition, for approval by a Joint Sitting of both Houses of the Federal Parliament. A two thirds majority will be required to approve the nomination (24).

5.15 The Convention made additional resolutions (20 to 23) relating to the composition of the Committee and its operation.

- Prime Minister not expressly required to make a nomination

5.16 The first paragraph of proposed s.60 provides that, after considering the report of the committee, the Prime Minister 'may' move that a named Australian citizen be chosen as the President. Use of the permissive 'may' is appropriate in the context of the appointment process. The process essentially relies on agreement being reached

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[12] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 38, paras 19, 24.

between the Prime Minister and the leader of the Opposition about the nomination to go forward to the joint sitting. It would be inappropriate to oblige the Prime Minister to put forward a nomination even where it has not been possible to reach agreement with the leader of the Opposition and there is no expectation of a successful outcome in the joint sitting. The conduct of a joint sitting in those circumstances is likely to prove unproductive at best, and quite possibly divisive.

5.17 In practice, any undue delay by a Prime Minister in moving to appoint a new President would be obvious, and the Prime Minister could expect to be called on in public debate and in Parliament to account for the delay.

- Prime Minister not required to choose a name from the short list

5.18 Under proposed s.60, the Prime Minister is technically under no obligation to limit his nomination to a person from a short list identified by the Committee in its report. The Convention's resolution is expressed in terms that the Prime Minister is to take into account the Committee's report. From the Report[13] of the proceedings of the Convention, it is clear that debate proceeded on the basis that the Prime Minister should not be under an obligation to appoint a person identified by the Committee, although it was recognised that the political realities would impose pressure to do so. The proposed provision is consistent with the Convention resolution.

5.19 It is possible to identify circumstances in which it may not be appropriate to nominate a person recommended by the Committee. An example would be where agreement could not be reached with the leader of the Opposition on any of the Committee's short list. Another example may be where an outstanding candidate who was excluded from the Committee's consideration because of apparent unavailability subsequently agreed to be considered when approached by the Prime Minister and leader of the Opposition.

- 'appointment', 'chosen' and 'affirmed'

5.20 The term 'appointment' of the President is used in the opening sentence of proposed s.60, while 'chosen' is used elsewhere. 'Appointment' reflects the language of the Convention and is a reference to the entire process which results in the President taking office. The first paragraph also refers to a motion that a named Australian citizen be 'chosen' as the President, and the second paragraph refers to the motion being 'affirmed' by the joint sitting of Parliament. (The Convention[14] referred to the nomination's 'approval' by the joint sitting.) The proposed language distinguishes between the affirmation of the Prime Minister's motion and the result that the nominee is chosen as President.

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[13] See Report of the Constitutional Convention, 1998, vol 4, pp 854, 902.

[14] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 38, para 24.

- 'leader of the Opposition'

5.21 The expression 'leader of the Opposition' is and would remain ascertainable by reference to parliamentary practice. It is therefore not necessary to define the term. The intention is that the term 'leader of the Opposition' would apply to the person performing that role, even if not given that exact title under the parliamentary practice of the day.

5.22 In the exposure draft, the reference was to 'the leader of the Opposition (if any)'. The inclusion of 'if any' was intended to make it clear that, in the unlikely event that there was no identifiable leader of the Opposition, the appointment of a new President would not become impossible because the procedural requirements could not be satisfied. The reference to 'if any' has been removed on the basis of advice that it is unnecessary, and that the provisions would not be construed so as to frustrate the appointment of a President even if no 'leader of the Opposition' existed.

- justiciability of President's appointment

5.23 Given the pivotal role of the Parliament in the appointment process, it is unlikely that judicial review of the selection would be available. Any such review is more likely to go to the qualifications of the President, and the fourth paragraph of proposed s.60 provides that the actions of a person otherwise duly chosen as President are not invalidated only because the person was not qualified to be chosen.[15] Justiciability is discussed more generally below in paragraphs 5.47-5.57.

Powers of the President

- proposed sections 59 and 70A

5.24 Proposed s.59, so far as relevant, and proposed s.70A, provide:

> **59 Executive power**
>
> The executive power of the Commonwealth is vested in the President, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.
>
> ...
>
> The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.
>
> …

[15] Decisions under the Nominations Committee Bill would also be excluded from review under the *Administrative Decisions (Judicial Review) Act 1977*: see the explanatory memorandum for the Nominations Committee Bill, para 6.10.

70A Continuation of prerogative

Until the Parliament otherwise provides, but subject to this Constitution, any prerogative enjoyed by the Crown in right of the Commonwealth immediately before the office of Governor-General ceased to exist shall be enjoyed in like manner by the Commonwealth and, in particular, any such prerogative enjoyed by the Governor-General shall be enjoyed by the President.

- what the Convention said

5.25 The Convention[16] resolved that:

> The powers of the President shall be the same as those currently exercised by the Governor-General (26).
>
> To that end, the Convention recommends that the Parliament consider:
>
> > the non-reserve powers (those exercised in accordance with ministerial advice) being spelled out so far as practicable; and … (27)
>
> The Commonwealth Government and Commonwealth Parliament give consideration to (41)…
>
> > Provision for continuation of prerogative powers, privileges and immunities until otherwise provided (45);

5.26 Paragraphs 5.3-5.4 and 5.7-5.10 of the explanatory memorandum for the Republic Bill cover the executive power of the Commonwealth and the Federal Executive Council. Paragraphs 10.1-10.2 of the explanatory memorandum cover the continuation of the prerogative.

- President's powers

5.27 The proposed provisions would give the President the same powers that the Governor-General has now. The Constitution presently provides for some powers to be exercised by the Governor-General in Council, making it clear that advice is required from the Federal Executive Council. Under the proposed amendments, references to the Governor-General in Council will be replaced by references to the President in Council.

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[16] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, pp 26, 41, paras 26, 27, 41, 45.

5.28 The President (or the President in Council) would have the following powers:

- powers conferred by the Constitution, including the reserve powers;
- powers previously enjoyed by the Crown which arose from the common law, often referred to as the prerogative powers; and
- powers conferred by ordinary legislation.

5.29 Powers conferred on the President by the Constitution would include: the executive power of the Commonwealth;[17] summoning Parliament and dissolving the House of Representatives;[18] assenting to Bills;[19] and the command in chief of the naval and military forces of the Commonwealth.[20] The reserve powers are discussed below.

5.30 Powers conferred on the President in Council by the Constitution would include: the issue of writs for a general election for the House of Representatives;[21] the establishment of departments of State;[22] and the appointment of Justices of the High Court.[23]

5.31 In practice, the Governor-General acts on advice when exercising all powers, other than the reserve powers, whether expressed to be exercisable by the 'Governor-General' alone or by the 'Governor-General in Council'[24] (see paragraphs 5.34-5.37 below). The situation would be the same in relation to the President.

5.32 The prerogative powers[25] include powers such as the power to declare war or make peace and the prerogative of mercy.

5.33 It is envisaged that consequential provisions of general application enacted as ordinary legislation would allow the President to exercise all powers that are presently conferred on the Governor-General by ordinary legislation. Such powers include powers to make regulations under Acts and to make certain appointments (eg commissioned Defence Force officers).

- powers to be exercised on ministerial advice

5.34 Proposed s.59 requires the President to act on advice, except when exercising the reserve powers (as to which, see below). This gives effect to the principle of responsible government which is fundamental to the Constitution. Responsible

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17 Proposed s.59.
18 Section 5, as it would be amended.
19 Section 58, as it would be amended.
20 Section 68, as it would be amended.
21 Section 32, as it would be amended.
22 Section 64, as it would be amended.
23 Section 72, as it would be amended.
24 See Constitutional Commission, *Final Report*, 1988, vol 1, paras 5.147-5.150.
25 For a brief discussion of the prerogatives see Republican Advisory Committee, *An Australian Republic: The Options*, 1993, vol 1, pp 144-148.

government involves the vesting of executive power in the head of state who in turn acts on the advice of ministers responsible to the Parliament.

- requirement to act on advice must be exercised according to law or convention

5.35 Proposed s.59 provides that advice may be given by the Federal Executive Council, the Prime Minister or another Minister of State. In relation to determining the appropriate source of advice on a particular issue, it is implicit that the requirement to act on advice is to be exercised according to law or convention. Within the current convention that the Governor-General (or the Crown) acts on ministerial advice, there are conventions and practices as to which ministers give advice on particular matters. These are in addition to statutory requirements arising from the Constitution and Commonwealth Acts, including the *Acts Interpretation Act 1901*.[26] Neither the statutory requirements nor the conventions would be displaced.

5.36 In relation to powers conferred on the Governor-General by Commonwealth legislation, s.16A of the *Acts Interpretation Act 1901* provides that, unless the contrary intention appears, the powers are exercisable by the Governor-General acting with the advice of the Federal Executive Council. In the event of change, it is proposed that s.16A apply in equivalent terms to statutory powers of the President.

5.37 Where Executive Council advice is not required, there are practices and conventions to determine which minister provides advice. For example, advice on assent to laws is provided by the Attorney-General and advice on the appointment of ministers or the calling of elections is provided by the Prime Minister.

- right to be consulted, to advise and to warn

5.38 Proposed s.59 would not displace the conventional right of the head of state to be consulted, to advise and to warn.

Reserve powers and constitutional conventions

- proposed section 59 and proposed Schedule 2, clause 8

5.39 Proposed s.59, so far as relevant, provides:

> **59 Executive power**
>
> ...
>
> The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.

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[26] See *Acts Interpretation Act 1901*, ss.19, 19A, 19B, 19BA, 19C.

5.40 Proposed Schedule 2, cl.8 provides:

> **8 Constitutional conventions**
>
> The enactment of the *Constitutional Alteration (Establishment of Republic) 1999* does not prevent the evolution of the constitutional conventions relating to the exercise of the reserve powers referred to in section 59 of this Constitution.

5.41 Paragraphs 5.5-5.6, 5.11-5.17 and 13.20 of the explanatory memorandum for the Republic Bill cover the reserve powers and constitutional conventions.

- what the Convention said

5.42 The Convention[27] resolved that the Parliament consider

> a statement that the reserve powers and the conventions relating to their exercise continue to exist (27).

- the reserve powers

5.43 Most of the Governor-General's powers must be exercised with ministerial advice (see paragraphs 5.34-5.37 above), but there are a small number of matters in relation to which the Governor-General is not required to act in accordance with advice. The Governor-General's powers in relation to these matters are known as 'reserve' powers. The Constitution does not spell out which of the Governor-General's powers are to be exercised on advice. However, it is generally agreed[28] that there are probably only four reserve powers:

- to appoint the Prime Minister;
- to dismiss the Prime Minister;
- to refuse to dissolve the Parliament; and
- to force a dissolution of the Parliament.

5.44 In exercising a reserve power, the Governor-General acts in accordance with rules of practice known as constitutional conventions which are for the most part well established and generally accepted.[29]

- express reference to the reserve powers

5.45 There is currently no special provision about the reserve powers in the Constitution. They form part of the Governor-General's powers in relation to dissolution of the Parliament (s.5) and appointment of ministers (s.64), but are not separately identified or referred to. The express reference to the reserve powers in

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[27] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 39, para 27.

[28] See, for example, Constitutional Commission, *Final Report*, 1988, vol 1, para 5.151; Republican Advisory Committee, *An Australian Republic: The Options*, 1993, vol 2, Appendix 6, especially pp 244-271.

[29] *Ibid.*

proposed s.59 would make it clear that those powers would be exercisable by the President as reserve powers.

- evolution of the constitutional conventions

5.46 The constitutional conventions are not written rules and have continued to evolve over the century since Federation, as the workings of the system of government have evolved. In this way, the conventions continue to have a sensible application and the constitutional provisions they support can endure. The Government's position is that the conventions should retain their inherent capacity to evolve over time. Proposed Schedule 2, cl.8 is to put that beyond doubt.

Justiciability of the exercise of powers by the President

5.47 There is an important issue as to whether the decisions of the President can be challenged in the courts, on what grounds, and by whom. The Government's position is that the President should be placed in the same position with regard to these matters as the Governor-General is now. While these issues raise significant legal questions, and there is some uncertainty about the current position, the general principles are clear.

- statutory powers

5.48 At one time, the actions of Governors-General, Governors and other Crown representatives, which were lawful in form, were not subject to general judicial review. However, while the courts continue to show deference to representatives of the Crown, they have rejected such a principle of general immunity. The courts have held that they no longer find compelling the bases for the traditional general immunity; namely that the Crown is responsible to the Parliament, that its decisions are matters of policy, and that its counsels are secret. Rather, the courts will now look to the nature and subject matter of the power, rather than who exercises it, in deciding whether the action is susceptible to general judicial review.[30] This approach has been taken in relation to decisions by the Crown under statutes, but the principles apparently apply to decisions under the Constitution.

5.49 It is clear that the courts would take the same approach to actions of the President.

5.50 Importantly, the courts have recognised that Governors-General and Governors act on the advice of Ministers, whose actions are subject to judicial review. This has been one of the reasons for allowing judicial review of actions by the Crown's representative. Proposed s.59 of the Constitution would specifically reflect the requirement to act on advice in almost all decisions.

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[30] See *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170; *F.A.I. Insurance Ltd v Winneke* (1982) 151 CLR 342.

5.51 Of course, there are actions of the Governor-General, and there would be actions of the President, whose nature and subject matter make judicial review inappropriate. This is particularly so in relation to actions under the Constitution, specifically those in relation to foreign affairs, the Parliamentary process and matters of a highly political nature (see the discussion in relation to the reserve powers in paragraphs 5.54-5.57 below). Many powers which the Governor-General does (and the President would) exercise on advice under the Constitution are not subject to specific legal limitations. Except in extreme cases, judicial review is not, and would not be, appropriate. Further, those with standing, and the remedies available, are, and would remain, limited.

- prerogative powers

5.52 The traditional view has been that the exercise of prerogative powers[31] by the Crown's representative is unsuitable for review by the courts. It may be that courts will now look to the nature and subject matter of the powers, rather than applying such a general rule.[32]

5.53 Whatever the case, proposed s.70A of the Constitution would make it clear that any prerogative right enjoyed by the Governor-General shall be enjoyed in like manner by the President.

- reserve powers

5.54 The third paragraph of s.59 of the Constitution would refer for the first time to the 'reserve powers' and the 'constitutional conventions' relating to their exercise. It would provide that the President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister, but the President need not do so when exercising a reserve power in accordance with constitutional conventions.

5.55 The traditional position is that the courts will not review the exercise of the reserve powers, and that the conventions applicable to the exercise of those powers are not justiciable. Recent commentators have questioned this position.[33] This questioning of the traditional position has arisen in the context of the general erosion of executive immunity from judicial supervision, including the immunity of Governors-General and Governors noted in paragraphs 5.48-5.51 above.

5.56 The proposed amendments do not seek to resolve this issue; rather, the amendments would leave the position as it currently is.

5.57 There would continue to be strong arguments that the exercise of reserve powers by the President would not be able to be reviewed by the courts. The nature and subject matter of these powers make judicial review inappropriate. They are

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[31] For examples of prerogative powers, see paragraph 5.32 above and the accompanying footnote.

[32] See *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, per Mason J at 220.

[33] See Winterton, *Parliament, the Executive and the Governor-General*, 1983, p 126; Zines, *The High Court and the Constitution*, 4th ed, 1997, pp 249-251.

essentially political matters, which the Constitution has entrusted to the President, and which are unsuitable for resolution by the courts. The constitutional possibility of review, especially in extreme cases is, however, a check on inappropriate Presidential action.

Term of office of the President

- proposed section 61

5.58 Proposed s.61, so far as relevant, provides:

> **61 Term of office and remuneration of President**
>
> The term of office of a President begins at the end of the term of office of the previous President. But if the office of President falls vacant, or the term of office of the outgoing President ends, before the day on which the incoming President makes the oath or affirmation of office, the incoming President's term of office begins on the day after that day.
>
> The President holds office for five years but if, at the end of the term, a new President does not take office, the office of President does not thereby fall vacant and the outgoing President continues as President until the term of office of the next President begins.
>
> A person may serve more than one term as President.
>
> The President may resign by signed notice delivered to the Prime Minister.
>
> ...

- what the Convention said

5.59 The Convention[34] resolved as follows:

> Term of Office: Five years. (29)
>
> The Commonwealth Government and Commonwealth Parliament give consideration to … (41)
>
> > The commencement in office of the head of state upon oath or affirmation (43);
> >
> > Provision for voluntary resignation (47);

5.60 Paragraphs 7.1-7.5 and 7.7-7.9 of the explanatory memorandum for the Republic Bill cover the term of office of the President.

- President's continuance in office

5.61 While the proposed provisions would allow a new President to be chosen in advance of the end of the incumbent's term, so as to allow the changeover to occur on the expiry of that term, provision has been included to cover the possibility that the

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[34] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, pp 39,41-42, paras 29, 41, 43, 47.

new appointment will not be finalised in time. This reflects the realities of the appointment process – it is not the sort of process for which a strict schedule and deadline can apply.

5.62 The proposed provisions would allow for the continuation of the incumbent President in office beyond the five-year term when the process is not finalised in time. This was seen as a better option than the alternative of relying on the acting arrangements. The incumbent President could of course resign if not prepared to continue, in which case the acting arrangements would apply.

- President may serve more than one term

5.63 The Convention resolutions do not deal with the question whether the President should be able to serve more than one term, except in relation to the circumstances that a President is removed by a Prime Minister and the House of Representatives does not approve the removal. The Convention[35] said that, in that situation, the President would not be restored to office but would be eligible for re-appointment.

5.64 Proposed s.61 expressly allows re-appointment. However, any re-appointment would need to be made through the normal appointment process and would involve a clear choice of the incumbent as the best candidate. There is no short-cut for re-appointment and no prospect that re-appointment would be seen as a substitute for the nomination and selection process. As appointment will in practice require bipartisan support, the possibility of re-appointment does not create an incentive for a President to favour the Government (or any other political group) with a view to increasing the chances of re-appointment.

Acting Presidents and presidential deputies

- proposed section 63

5.65 Proposed s.63, so far as relevant, provides:

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

[35] See *ibid*, p 39, para 25.

> Until the Parliament otherwise provides, the President may appoint any person, or any persons jointly or severally, to be the President's deputy or deputies, and in that capacity to exercise during the pleasure of the President (including while the President is absent from Australia) such powers and functions of the President as the President thinks fit to assign to such deputy or deputies. The appointment of such deputy or deputies shall not affect the exercise by the President personally (including while the President is absent from Australia) of any power or function.
>
> ...

- what the Convention said

5.66 The Convention[36] resolved that:

> The Commonwealth Government and Commonwealth Parliament give consideration to … (41)
>
> Provision for an acting head of state in certain circumstances (44);

5.67 Paragraphs 9.1-9.19 of the explanatory memorandum for the Republic Bill cover acting Presidents and presidential deputies.

- acting arrangements apply automatically in the event of a vacancy

5.68 The proposed provisions would operate of their own force to install the senior available State Governor as acting President in the event of a vacancy. No action would be required by the Prime Minister or other office-holder to select the acting President and formalise the commencement of the acting arrangement. This is particularly important in the context of the interaction of the acting arrangements with the provisions for removal of a President. It is important that an acting President be in place promptly following removal of a President, and it would seem inappropriate for the Prime Minister to be in a position to select the acting President or to delay the commencement of the acting arrangements.

5.69 In practice, it is expected that commencement of the acting arrangements would be reflected in a proclamation and published. But it is not seen as necessary to provide for that in the Constitution. Under current arrangements, the assumption of duties by the Administrator when a Governor-General is unavailable is proclaimed and published in the Gazette.

5.70 The automatic acting arrangements would not apply in the event of the incapacity of the President. In that case, the Prime Minister would be involved in appointing the senior State Governor to act. The critical difference is that decisions are required about when the President becomes incapacitated and when the President is able to resume duties. In these circumstances, an automatic arrangement could give rise to confusion and possible disputation.

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[36] See *ibid*, p 41, paras 41,44.

- 'availability' of a State Governor to act

5.71 The provisions have been prepared on the understanding that a State Governor would not be in a position to take up the position of acting President without agreement of the State government. In this context, the State Governor would only be 'available' where he or she is both personally prepared to take on the role and able to secure agreement from the State government. Courts would interpret proposed s.63 in the light of established constitutional practices. One such practice is that Governors act only in accordance with ministerial advice tendered by the State Government (except when exercising the reserve powers).[37] There is no reason to suppose that a Governor would be able to act otherwise than in accordance with the advice of the State Government when indicating his or her availability to act as President under proposed s.63. Further, the proposed arrangements are consistent with the present arrangements for a Governor to act as Administrator, for which there is no express provision.

- role of deputies

5.72 Presently, s.126 of the Constitution provides for the appointment of deputies of the Governor-General to perform such powers or functions as the Governor-General assigns. It is usual practice for two State Governors to be given standing appointments as deputies to exercise formal or ceremonial powers when the Governor-General is unavailable, including power to assent to bills, authorise expenditure and sign subordinate legislation with Federal Executive Council advice. In practice, it would now be extremely rare for the Governor-General to request a deputy to exercise any of the powers or functions assigned under standing appointments. Advances in transport and communications since Federation have almost eliminated the need for the Governor-General to rely on deputies. The ceremonial duties performed by the Chief Justice of the High Court at the opening of Parliament provide one current example where a deputy still performs a function for the Governor-General.

5.73 Section 126 of the Constitution refers to the appointment of persons to be deputies 'within any part of the Commonwealth'. The proposed new provisions would not include the phrase 'within any part of the Commonwealth'. It is no longer desirable or necessary to appoint a presidential deputy in respect of a particular geographical location.

5.74 The proposed provisions broadly preserve the scope for appointment of deputies. There is no expectation that reliance on deputies would increase in practice. The power to appoint deputies would not be a purely personal discretion in the President. Under the general provisions relating to exercise of the powers of the President, any decision by the President to appoint a deputy and assign functions would need to be made on advice.

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[37] Winterton, 'The Constitutional Position of Australian State Governors' in Lee and Winterton, *Australian Constitutional Perspectives*, 1992, pp 290-291.

- acting Presidents and presidential deputies do not need to be qualified as President

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

- limits on power of deputies

5.76 It is not necessary to provide expressly that constitutional provisions applying to the President also apply to any exercise of powers by a presidential deputy. The President could assign only those powers that the President possesses, including relevant limitations.

- resignation of an acting President or presidential deputy

5.77 It is unnecessary to include express provision for resignation of an acting President or presidential deputy. An acting President who was no longer prepared to act would need only advise that he or she is no longer 'available', in which case the next most senior State Governor available would act. Equally, it would be unusual to include an express provision for resignation of a deputy, where the appointment is at the President's pleasure.

Removal of the President

- proposed section 62

5.78 Proposed s.62 provides:

> **62 Removal of President**
>
> The Prime Minister may, by instrument signed by the Prime Minister, remove the President with effect immediately.
>
> A Prime Minister who removes a President must seek the approval of the House of Representatives for the removal of the President within thirty days after the removal, unless:
>
> (i) within that period, the House expires or is dissolved; or
>
> (ii) before the removal, the House had expired or been dissolved, but a general election of members of the House had not taken place.
>
> The failure of the House of Representatives to approve the removal of the President does not operate to reinstate the President who was removed.

5.79 Paragraphs 8.1-8.10 of the explanatory memorandum for the Republic Bill cover removal of the President.

- what the Convention said

5.80 The Convention[38] resolved that the

> President may be removed at any time by a notice in writing signed by the Prime Minister. The President is removed immediately the Prime Minister's written notice is issued. The Prime Minister's action must be presented to a meeting of the House of Representatives for the purpose of its ratification within 30 days of the date of removal of the President. In the event the House of Representatives does not ratify the Prime Minister's action, the President would not be restored to office, but would be eligible for re-appointment. The vote of the House would constitute a vote of no confidence in the Prime Minister (25).

- dismissal of the Governor-General

5.81 Under s.2 of the Constitution the Governor-General is appointed by the Queen and holds office during the Queen's pleasure. The Queen acts on the advice of the Prime Minister. A Governor-General is thus subject to removal by the Queen, acting on the advice of the Prime Minister, at any time. The Constitution does not specify any grounds for removal of the Governor-General. No Governor-General has been removed.

- provision's consistency with Convention resolutions

5.82 The proposed provision follows the Convention resolution closely, with two exceptions: it does not spell out the consequences of a failure to obtain approval from the House of Representatives; and it provides an exception to the requirement to seek approval where an election is held after removal.

- failure to obtain approval from the House does not reinstate the President

5.83 The final paragraph of proposed s.62 was added following the consultation process, in response to concern that the provisions in the exposure draft were ambiguous. The concern was that they could leave open an interpretation that the President would be reinstated in the event that the House did not approve removal. In line with the Convention resolution, it has now been put beyond doubt that any failure to approve the removal would not reinstate the removed President.

- disapproval of the House not a vote of no-confidence

5.84 The Convention said that the vote on whether to approve removal should constitute a vote of no confidence in the Prime Minister. It is highly unusual to have a vote of no confidence in a single Minister, particularly the Prime Minister, and it is not

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[38] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 39, para 25.

entirely clear what the Convention envisaged would be the implication of such a vote. One interpretation may be that it would amount to a vote of no confidence in the government, possibly leading to an election. Another is that it would be treated as applying only to the Prime Minister, in which case the Prime Minister might have to resign but another member of the government party might take over as Prime Minister.

5.85 The proposed provision does not spell out what the implications of failure to obtain approval would be. This reflects the Government's view that the matter should be left for the political process to resolve in any particular case. The requirement to seek approval provides a clear basis for consideration by the House of the merits of the dismissal. In the absence of majority support for the removal, some form of no confidence motion would seem almost inevitable. It is unnecessary to attempt to codify that outcome and its consequences. Any such provision could operate inappropriately in particular circumstances.

- no requirement to seek approval where an election is held

5.86 Proposed s.62 provides for two exceptions from the general requirement for the Prime Minister to seek approval for the removal within 30 days. Both relate to situations where a general election follows the removal. Paragraph (i) applies where the Prime Minister calls an election within 30 days after the removal. Paragraph (ii) applies where the election processes were already in train when the removal took place. In either case, the Australian people would be able to express any reaction to the removal in their votes and it would be unnecessary to force further consideration in the House. Notwithstanding the vote, the removal could remain a matter of controversy for some time, and the proposed provision would not prevent the issue being raised for debate in Parliament.

5.87 The removal of a President during an election period seems extremely unlikely. However, it is appropriate to provide for it as a theoretical possibility (for example, in the event that the President was to become involved in the campaign in a partisan way). Under the caretaker conventions which apply during election periods, it would be open for a Prime Minister to act where it is urgent and unavoidable, following consultation with the Opposition.

- no grounds for removal are specified

5.88 Consistent with the Convention recommendation that the 'President may be removed at any time by a notice in writing signed by the Prime Minister', proposed s.62 does not specify any grounds for removal of the President. This also accords with the present arrangements, under which the Governor-General is subject to removal by the Queen, acting on the advice of the Prime Minister, at any time.

5.89 Experience with s.72 of the Constitution, which specifies grounds for the removal of federal judges, shows that the specification of grounds inevitably introduces difficult questions of fact and degree. Such questions, with attendant

controversy, would properly be the subject of judicial rather than prime ministerial determination.

5.90 The proposed mechanism would:

- enable decisive resolution of any question concerning the removal of the President; and

- allow scrutiny by the House of Representatives (or the voters, if an election is held) of the Prime Minister's decision.

- communication of removal to President

5.91 While there is no constitutional requirement for the Prime Minister to do so, the Prime Minister could be expected to communicate the fact of removal to the President at the earliest opportunity.

- justiciability of President's removal

5.92 The Government's advice is that the prospects of judicial review of a decision to remove a President would be remote. The breadth of the discretion given to the Prime Minister, the role of the Parliament, the essentially political nature of the issue (which the Constitution has entrusted to the Prime Minister to be reviewed by the Parliament) and the fact that these issues are unsuitable and inappropriate for resolution by the courts make it unlikely that a court would see any reason to intervene. Justiciability is discussed more generally above in paragraphs 5.47-5.57.

6. THE STATES

Referendum procedure as it relates to the States

6.1 The referendum procedure generally is described above in paragraphs 2.3-2.5. The role of the States in the consultation process undertaken in the development of the legislation is described above in paragraph 3.9.

6.2 An Australian republic would be established under the Republic Bill if the proposed law is approved at the referendum by a majority overall, and by majorities in a majority of States. Change to a republic would not require the approval of a majority of the electors in every State as required for some alterations by the fifth paragraph of s.128 of the Constitution (see paragraph 2.4 above).[39]

Proposed provisions

- what the Convention said

6.3 The Convention[40] resolved:

> That any move to a republic at the Commonwealth level should not impinge on State autonomy, and the title, role, powers, appointment and dismissal of State heads of state should continue to be determined by each State (15).
>
> While it is desirable that the advent of the republican government occur simultaneously in the Commonwealth and all States, not all States may wish, or be able, to move to a republic within the timeframe established by the Commonwealth. That the Government and Parliament should accordingly consider whether specific provision needs to be made to enable States to retain their current constitutional arrangements (16).

- change at State level if republic endorsed at referendum

6.4 The Government is firmly of the view that, if change to a republic is endorsed at the referendum, the change should occur simultaneously at Commonwealth and State levels on 1 January 2001. While it is constitutionally possible to have an arrangement with a republican form of government at Commonwealth level but with some or all States retaining links to the Crown at State level, such an arrangement is less than ideal.

6.5 There are serious issues, however, about how best to pursue the objective of simultaneous change. The Government has indicated that it would consider it inappropriate to make changes to State constitutions through a national referendum to impose a republican form of government. That approach would raise the possibility of

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[39] For an outline and rejection of the argument that a change to a republic would require the approval of a majority of electors in every State see Republican Advisory Committee, *An Australian Republic: The Options*, 1993, vol 1, pp 130-131.

[40] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 37, paras 15-16.

changes to a State constitution being imposed against the will of the majority of the people of that State.

6.6 The Government sees it as appropriate for the States to manage their own processes for considering change at State level. The Prime Minister has written to Premiers asking for their agreement to do everything within their powers to achieve simultaneous change on 1 January 2001 if change is endorsed at the Commonwealth referendum.

6.7 Some States would require State referendums to change their State constitutions to sever links to the Crown and establish republican arrangements. In this context, the proposed provisions must cover the possibility that one or more States will not change by 1 January 2001.

- definition of 'The States'

6.8 Proposed s.127 defines 'The States' to mean 'the original States, and such territories as may be admitted into or established by the Commonwealth as States'. Subject to the omission of references to 'the colonies' and 'New Zealand', it reflects the current wording of covering clause 6.[41]

- proposed Schedule 2, clauses 5 and 9

6.9 Proposed Schedule 2, cll.5 and 9 provide:

> **5 The States**
>
> A State that has not altered its laws to sever its links with the Crown by the time the office of Governor-General ceases to exist retains its links with the Crown until it has so altered its laws.
>
> ...
>
> **9 Interpretation**
>
> The reference to the Crown in clause 5 of this Schedule shall extend to the Queen's heirs and successors in the sovereignty of the United Kingdom.

6.10 Paragraphs 13.11-13.13 and 13.21 of the explanatory memorandum for the Republic Bill cover State links with the Crown.

- ensuring State links with the Crown can continue if necessary

6.11 It is arguable that any establishment of a republic at Commonwealth level would not affect State links with the Crown. However, it is appropriate to include proposed cl.5 to remove any possible doubt about the continuity of those State links.

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[41] As to the covering clauses generally, see Part 7 below 'Commonwealth of Australia Constitution Act – existing preamble and covering clauses'.

6.12 There has been some concern expressed about the proposed provision in that it can be read to suggest that the authority for a State maintaining its links with the Crown will rest upon the authority of the Commonwealth Constitution. Concern was expressed on behalf of at least one of the States that proposed cl.5 could have some significance as a precedent for the use of a referendum under s.128 to make provisions relating to State constitutional arrangements. This concern should not be overstated. Section 106 of the Constitution already deals with the continuation of State constitutions, subject to the Commonwealth Constitution. The proposed provision does not effect any change to State constitutions but reinforces the position that the States would be able to make their own decisions about whether to change.

6.13 The inclusion of the interpretation provision (proposed Schedule 2, cl.9) is necessary to ensure that there is no doubt about the line of succession.[42] Under the proposed provisions, any change in succession arrangements in the United Kingdom would flow through to any State which still had links to the monarchy.

- proposed Schedule 2, clause 6

6.14 Proposed Schedule 2, cl.6 provides:

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

6.15 Paragraphs 13.14-13.15 of the explanatory memorandum for the Republic Bill cover the unified federal system.

- unified federal system

6.16 The intention in developing the Bills has been that the changes would not affect the continuity of the federation or the Australian system of law. Proposed cl.6 has been included for avoidance of doubt and as a clear expression of that intention. It would overcome any suggestions that arrangements between the Commonwealth and a State, or between one State and another, would be affected by the proposed changes.

6.17 A particular concern raised with the Taskforce was that, without such a provision, there may be unintended consequences for the common law of Australia.[43] In particular, it was suggested that there may be doubts about cross-jurisdictional issues where one jurisdiction has retained links to the Crown and the other has not. An example given was the application of the double jeopardy principle to criminal

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[42] See *Sue v Hill* [1999] HCA 30 at para 93, per Gleeson CJ, Gummow and Hayne JJ.

[43] The phrase 'unified system of law' is intended to encompasses both Australia's integrated legal system and our unified system of common law. Australia's integrated legal system derives from the Constitution, particularly Chapter III. The unified system of common law is ensured by the position of the High Court as the ultimate court of appeal in that integrated legal system: see *Re Wakim; ex p McNally* [1999] HCA 27 at para 110, per Gummow and Hayne JJ.

trials in different jurisdictions arising from the same offence. Without accepting that these concerns are well-founded, proposed cl.6 has been included in the interests of caution.

- proposed Schedule 2, clause 7

6.18 Proposed Schedule 2, cl.7 provides:

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

6.19 Paragraphs 13.16-13.19 of the explanatory memorandum for the Republic Bill cover amendment of the Australia Acts.

- proposed Schedule 2, clause 7 is a necessary 'fall back' at this stage

6.20 Subsection 7(1) of the Australia Acts (Commonwealth and United Kingdom) provides that 'Her Majesty's representative in each State shall be the Governor'. It would be desirable, in the event of change to a republic, to amend s.7 in each Act to avoid any argument that they entrench Crown links at the State level.

6.21 There are two potential mechanisms for amending the Australia Acts:

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

6.22 Proposed Schedule 2, cl.7 includes a provision which could form the basis for the s.15(3) procedure if necessary.

6.23 During consultation on the exposure draft of the Republic Bill (as to which, see paragraphs 3.8-3.9 above), States indicated their concern about an approach based on s.15(3), and their strong preference for reliance on the mechanism under s.15(1). The Government has indicated to the States that it is prepared to rely on s.15(1) instead of s.15(3) if all States are able to pass legislation in time (by about mid-2000). In this context, the s.15(3) provision in proposed cl.7 is only a fall back. Proposed cl.7 would make it clear that the inclusion of a s.15(3) provision as a fall back does not prevent reliance on s.15(1) if possible.

6.24 Further, the Government has indicated it will consider removing that fall back provision if all States have their legislation in place by the time the Republic Bill is debated. However, it would not be appropriate to remove the fall back provision if one or more States are still to secure passage when the Commonwealth's legislation is passed. If that State was subsequently unable to secure passage of the request legislation, the Commonwealth would be unable to fix the s.7 problem for the other States. The result would be that delay in one State could prejudice the scope for other States to act.

6.25 At the time this submission was lodged, appropriate request legislation under s.15(1) of the Australia Acts had been passed by the Victorian[44] and New South Wales[45] parliaments and introduced into all other State parliaments. The language of proposed cl.7 is in line with that adopted in the Victorian and New South Wales request Bills.

[44] *Australia Acts (Request) Act 1999* (Vic).
[45] *Australia Acts (Request) Act 1999* (NSW).

7. COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - EXISTING PREAMBLE AND COVERING CLAUSES

- preamble and covering clauses not to be repealed

7.1 The Constitution proper is contained in s.9 of the *Commonwealth of Australia Constitution Act* (UK) (the 'Constitution Act (UK)'). The Republic Bill would not alter the existing preamble or the covering clauses (the first 8 sections) of the Constitution Act (UK). It is not necessary to alter or repeal the preamble or the covering clauses of the Constitution Act (UK) in order to establish Australia as a republic. The Government's view is that the preamble and covering clauses should at present be left unamended as statements of historical fact. In the event of a vote for change at the referendum, consideration could be given to their repeal as part of the wider range of consequential issues which will fall for consideration.

7.2 Paragraphs 1.5-1.8 of the explanatory memorandum for the Republic Bill cover the existing preamble and the covering clauses. Paragraphs 12.86-12.90 cover the restatement of parts of covering clauses 5 and 6 in proposed ss.126 and 127.

7.3 The existing preamble, which refers to a federation under 'the Crown of the United Kingdom of Great Britain and Ireland' was correct at the time of Federation. Following Australia's evolution into a fully independent nation, it cannot be seen as limiting the scope for Australia to sever links to the Crown.

7.4 Consistent with the recommendations of the Constitutional Convention, those covering clauses which have continuing force would be substantially reproduced in the Constitution proper.[46] This ensures that to the greatest extent possible, an Australian republican Constitution would be self-contained. It also means that the preamble and covering clauses could be repealed at a later date without further addition to the Constitution being necessary. The preamble and covering clauses can be repealed by Commonwealth legislation following requests from the States.[47] No referendum would be necessary.

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[46] Proposed s.126 is in essentially the same terms as covering clause 5 and proposed s.127 includes some definitions included in covering clause 6.

[47] The covering clauses may be amended by first amending s.8 of the *Statute of Westminster 1931* and then the covering clauses. This could be achieved by a Commonwealth Act passed at the request of the Parliaments of all the States under s.15(1) of the Australia Acts.

8. PRESIDENTIAL NOMINATIONS COMMITTEE

- what the Convention said

8.1 The principal features of the Convention's proposals for the Presidential Nominations Committee are as follows:[48]

- The Parliament is to establish a Committee with responsibility for considering nominations for the position of President and reporting to the Prime Minister.
- The Committee should be of workable size and should have a balance between parliamentary and community members.
- All parties with party status in the Commonwealth Parliament should be represented on the Committee.
- The composition of the Committee should take into account so far as practicable considerations of federalism, gender, age and cultural diversity.
- The Committee should be mindful of community diversity in the compilation of a shortlist of candidates for consideration by the Prime Minister.
- No nomination should be disclosed without the consent of the nominee.

- purpose of the Nominations Committee Bill

8.2 The establishment of a Committee is required under the proposed constitutional provisions as part of the broad arrangements for appointment of a President. The proposed provisions of the Nominations Committee Bill are to provide additional clarity in relation to the establishment, functions, powers, composition and operation of the Committee. The Government's approach has been to avoid going into unnecessary detail. Additional provisions could, of course, be made in future legislation if that were seen as appropriate in the light of experience. The provisions are explained in the explanatory memorandum to the Nominations Committee Bill, and this submission deals only with particular issues that are likely to be the subject of submissions to the Committee.

8.3 The Nominations Committee Bill does not contain proposed constitutional amendments and would not form part of the proposed law to be put to the voters in a referendum. If the referendum is passed, it would be considered by Parliament as ordinary Commonwealth legislation.

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[48] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 38, paras 18-23.

Composition of the nominations Committee

- clause 9

8.4 Clause 9 of the Nominations Committee Bill provides:

9 Commonwealth members

(1) The Prime Minister must appoint to a Presidential Nominations Committee 8 members of the Commonwealth Parliament. The 8 places are allocated on the basis of the representation of political parties in the Parliament, as follows.

(2) Only political parties with at least 5 members of the Parliament are entitled to be allocated places.

(3) Starting with the party or parties with the most members of the Parliament and ending with the party or parties with the fewest members (but no fewer than 5), one place is allocated to each of the parties in turn.

(4) If there are places remaining to be allocated because there are fewer than 8 parties with at least 5 members of the Parliament, those places are allocated among the parties in the same way as the other places were allocated, except that only parties with at least 15 members of the Parliament are entitled to be allocated places under this subsection.

(5) If 2 or more parties with equal numbers of members of the Parliament are entitled to a place or places, and there are not enough places for each of those parties to be allocated a place, the remaining place or places must be allocated between them by lottery.

(6) In filling each place that is allocated to a particular party, the Prime Minister must appoint the member of the Parliament nominated by that party's leader in the Parliament.

8.5 Paragraphs 5.3-5.7 of the explanatory memorandum for the Nominations Committee Bill cover Commonwealth members of the Committee.

- Commonwealth members

8.6 On a proportional basis, the proposed arrangements favour small parties in that any party with 5 members of Parliament (out of 224) would normally secure a place on the Committee (out of the 8 places for Commonwealth members). The party must have 15 members in the Parliament to be eligible for a second place on the Committee.

8.7 Under the proposed rules, in the Parliament as it will be from July 1999, the 8 Commonwealth members of the nominations Committee would be allocated as follows: Australian Labor Party 3, Liberal Party 2, National Party 2, Australian Democrats 1. The following table shows the representation of the parties in Parliament after July, together with each party's allocation under the rules.

Party	Members in Parliament		Members of Committee	
Liberal Party	95	42.4%	2	25%
National Party	19	8.5%	2	25%
Country Liberal Party	1	0.4%	0	0%
Australian Labor Party	96	42.9%	3	37.5%
Australian Democrats	9	4.0%	1	12.5%
Other	4	1.8%	0	0%
Total	**224**		**8**	

- clause 11

8.8 Clause 11 of the Nominations Committee Bill provides:

> **11 Community members**
>
> The Prime Minister must appoint to a Presidential Nominations Committee 16 persons who are not members of the Commonwealth Parliament or the Parliament or a legislature of a State or Territory.

8.9 Paragraph 5.10 of the explanatory memorandum for the Nominations Committee Bill covers community members of the Committee.

- community members

8.10 Clause 11 would not impose any express requirement on the Prime Minister in relation to diversity of appointments, whether in relation to gender, age, cultural background or place of residence in Australia. It can be expected that the Prime Minister would take account of the diversity of the Australian community in appointing community members. The substantial number of community members would permit the Prime Minister to appoint a diverse membership. The Government's position is that the imposition of prescriptive rules regarding the make-up of the community members of the Committee is unnecessary and would not lead to better outcomes. By way of example, a diverse range of people were appointed to the 1998 Constitutional Convention without any legislative requirements.[49] The 36 non-parliamentary delegates appointed by the Prime Minister included an equal number of women and men, a spread of people from all States and Territories, young people as well as older Australians and representation of Aboriginal and Torres Strait Islander people.

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[49] See Report of the Constitutional Convention, 1998, vol 1, pp 16-17.

Committee report

- clauses 22 and 25

8.11 Clauses 22 and 25 of the Nominations Committee Bill, so far as relevant, provide:

> **22 Committee's report**
>
> (1) The Presidential Nominations Committee must give to the Prime Minister a written report on the nominations received.
>
> (2) The report must include a short list of nominees whom the Committee considers to be the most suitable candidates to be appointed as President.
>
> ...
>
> **25 Protection of confidentiality of report**
>
> ...
>
> (2) An entrusted person must not produce to any person a section 22 report, or part of such a report, except in the course of the performance of the duties of the entrusted person as a member of the Committee or the Committee's staff.
>
> (3) An entrusted person is not to be required to produce to a court a section 22 report, or part of such a report, unless the production is for the purposes of proceedings in respect of a contravention of this Act or in respect of the performance of functions, or exercise of powers, under this Act.

8.12 An 'entrusted person' is someone who is or has been a member of a Presidential Nominations Committee, or a staff member assisting a Committee (cl.23).

8.13 Paragraphs 6.7-6.10 and 7.7 of the explanatory memorandum for the Nominations Committee Bill cover the Committee report and the protection of confidentiality of the report.

- what the Convention said

8.14 The Convention[50] resolved:

> Parliament shall establish a Committee which will have responsibility for considering the nominations for the position of President. The Committee shall report to the Prime Minister (19).
>
> ...
>
> The Committee should not disclose any nomination without the consent of the nominee (23).

[50] See Constitutional Convention communique, reproduced in the explanatory memorandum for the Republic Bill, p 38, paras 19, 23.

- report provided only to the Prime Minister

8.15 Consistent with the Convention model, under cl.22, the report is provided only to the Prime Minister. To give full effect to the Convention's recommendation that nominations should not be disclosed without consent, it is necessary to provide for the confidentiality of the Committee's report.

- form of report and size of short list not specified

8.16 The proposed provisions do not elaborate on the contents of the report or set a maximum or minimum number of names for the Committee's short list. The requirement for a short list indicates that the Committee is not expected to come forward with a single recommended nomination, but it would be left to the Committee to decide how many names to put forward. As noted in paragraphs 5.18-5.19 above, consistent with the Convention debate, the proposed constitutional provisions do not require the Prime Minister to move a nomination for President from the short list provided by the nominations Committee. In practice, the size of the short list may affect the prospects of finding a nominee from that list who is acceptable to both the Prime Minister and the leader of the Opposition.