3

Appointment of the President

3.1 The model adopted by the Constitutional Convention for appointing a President has become known as 'the Bipartisan Appointment of the President Model' ('the Model'). The Model recommended a procedure for public nomination of candidates involving the establishment of a committee to consider nominations and prepare a short list. The draft legislation gives effect to this aspect of the Model in the Presidential Nominations Committee Bill 1999 ('the Nominations Committee Bill'). The Republic Bill makes provision for the process of appointment of the President. The provisions of both Bills relating to the nomination and appointment process were the subject of much discussion in the evidence before the Committee.

3.2 The evidence to the inquiry reflected sensitivities surrounding the appointment of the President. The Committee is aware that the Nominations Committee represents a step in involving the public more fully in the appointment process. The Committee is also aware that government cannot function adequately if it is hampered by undue procedural obstacles. Further, it takes the view that, ultimately, the Prime Minister is accountable to the Australian people through the Parliament and the political process.

3.3 In this chapter, the Committee seeks to reconcile these partially competing objectives of public input and efficiency.

Matters arising under the Nominations Committee Bill

Establishment of the Nominations Committee

3.4 The Constitutional Convention recommended that 'Parliament shall establish a Committee which will have responsibility for considering the nominations for the position of President.'[1]

3.5 The Nominations Committee Bill gives effect to this recommendation by requiring in cl.4 that a Nominations Committee is to be established each time it is necessary to choose a President. The Nominations Committee will consist of representatives of the Commonwealth Parliament, the State and Territory Parliaments [2] and 16 community members appointed by the Prime Minister.[3] While every member of the Nominations Committee is formally appointed by the Prime Minister, the Prime Minister has no control over who is appointed to represent other political parties in the Commonwealth Parliament or the eight representatives of the State and Territory Parliaments.

3.6 A number of witnesses suggested that having the members of the Nominations Committee appointed by the Prime Minister did not give effect to the intention of the Constitutional Convention in this respect, and that the Model would be better reflected by a process whereby each member was appointed by Parliament. Others rejected this idea. The Hon Michael Lavarch remarked that "…it would be exceedingly difficult for a committee to be appointed by parliament, as a matter of practicality".[4]

3.7 An examination of the transcript of the Constitutional Convention's proceedings reveals that this matter was not conclusively determined. Some discussion reflected an intention that the members of a nominating committee should be appointed by parliamentary resolution,[5] but there are also suggestions that the precise mechanism for appointment of members was to be left to Parliament to determine.[6]

3.8 The Committee considers that a system whereby Parliament appoints each member of the Nominations Committee would be unwieldy and

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1 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 38, paragraph 19.

2 Nominations Committee Bill, cl.10.

3 Nominations Committee Bill, cl.11.

4 The Hon Michael Lavarch, *Transcript*, p. 532.

5 Report of the Constitutional Convention, 1998, vol. 4, pp. 853–854.

6 Report of the Constitutional Convention, 1998, vol. 4, pp. 849–850.

impractical. It agrees that the enactment by Parliament of legislation giving a person the power to appoint the members of the Nominations Committee is one of a number of ways in which Parliament could 'establish' the Nominations Committee. Moreover, the Committee considers that the Prime Minister is an appropriate person to exercise this power.

Composition and selection of the Nominations Committee

3.9 The Constitutional Convention decided that the primary objective of the process for the nomination of presidential candidates is:

> to ensure that the Australian people are consulted as thoroughly as possible … This process of consultation shall involve the whole community, including … community organisations, and individual members of the public all of whom should be invited to provide nominations.[7]

3.10 The related recommendation of the Constitutional Convention requires that the nominating committee should:

> be of a workable size, [but] its composition should have a balance between parliamentary (including representatives of all parties with party status in the Commonwealth Parliament) and community membership and take into account so far as practicable considerations of federalism, gender, age and cultural diversity.[8]

3.11 The Nominations Committee Bill gives effect to these recommendations in Part 3. The relevant provisions are:

> **8 Committee members**
>
> A Presidential Nominations Committee has 32 members appointed by the Prime Minister by giving written notice to the appointee. The membership is as follows:
>
> (a) 8 Commonwealth members appointed under section 9;
>
> (b) 8 State/Territory members appointed under section 10;
>
> (c) 16 community members appointed under section 11.

7 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 38, paragraph 18.

8 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 38, paragraph 20.

3.12 Clause 11 of the Nominations Committee Bill deals with the appointment of the 16 community members of the Nominations Committee, and 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 legislature of a State or Territory.

Diversity

3.13 The main concern raised with the Committee regarding these provisions was the failure of cl.11 to expressly reflect the Constitutional Convention's recommendation that the Nomination Committee's composition should as far as practicable reflect community diversity. The Nominations Committee Bill confers a discretion upon the Prime Minister to appoint the 'community members', but does not oblige the Prime Minister, when exercising this power, to take into account 'so far as practicable considerations of federalism, gender, age and cultural diversity'.

3.14 This proposed wording was an important component of the compromise reached at the Constitutional Convention, and was intended to ensure a degree of accountability by the Prime Minister. The general principle as expressed in the Constitutional Convention Communique received broad endorsement from witnesses before the Committee. Many witnesses urged that the Nominations Committee Bill be amended to include an express obligation upon the Prime Minister in these terms.[9] One view was that it would be sufficient to require the Prime Minister to consider 'diversity'.[10]

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9 Ethnic Communities Council of NSW Inc, *Submissions*, p. S450; Australian Council of Trade Unions, *Submissions*, pp. S368–S369; Ms Anne Winckel, *Submissions*, p. S342; Mr Jason Yat-Sen Li, *Transcript*, p. 71; Professor Cheryl Saunders, *Transcript*, p. 704; Mr George Williams, *Transcript*, p. 705; Mr Dennis Rose AM QC, *Transcript*, p. 705; Professor Leslie Zines, *Transcript*, p. 705.

10 Professor Cheryl Saunders, *Transcript*, p. 704; Mr George Williams, *Transcript*, p. 705.

3.15 In relation to cl.11, the Referendum Taskforce stated:

> 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. 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.[11]

3.16 Several witnesses suggested that the Nominations Committee should be made up of an equal number of men and women.[12] The Aboriginal and Torres Strait Islander Commission supported a provision requiring '…the appointment by the Prime Minister of two indigenous members to the Presidential Nominations Committee.'[13] It was also suggested that the Nominations Committee Bill should require that at least two of the community members be below the age of twenty-five,[14] and that geographical diversity on the Nominations Committee should be expressly required in the Nominations Committee Bill.[15]

3.17 The Committee considers that the inclusion of such overly prescriptive requirements would unnecessarily compromise the merit-based selection of delegates, and therefore does not agree with these suggestions.

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11 Referendum Taskforce, *Submissions,* p. S104.

12 Women's Constitutional Convention Steering Committee, *Submissions,* p. S316; Senator Jan McLucas, *Transcript,* p. 464.

13 Aboriginal and Torres Strait Islander Commission, *Submissions,* p. S569.

14 Mr Philip Kimpton, *Submissions*, p. S616.

15 Government of Tasmania, *Submissions*, p. S709.

3.18 The Committee however acknowledges the widespread concern that the Prime Minister is not expressly obliged, when appointing community members of the Nominations Committee, to consider the factors identified by the Constitutional Convention. While the Committee considers that public opinion and political reality would be a very strong impetus leading the Prime Minister to have regard to such factors when appointing community members of the Nominations Committee, the Committee recommends that the Nominations Committee Bill should be amended to expressly require the Prime Minister to give consideration to the issue of diversity.

Recommendation 2

3.19 **The Committee recommends that cl.11 of the Nominations Committee Bill be amended to require the Prime Minister to, as far as practicable, have regard to the diversity of the Australian people when appointing community members of the Nominations Committee.**

Ratio of community members to political members

3.20 Some witnesses were dissatisfied with the ratio of community members to political members of the Nominations Committee. It was argued that the key role of the Nominations Committee is to ensure community involvement in the process of selecting the President, and that therefore the ratio of community members to political appointees should not be equal.[16] Rather, community members should out-number political members. It was suggested that the number of federal political members of that committee could be reduced to allow for more community members.[17] It was also suggested that the Nominations Committee should not include members of Federal Parliament, given that they would be involved later in the selection process in the joint sitting of Parliament.[18]

3.21 The Committee is of the view that the existence of parliamentary representatives on the Nominations Committee provides a reliable means of avoiding prime ministerial control of the Nominations Committee. Indeed, it entrenches the presence of the Prime Minister's parliamentary

16 Mr Eric Lockett, *Transcript*, p. 380.

17 Australian Council of Trade Unions, *Submissions*, p. S369.

18 Ms Jennifer Doran, *Transcript*, p. 188.

opponents while guaranteeing a voice for any party that secures five seats in an election.[19]

3.22 In relation to community members of the Nominations Committee, some witnesses argued that they should not be able to also be members of political parties.[20] The Committee takes the view that membership of a political party should not of itself preclude a member of the community from serving on the Nominations Committee.

Method of selection of community members

3.23 A number of witnesses suggested that there should be greater parliamentary input into the appointment of community members of the Nominations Committee.[21] One suggestion was that these members should be 'appointed jointly by the Prime Minister and the leader of the Opposition.'[22] The Hon Michael Lavarch suggested:

> [t]here would be a greater degree of public confidence in [the Nominations Committee] if the community members were appointed through a process of consultation with the leader of the Opposition and other parties in the parliament. To that extent … clause 11 of the [Nominations Committee Bill] … might be examined to see if the Prime Minister can appoint the members following consultation with leaders of political parties with at least five members of the Parliament. That picks up the same formula which is earlier in the Bill in terms of representation at a political level on the committee.[23]

3.24 Another suggestion was that the Nominations Committee could be directly elected, possibly using proportional representation.[24]

3.25 The Committee notes the significance of the Nominations Committee as a key means of securing community participation in the selection of the President. While it is important that worthy candidates are not overlooked, it is also important that the Prime Minister, who is ultimately accountable to the Parliament and the voters, enjoys a degree of flexibility in appointing members. The Committee concludes that a requirement that the Prime Minister consult with parliamentary leaders would render the appointment process overly cumbersome. The Committee acknowledges

19 See cl.9 of the Nominations Committee Bill.

20 Ms Anne Winckel, *Submissions*, p. S342.

21 Senator Jan McLucas, *Transcript*, p. 467.

22 Mr Bernie Treston, *Submissions*, p. S310.

23 The Hon Michael Lavarch, *Transcript*, p. 525; see also Dr Richard Herr, *Transcript*, p. 435.

24 Dr John Uhr, *Transcript*, pp. 26, 40.

that, in light of the bipartisan nomination of the President, it is more than likely that the Prime Minister would consult with the leader of the Opposition and the leaders of other parties.

Size of the Nominations Committee

3.26 Some witnesses disputed that 32 members would constitute a workable committee.[25] However, the Committee is confident that:

- possible problems of workability are likely to be outweighed by the enhanced potential for representation that a committee of this size would provide; and
- the Nominations Committee would develop procedures to ensure that it operates efficiently and effectively.[26]

3.27 The Committee notes that, should these expectations prove to be unfounded, this provision could be altered by an ordinary Act of Parliament.

Quorum for the Nominations Committee

3.28 Subclause 17(2) provides that:

> A Presidential Nominations Committee may only perform functions or exercise powers if there are at least 16 members, at least 8 of whom are community members.

3.29 It was argued that the Nominations Committee should only be able to operate if half of those present are community representatives.[27]

3.30 The Committee believes that cl.17(2) adequately protects the representation of community representatives and should remain as currently proposed.

Convenor of the Nominations Committee

3.31 The Constitutional Convention Communique does not address the matter of a convenor for the Nominations Committee. However, cl.6 of the Nominations Committee Bill provides for the Prime Minister to appoint a member of the Nominations Committee as convenor.

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25 For example, Mr Eric Lockett, *Transcript*, p. 380.

26 See cl.7 of the Nominations Committee Bill.

27 Mr Eric Lockett, *Transcript*, p. 380.

3.32 This provision attracted some criticism during public hearings before the Committee. One suggestion was that the Nominations Committee should choose its convenor itself.[28] Another suggestion was that the Nominations Committee Bill should require that the convenor be a community member, as opposed to a political member.[29]

3.33 The Committee considers that it is appropriate for the Prime Minister to select the convenor.

Matters concerning the short list of nominees

3.34 Two broad issues were raised regarding the short list of nominees. These concerned the confidentiality of the list and the degree to which the list should reflect the diversity of the Australian community.

Confidentiality

3.35 The Constitutional Convention recommended that the Nominations Committee '… should not disclose any nomination without the consent of the nominee'.

3.36 This is given effect to in Part 5 of the Nominations Committee Bill. Subclause 24(2) provides:

> An entrusted person must not make a record of, or disclose, the identity of, or information that might tend to identify, a person who has been nominated for President and whose nomination the Committee has received, unless:
>
> (a) the nominee has given written consent to the recording or disclosure; or
>
> (b) the recording or disclosure happens in the course of the performance of the duties of the entrusted person as a member of the Committee or the Committee's staff.

3.37 This provision was the source of some debate in the evidence before the Committee.

28 Australian Council of Trade Unions, *Submissions*, p. S369.

29 Australian Council of Trade Unions, *Submissions*, p. S369.

3.38 The Referendum Taskforce stated that:

> It is clear that the Convention proceeded on the basis that the selection process would be more effective if nominations and supporting material remained confidential. This may reflect a concern at the potential of a divisive public debate over the relative claims of the various nominees, and the possibility that some excellent potential nominees would not be prepared to engage in such a debate.
>
> …The point remains that the person nominated must be someone acceptable to the leader of the Opposition. The system is designed to ensure that only a person who has bipartisan support, and who is seen to be capable of performing the role of President without regard to party politics, can be selected.[30]

3.39 Some witnesses told the Committee that confidentiality is required in order to encourage people to allow their names to be put forward.

3.40 In arguing against the confidentiality requirement, some witnesses raised the concern that if the short list were not made public, the community (and indeed the leader of the Opposition) would be unaware that the Prime Minister's nominee was not short listed by the Nominations Committee.[31] Other witnesses stressed the importance of an open, transparent process.[32]

3.41 The Committee's attention was drawn to the possibility of the names of short listed candidates being leaked to the media, causing embarrassment. It would be preferable, it was argued, to be open about the short list from the start rather than to encourage speculation about the identity of candidates.[33]

3.42 The Committee recognises the importance of the Nominations Committee as a key mechanism for involving the community in deliberations about the choice of President, and sees merit in the arguments against secrecy. However, the Committee is reluctant to suggest any provisions that might discourage worthy candidates from making themselves available for nomination.

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30 Referendum Taskforce, *Submissions*, p. S721.

31 See for example, Ms Jacqui Cochrane, *Transcript*, p. 358; Dr John Uhr, *Transcript*, p. 26.

32 Senator Jan McLucas, *Transcript*, p. 467; Mr George Williams, *Transcript*, p. 22.

33 Ms Anne Winckel, *Transcript*, p. 167.

3.43 The most persuasive argument to be made against confidentiality appears to be that it makes it easier for the Prime Minister to appoint a person as President who was not named on the short list, as the relevant circumstances surrounding such a decision would not be able to be revealed. The Committee considers that in these circumstances, the public is entitled to know that the Prime Minister has departed from the recommendations of the Nominations Committee. The Committee considers that publication of that fact would constitute a valuable incentive to the Prime Minister not to diverge from the recommendations of the Nominations Committee other than in the most exceptional circumstances.

Recommendation 3

3.44 **The Committee recommends that the draft legislation be appropriately amended to provide that where the Prime Minister nominates as President a person other than a candidate mentioned in the short list from the Nominations Committee, the Prime Minister be required to table a statement in Parliament giving his or her reasons for deciding that such exceptional circumstances existed for failing to comply with the Nomination Committee's recommendations.**

3.45 Given that the leader of the Opposition is required to second the motion moved by the Prime Minister that a named person be approved as President, the Committee notes that it is more than likely that the Prime Minister would discuss the short list with the leader of the Opposition.

Diversity of the short list

3.46 The Constitutional Convention recommended that:

> The [Nominations] Committee should be mindful of community diversity in the compilation of a short-list of candidates for consideration by the Prime Minister.[34]

34 Report of the Constitutional Convention Vol.1, p. 44.

3.47 Subclause 22(3) of the Nominations Committee Bill requires the Nominations Committee to consider:

(a) the diversity of the Australian community; and

(b) the ability of the nominees to command the respect and support of the Australian community.

3.48 It was suggested to the Committee that this wording implied that 'taking into account the diversity of the Australian community would somehow affect the [Nominations] Committee's ability to choose persons who would command the respect and support of the Australian community.'[35]

3.49 The Committee rejects this interpretation and sees the two requirements as separate and complementary.

3.50 The Committee also heard evidence that the short list of the Nominations Committee should include an equal number of men and women and at least two indigenous candidates.[36]

3.51 The Committee is reluctant to see the operations of the Nominations Committee constrained by prescriptive quota requirements for the short list. The Committee therefore does not recommend the inclusion of such requirements in the Nominations Committee Bill.

Republic Bill provisions concerning appointment of the President

3.52 The Constitutional Convention recommended:

> Having taken into account the report of the (Nominations) 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.[37]

35 Women's Constitutional Convention Steering Committee, *Submissions*, p. S318.

36 Aboriginal and Torres Strait Islander Commission, *Submissions*, p. S569.

37 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 38, paragraph 24.

3.53 Proposed s.60 of the Republic Bill gives effect to this recommendation, providing as follows:

> **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.

3.54 The major points of contention surrounding this provision which were raised in the evidence before the Committee related to:

- the fact that the Prime Minister's power to put to the joint sitting the motion to appoint a President is discretionary rather than obligatory;
- the fact that, on the face of the provisions, the Prime Minister is not obliged to select a candidate from the Nominations Committee short list; and
- the reference in proposed s.60 to 'the leader of the Opposition'.

The Prime Minister's discretion to put a nomination to Parliament.

3.55 Proposed s. 60 does not expressly oblige the Prime Minister to put a nomination to Parliament. The Referendum Taskforce indicated that the word 'may' rather than 'must' had been used as:

> … appropriate in the context of the appointment process. The process essentially relies on agreement being reached 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.[38]

3.56 This justification was not generally accepted by other witnesses before the Committee. A number recommended that the word 'may' be replaced with 'must' or 'shall'.[39] Professor George Winterton felt that:

> the word 'may' is inappropriate here because it is certainly intended that the Prime Minister will nominate, and not that the Prime Minister at his or her discretion might decline to nominate someone to be President. So I would urge that the word 'may' be changed to 'must'.[40]

3.57 The Committee notes that, under proposed s.60 of the Republic Bill, the function of putting a motion to the joint sitting of Parliament is conferred upon the Prime Minister. However, the Prime Minister is to perform this function 'after' considering the report prepared by 'a committee established and operating as the Parliament provides' (see proposed s. 60). Hence, the appointment process set out in the Republic Bill confers a role on a body other than the Prime Minister—namely, the Nominations Committee. This Committee therefore considers that it would be inappropriate in this context to impose a mandatory duty upon the Prime Minister.

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38 Referendum Taskforce, *Submissions*, p. S80.

39 Dr John Hirst, *Submissions*, p. S282; Australian Council of Trade Unions, *Submissions*, p. S367; Mr Malcolm Turnbull (Australian Republican Movement) *Transcript*, p. 116; Mr John Pyke, *Submissions*, p. S546.

40 Professor George Winterton, *Transcript*, p. 92.

3.58 Further, the Committee considers that, in practice, public and parliamentary scrutiny would ensure that the Prime Minister would not delay, unreasonably, putting forward a nomination. In particular, in the unlikely event of an impasse occurring, it would be resolved at the following general election when the Prime Minister's inaction would be judged by Australians expressing their decision through the ballot box.

The Prime Minister's discretion to select a candidate not on the short list

3.59 Proposed s.60 does not require the Prime Minister to select a candidate from the Nominations Committee's short list. All the Prime Minister is obliged to do is to 'consider' the report.

3.60 The Referendum Taskforce explained that, in this respect, the proposed provision is consistent with the Constitutional Convention's resolution.[41] The Committee notes that it is correct that the Convention specifically debated this issue and that the Prime Minister would not be under an obligation to appoint a person identified by the Nominations Committee, although it was recognised that the political realities would impose pressure to do so.[42]

3.61 The Referendum Taskforce also noted that:

> It is possible to identify circumstances in which it may not be appropriate to nominate a person recommended by the [Nominations] 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.[43]

3.62 The Committee acknowledges that there are good reasons for not imposing an inflexible duty upon the Prime Minister to select a candidate from the Nominations Committee shortlist. The Committee also observes that this aspect of proposed s.60 accords with the recommendations of the Constitutional Convention.

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41 Referendum Taskforce, *Submissions,* p. S80.

42 Report of the Constitutional Convention, 1998, vol. 4, pp. 854, 902.

43 Referendum Taskforce, *Submissions,* p. S80.

3.63 Moreover, the Committee considers that, in practice, public and parliamentary scrutiny would probably ensure that the Prime Minister would select a candidate other than one recommended by the Nominations Committee very rarely, and only in exceptional circumstances. This is particularly so if, as recommended above, the Prime Minister is required to table a statement giving reasons for departing from the short list.

Reference to the leader of the Opposition

3.64 Under the second paragraph of proposed s.60, the 'leader of the Opposition' is required to second the Prime Minister's choice of candidate. Arguably, therefore, for the appointment of a President to be able to proceed, there must be an identifiable leader of the Opposition.

3.65 A number of witnesses before the Committee raised concerns with this aspect of proposed s.60, most particularly the question of what would be the result if the configuration of Parliament were to radically change so that there is no identifiable 'leader of the Opposition'.[44] The argument was developed that the leader of the Opposition's involvement would be construed as an essential precondition to the election of the President, so that if there was no ascertainable leader of the Opposition, a President could not be appointed.[45]

3.66 In the exposure draft version of the Republic Bill, proposed s.60 referred to 'the leader of the Opposition, if any'. The Referendum Taskforce indicated that the words 'if any' had been omitted on the basis that they are unnecessary, and stated the view that the provision would not be construed 'so as to frustrate the appointment of a President even if no 'leader of the Opposition' existed'.[46] The explanatory memorandum to the Republic Bill states that 'the constitutional reference to the leader of the Opposition is not intended to create any impediment to the appointment of a President in the unlikely event that the Parliament would not recognise a leader of the Opposition'.[47]

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44 Professor Winterton instanced a case in a Canadian province where the opposition had no Members of Parliament at all. *Transcript*, p. 92. See also Professor Brian Costar, *Submissions*, p. S578.

45 Professor George Winterton, *Transcript*, p. 92; Dr John Hirst, *Submissions*, p. S282; The Hon Malcolm McLelland QC, *Submissions*, p. S626.

46 Referendum Taskforce, *Submissions*, p. S80.

47 Explanatory memorandum to the Republic Bill, p. 11, paragraph 6.9.

3.67 Various witnesses urged that the words 'if any' be reinstated, or, alternatively, words such as 'If there is a leader of the Opposition in the House of Representatives, the motion can only be put to a vote if it is seconded by that person' should be included in the provision.[48]

3.68 The Committee takes the view that, should the matter ever come before a court, it is likely that the leader of the Opposition's involvement would not be characterised as a mandatory requirement in the absence of an identifiable leader of the Opposition.[49] The consequence of characterising it as a mandatory requirement would be extreme inconvenience—namely, no President could be appointed, and hence the processes of government would be compromised. On the other hand, in such circumstances, the provisions for acting President would operate to ensure that there was an occupant of the office of President. On balance, therefore, the Committee finds that there is merit in making provision in the Republic Bill for the possibility of there being no person satisfying the description of 'leader of the Opposition'.

Recommendation 4

3.69 **The Committee recommends that the Republic Bill be amended by inserting the words, 'if any' in proposed s.60 following the words 'the leader of the Opposition'.**

Other matters relating to the appointment of the President

3.70 A number of other matters were raised concerning the appointment processes. It was noted by one witness that the Republic Bill makes no express provision for convening the joint sitting of Parliament which is required for the appointment of a President.[50]

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48 Dr John Hirst, *Submissions*, p. S282; Professor George Winterton, *Transcript*, p. 92.

49 In determining whether a procedure specified as a condition precedent for the exercise of a power, Australian courts tend to consider two matters—namely, the consequences of holding a procedure to be mandatory or invalidatory, and whether the purpose or object of the legislation in question would be served by holding the provision to be invalidatory (*Tasker v Fulwood* [1978] 1 NSWLR 20; *Clayton v Heffron* (1960) 105 CLR 214; see also *Simpson v Attorney-General* [1955] NZLR 271. The discussion in Pearce & Geddes *Statutory Interpretation in Australia* 4th ed, 1996 is helpful in this regard).

50 The Hon Malcolm McLelland, *Submissions*, p. S626.

3.71 The Committee takes the view that it is not necessary to expressly provide for this, as a power to convene such a sitting would almost certainly be implied in the constitutional provision. The Houses of Parliament have power under the Constitution to determine the detail of such procedures. Specifically, s.50 of the Constitution relevantly provides:

> **50.** Each House of the Parliament may make rules and orders with respect to—…
>
> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

Qualifications of office

3.72 The Constitutional Convention recommended that the President:

- be an Australian citizen;
- be eligible to vote in an election for the Senate or House of Representatives at the time of nomination;
- not be a member of any political party; and
- be subject to the same disqualifications that are set out in s.44 of the Constitution. Any future amendments to s.44 should also apply to the head of state.[51]

3.73 The third paragraph of proposed s.60 provides:

> 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.

51 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, pp. 39, 42, paragraphs 28, 53, 54, 55, 56 and 57.

When must the qualifications of office be satisfied?

3.74 Some witnesses were concerned that the provisions of proposed s.60 of the Republic Bill, combined with cl.20 of the Nominations Committee Bill, would have the effect that a potential presidential candidate would have to satisfy the various qualifications of office from the time he or she was nominated, as opposed to simply at the time he or she was appointed as President.

3.75 The Committee notes that the second paragraph of proposed s.60 applies to the office of President the substantive qualification requirements of s.44 of the Constitution applying to members of the House of Representatives. Under s.44, for example, a person who 'is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen of a foreign power' or 'holds any office of profit under the Crown' is 'incapable of being chosen' as a member of the House of Representatives.

3.76 The Constitution does not define, or give content to, the notion of 'being chosen' for the purposes of s.44. Thus, the word 'chosen' in s.44 has been interpreted by the High Court as covering the entire process of being chosen, including the initial step of nomination. In *Sykes v Cleary*, a majority of the High Court held that "the words 'shall be incapable of being chosen' refer to the process of being chosen, of which nomination is an essential part".[52]

3.77 By contrast, the concept of 'being chosen' as President is defined and limited by the first and second paragraphs of proposed s.60—that is, a person is 'chosen' by virtue of all the following steps being completed:

- the public nomination process;
- the motion of the Prime Minister;
- the seconding of the motion by the leader of the Opposition; and
- the affirmation of the motion by two-thirds of the House of Representatives.

52 (1992) 176 CLR 77.

3.78 Thus, the effect of proposed s.60 is that a candidate is required to satisfy the qualification requirements set out in s.44, but only at the point when these three steps occur, and not at the point of nomination. The broad interpretation which the High Court has given to the notion of "being chosen" in s.44 would be displaced in the context of proposed s.60 by the specific and limited meaning given to the notion of 'chosen' by the proposed section.

3.79 While acknowledging that proposed s.60 in its present form is probably satisfactory, the Committee takes the view that it would be valuable if the Republic Bill contained an express statement of exactly when the qualification requirements must be satisfied. The Committee suggests that the appropriate time would be at the time the Prime Minister puts the motion to Parliament.

3.80 Clause 20 of the Nominations Committee Bill sets out the formal requirements for a nomination, and, in paragraph (b), provides that a nomination must be accompanied by a written statement indicating 'whether the nominee is qualified to be chosen as President'. A number of witnesses before the Committee considered that this would have the effect of requiring a nominee to satisfy the qualification requirements at the time of nomination.[53]

3.81 This interpretation, while understandable, is probably incorrect. Paragraph (b) of clause 20 does not impose an obligation upon nominees to satisfy the qualification requirements of the office of President at the time the nomination is submitted. Rather, the provision simply requires a statement about the nominee's position vis-à-vis the qualification requirements at the time of nomination. Such a statement might well say, for example, that the person currently holds an office of profit under an executive government, but would relinquish that office should he or she be the preferred candidate of the Prime Minister and the leader of the Opposition.

53 For example, Professor Brian Costar, *Submissions*, p. S578.

3.82 The Committee considers that some amendment to clarify this aspect of cl.20 of the Nominations Committee Bill would be helpful. For example, paragraph 20(b) could provide for a statement that a nominee '…is or would be qualified to be chosen as President.' Alternatively cl.20 could provide for an unqualified nominee to give an undertaking to become qualified if he or she is to be chosen as President. The Committee sees merit in the suggestion of Professor Leslie Zines, that paragraph (b) of cl.20 should permit a statement about whether a nominee is at present qualified, and if not, what steps the nominee would take to become qualified.[54]

3.83 The Committee notes that a requirement that a nominated person must meet the qualifications of office at the outset of the nomination process would deprive many people who hold an 'office of profit under the Executive Government of the Commonwealth, a State or a Territory'[55] from earning an income. This might deter such people as teachers, nurses, police officers, judges and other public servants from allowing their names to go forward. For this reason, the Committee recommends that a nominee only be required to meet the qualifications of office at the time the Prime Minister puts the motion to Parliament.

Recommendation 5

3.84 **The Committee recommends that proposed s.60 of the Republic Bill be amended to specify exactly when a candidate for the office of President must satisfy the qualification requirements.**

The Committee recommends that the appropriate time would be before the Prime Minister puts the motion to Parliament.

The Committee recommends that cl.20 of the Nominations Committee Bill be amended so that a nominee, who does not satisfy the qualification requirements at the time of nomination, must give an undertaking that he or she will take appropriate steps to satisfy the qualifications if he or she is to be chosen as President.

54 Professor Leslie Zines, *Transcript*, p. 721.

55 See Item 18 in Schedule 2 of the Republic Bill.

Membership of a political party

3.85 A number of witnesses were critical of the exclusion from eligibility to hold presidential office of members of political parties, suggesting that such a provision might be inconsistent with the principles of freedom of association,[56] and 'sends a message to the community that…involvement [in government and the political system] is somehow undesirable'.[57]

3.86 Another concern expressed was that the term 'member of a political party' is not defined and has no clearly understood meaning.[58] Mr George Williams suggested that the Republic Bill be amended to state that the President should not be 'a member of any organisation seeking to promote the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it', or to import the definition of 'political party' in the *Commonwealth Electoral Act 1918*.[59]

3.87 The Committee substantially agrees with the criticisms of this provision which were put to it in the evidence, but given the recommendations immediately above, membership of a political party would not prevent a person being considered by the Nominations Committee. Rather, that person would be required to resign membership of their political party only in the event of them being the person nominated by the Prime Minister.

Implications of ineligibility

3.88 The fourth paragraph of proposed s.60 of the Republic Bill saves from invalidity the actions of a President who was not in fact eligible to be chosen for appointment. However, it contains no provision to address the question of the effect upon the continued holding of office by a President if the President was either in fact unqualified at the time of appointment, or if he or she were to cease to satisfy the qualifications of office after appointment.

3.89 Dr Gavan Griffith QC suggested that the Republic Bill should include a parallel provision to s.45 of the Constitution, which applies to Members of Parliament, and that arguably this was the intention of the Constitutional Convention.[60]

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56 For example, Mr George Williams, *Submissions*, p. S223.

57 Law Society of New South Wales, *Submissions*, p. S504. See also The Hon Michael Hodgman QC, *Transcript*, p. 393; Professor John Warhurst, *Submissions*, p. S588.

58 Law Society of NSW, *Submissions*, p. S504.

59 Mr George Williams, *Submissions*, p. S223.

60 Dr Gavan Griffith QC, *Submissions*, p. S392.

3.90 As to this point, the explanatory memorandum to the Republic Bill notes:

> 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, in the light of the proposed removal provision. The inclusion of certain specified grounds of disqualification might also implicitly fetter the Prime Minister's otherwise unqualified power to remove.[61]

3.91 The Committee agrees with this view. Further, the Committee does not agree that the recommendations of the Constitutional Convention warrant replicating s.45 of the Constitution with respect to the President.

3.92 The Republic Bill does not address the question of the validity of the actions of a President who was appropriately qualified at the time of appointment, but who ceases to be appropriately qualified after appointment. However, it is clear that the qualifications of office set out in proposed s.60 apply only to the appointment of the President. They do not, in the absence of a provision parallel to s.45 of the Constitution, operate as disqualifications of office. Therefore there is no need to provide a provision to validate actions of a President who, subsequent to his or her appointment, ceases to satisfy these qualifications.

Term of office of President

3.93 The Constitutional Convention recommended that the term of office of the President be five years.[62]

3.94 Proposed s.61 of the Republic Bill gives effect to this recommendation by providing:

> **61 Term of office and remuneration of President**
>
> The term of office of 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.

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61 Explanatory memorandum to the Republic Bill, p. 12, paragraph 6.11.

62 See Constitutional Convention Communique, reproduced in the explanatory memorandum to the Republic Bill, p. 39, paragraph 29.

> 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…

3.95 Proposed s.61 attracted some comment in the evidence before the Committee. A frequently-expressed concern was that under proposed s.61 it would be possible for a Prime Minister to manipulate the constitutional provisions by allowing a compliant President to continue in office beyond the 5 year term simply by not appointing a new President. [63]

3.96 Various suggestions were put forward by witnesses to prevent such a scenario:

- no extension of term should be allowed—if the office of President became vacant, the acting President provisions should be relied upon;[64]
- an extension of term should be possible, but limited to 30 days or so—this would allow some flexibility in the system while at the same time reducing the potential for abuse;[65]
- a new President should be required to be appointed before the incumbent's term of office ends, so that a President cannot continue in office without parliamentary approval.[66]

3.97 The Referendum Taskforce explained this aspect of the Republic Bill as follows:

> provision has been included [in s.61] to cover the possibility that the 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.
>
> …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.

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63 Mr Harry Evans, *Submissions*, p. S36.

64 Dr John Hirst, *Submissions*, p. S283.

65 Professor George Winterton, *Transcript*, pp. 92-93; Dr John Hirst, *Transcript*, p. 145; Senator Andrew Murray, *Submissions*, p. S521.

66 Mr Harry Evans, *Transcript*, p. 36.

3.98 Proposed s.61 also permits a person to serve more than one term as President. This feature of the Republic Bill also attracted some criticism. Some witnesses felt that due to 'the largely symbolic nature and ceremonial nature of the post [of President] no one person should occupy it for a decade (or even more)'.[67] It was argued, therefore, that the presidential term should be fixed to a single term. Others suggested that the possibility of reappointment might lead to bias in favour of the Government in an incumbent President who wanted to serve another term, thereby destroying the neutrality of the presidential office.[68]

3.99 The Referendum Taskforce responded to this concern, arguing that:

> 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 political group) with a view to increasing the chances of re-appointment.[69]

3.100 The Committee accepts that there are good policy reasons for permitting a person to serve more than one term as President. It also notes that the process set out in the Republic Bill for the selection and appointment of the President involves a number of steps and requires input from a number of persons and bodies. It therefore considers that, in order to ensure that the best candidate is ultimately appointed, the process should incorporate maximum flexibility.

67 Mr George Williams, *Submissions*, p. S223.

68 Mr George Williams, *Submissions*, p. S223; Harry Evans, *Transcript*. p. 22.

69 Referendum Taskforce, *Submissions*, pp. S88–S89.

3.101 The Committee therefore agrees that there should be a mechanism to ensure that there is an occupant of the office if the nomination and appointment process has not been finalised before the end of the incumbent's term. The Committee recognises that this objective could be achieved in a number of ways, including by permitting an outgoing President to continue in office until the next President is chosen. However, the Committee takes the view that this is not the best option. Rather it would be preferable if a President's term of office were to end after five years, at which time the office would fall vacant. If the process of selecting a new President had not been completed, the provisions for acting President (proposed s.63) would come into operation so that there would be no hiatus in occupancy of the office for constitutional purposes.

3.102 The Committee notes that there would be no obstacle to the outgoing President being renominated as a candidate to the Nominations Committee, and being appointed to serve another term after approval by two-thirds of a joint sitting of Parliament.

Recommendation 6

3.103 **The Committee recommends that the Republic Bill be amended to provide that, at the conclusion of a President's term of office, the position falls vacant (meaning that the provisions of proposed s.63 would then come into effect).**