

1999

**THE PARLIAMENT OF
THE COMMONWEALTH OF AUSTRALIA**

HOUSE OF REPRESENTATIVES

PRESIDENTIAL NOMINATIONS COMMITTEE BILL 1999

EXPLANATORY MEMORANDUM

**(Circulated with the authority of the
Attorney-General, the Hon Daryl Williams AM QC MP)**

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PRESIDENTIAL NOMINATIONS COMMITTEE BILL 1999

OUTLINE

This explanatory memorandum outlines the purposes and results of the 1998 Constitutional Convention, and the main elements of the Bill, before setting out notes on the provision of the Bill.

The Constitutional Convention

1.1 The Constitutional Convention met in February 1998 to consider whether Australia should become a republic, which republic model should be put to voters to consider against the present system of government, and in what timeframe any change might take place. The Convention supported the adoption of a republican system of government based on a 'bipartisan appointment of the President model' and recommended that the model, and other related changes supported by the Convention, be put to the people at a constitutional referendum.

1.2 The Prime Minister confirmed at the close of the Convention that the government would put the Convention's preferred model to a referendum in 1999. The Convention resolved that, if the referendum is successful, the republic should be established by 1 January 2001.

1.3 The Constitution Alteration (Establishment of Republic) 1999 sets out the changes to the Constitution necessary to establish a republic of the Commonwealth of Australia based on the Convention's preferred model. Those changes include a new s.60 establishing a mechanism for choosing a President. The constitutional mechanism refers to a committee established for the purpose of inviting and considering nominations and to consideration by the Prime Minister of a report of the committee.

1.4 The Presidential Nominations Committee Bill 1999 would establish such a committee.

The main elements of the Bill

1.5 The main elements of the Bill are described briefly below. A description of each of the provisions of the Bill then follows.

Establishment of the Committee

1.6 The Bill provides for a Presidential Nominations Committee to be established whenever it is necessary to choose a person as President of the Commonwealth of Australia.

Composition of the Committee

1.7 A Presidential Nominations Committee comprises 32 members. Members are formally appointed by the Prime Minister but the appointments must be made in accordance with rules set out in the Bill.

1.8 Briefly, the rules are as follows:

- There are 8 Commonwealth members, who are members of the Commonwealth Parliament. Each political party with 5 members or more in the Commonwealth Parliament is entitled to one place on the Committee. If there are leftover places after this formula is applied, the leftover places are allocated among the parties with at least 15 members by reference to the extent of their membership in the Parliament. If there are more than 8 parties with at least 5 members, the 8 parties with the highest number of places get the 8 places and any remaining party misses out.
- There are 8 State/Territory members, comprising one member of each State legislature, one member of the Northern Territory Legislative Assembly and one member of the Australian Capital Territory Legislative Assembly. These members are nominated by the legislatures.
- There are 16 community members appointed by the Prime Minister who are not members of any legislature.

Functions of the Committee

1.9 The functions of the Committee are to invite and consider nominations for appointment as President of the Commonwealth of Australia and to give a report on the nominations to the Prime Minister. Any Australian citizen or group of citizens may nominate a person as President.

Consistency between the Bill and the Convention recommendations

The recommendations of the Constitutional Convention

1.10 The communique issued by the Convention containing its recommendations is attached to the explanatory memorandum for the Constitution Alteration (Establishment of Republic) 1999.

1.11 The principal features of the Convention model are as follows:

- The Parliament establishes a committee with responsibility for considering nominations for the position of President and reporting to the Prime Minister.

- After taking into account the report of the committee, the Prime Minister presents a single nomination for the office of President, seconded by the leader of the Opposition, for approval by two-thirds of a joint sitting of the Parliament.
- The qualifications of a person entitled to be chosen as President are set out in the Constitution. A person who is a member of a legislature or a political party cannot be chosen as President.
- Before taking office, a person chosen as President must swear an oath or affirmation of allegiance and office.
- The President's term of office is 5 years.
- The executive power of the Commonwealth vests in the President, who is the head of state. The President has the same powers as the Governor-General and the conventions applicable to the exercise of the 'reserve' powers by the Governor-General apply to the exercise of those powers by the President.
- The Prime Minister may remove the President from office and must seek the approval of the House of Representatives for the removal of the President unless an election is called.

1.12 The Presidential Nominations Committee Bill 1999 provides for the nomination procedure recommended by the Convention. The key features of this procedure are set out in the first 2 dot points in paragraph 1.11 above. The communique describes the objective of the nomination procedure as being 'to ensure that the Australian people are consulted as thoroughly as possible'. It said the process of consultation should involve the whole community, including State and Territory Parliaments, local government, community organisations and individual members of the public, all of whom should be invited to provide nominations.

1.13 The communique also states that the process for community consultation and evaluation of nominations is likely to evolve with experience and is best dealt with by ordinary legislation or parliamentary resolution.

1.14 The Convention communique recommended that the Committee be composed and operate as follows:

- the committee should be of a 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; and
- no nomination should be disclosed without the consent of the nominee.

How the Bill gives effect to the Convention's recommendations

1.15 A Presidential Nominations Committee established by the Bill has the functions recommended by the Convention of inviting and considering nominations for appointment as President and preparing a report on the nominations for the Prime Minister (see clause 5 of the Bill). As also recommended by the Convention, in compiling a shortlist the Committee is required to have regard to the diversity of the Australian community (see clause 22).

1.16 The Convention considered that a Presidential Nominations Committee should be of a workable size, with a balance between parliamentary and community members. The size of the Committee is 32 members. There is a balance between parliamentary and community members, 16 of each (see clause 8).

1.17 The composition of the Committee takes Australia's federal system of government into account by providing for the Committee to have Commonwealth and State members.

1.18 The Bill provides for 6 members of the Committee to be members of the State Parliaments, nominated by the Parliaments. While the Convention did not expressly address the question whether the Committee should also include members from the two large mainland Territories, the Bill makes provision for the Committee to include one parliamentarian for the Northern Territory and one for the Australian Capital Territory.

1.19 The Convention recommended that political parties with party status in the Commonwealth Parliament should be represented on a Presidential Nominations Committee. It is not entirely clear what the Convention meant by a party having 'party status' in the Parliament. Even a party with a single member in the Parliament has party representation. The Convention's recommendation has been given effect by ensuring that parties with a significant presence in the Parliament (ie, at least 5 members) have a place on the Committee.

1.20 The Convention also recommended that the composition of a Presidential Nominations Committee should take into account so far as practicable considerations of gender, age and cultural diversity. The fact that a Committee has 16 community members will permit these factors to be taken into account.

1.21 The Bill contains provisions designed to ensure the confidentiality of nominations and material received in connection with nominations. Those provisions are intended to prevent the disclosure of nominations except with the consent of nominees, as recommended by the Constitutional Convention.

FINANCIAL IMPACT STATEMENT

2.1 The Government anticipates that \$19.5m will be expended on proposed public information activities: \$4.5m on a balanced public education programme and \$15m on Yes/No advertising campaigns conducted by committees drawn from the delegates to the Constitutional Convention.

2.2 It is estimated that the AEC's costs for conducting the referendum will be \$63m.

2.3 The cost of consequential changes (eg, changes to military insignia and coinage) would depend on the nature of those changes, the proposed timetable for transition and the extent to which the changes may be absorbed within existing funding arrangements. No estimate of these costs has been made.

2.4 The cost of running the office of President could be expected to equate broadly with the costs of running the office of the Governor-General. The cost of appointing a President under the proposed arrangements has not been estimated.

NOTES ON THE PROVISIONS OF THE BILL

Part 1 - Introduction

3.1 Part 1 of the Bill contains provisions for the short title and commencement of the Bill and a definitions section.

Clause 1 Short title

3.2 Clause 1 sets out the short title of the Bill.

Clause 2 Commencement

3.3 Clause 2 provides for the Bill to commence on royal assent. The transitional provisions for the establishment of a republic proposed to be included, by the Constitution Alteration (Establishment of Republic) 1999, in new Schedule 2 to the Constitution would enable the first President to be chosen during 2000 so that he or she may take office on 1 January 2001. The transitional provisions would authorise the enactment of the Presidential Nominations Committee Bill 1999 during 2000.

Clause 3 Definitions

3.4 Section 3 defines expressions used in the Act.

A **Commonwealth member** is a member of the Commonwealth Parliament appointed as a member of a Presidential Nominations Committee under cl.9 of the Bill.

A **community member** is a person, who is not a member of a legislature, who is appointed as member of a Presidential Nominations Committee under cl.11 of the Bill.

A **Convenor** of a Presidential Nominations Committee is a member of the Committee appointed as the Convenor under cl.12.

A **member** of a Presidential Nominations Committee includes the Convenor of the Committee.

The **President** means the President of the Commonwealth of Australia.

A **Presidential Nominations Committee** is a committee established under the Bill.

A **State/Territory member** is a member of a legislature of a State or the Northern Territory or Australian Capital Territory who is appointed as a member of a Presidential Nominations Committee under cl.10 of the Bill.

Part 2 - Establishment, functions and powers of Presidential Nominations Committee

4.1 Part 2 of the Bill makes provision for the establishment of Presidential Nominations Committees and sets out their functions and powers.

Clause 4 - Establishment and cessation of Committee

4.2 A Presidential Nominations Committee needs to be established each time that it becomes necessary to choose a person as President.

4.3 In the usual case of a President serving a full 5-year term it can be expected that a committee will be established some months before the end of the incumbent's term, so that a new President can be chosen and be ready to take office at the end of that term.

4.4 However, if a President resigns or is removed or dies in office, it can be expected that a Committee will be established as soon as practicable after the office becomes vacant. Where a President is removed, it may prove impracticable to establish a Committee until after the 30 day period in which the Prime Minister is required by the Constitution to seek the approval of the House of Representatives for the removal.

4.5 Clause 4 provides that a Presidential Nominations Committee is only established when the appointment of the 16th member comes into effect.

4.6 It would not be feasible to require all 32 appointments to be made before a Committee could start operating. The Prime Minister can only appoint as a State/Territory member a member of the legislature of the State or Territory concerned who has been nominated by the legislature. There may be delays in a legislature nominating a person if, eg, the need to choose a new President arises when an election is taking place (or is about to take place) in a State or Territory or the legislature is not sitting. In the case of Commonwealth members, there may also be delays if a federal election is taking place about the time the need to choose a new President arises. The provision that a Committee is established upon the appointment of the 16th member will enable a Committee to begin work although further appointments are still to be made.

4.7 Subclause 4(3) provides for when a Presidential Nominations Committee ceases to exist. This is when the incoming President takes office. As a result, if a person chosen as President died or became incapacitated after being chosen as President and before taking office, the Committee would continue in existence until a new President was chosen and took office. This would enable the Committee, if necessary, to reconsider nominations or call for fresh nominations and prepare a fresh report for the Prime Minister, and would avoid the need to establish a new Committee.

Clause 5 - Functions and powers

4.8 Clause 5 sets out the functions of a Presidential Nominations Committee. The functions are:

- to invite nominations for appointment as President;
- to consider the nominations; and
- to give the Prime Minister a report on the nominations.

These are the functions that the Constitutional Convention recommended be given to the Committee.

4.9 Clause 5 gives a Presidential Nominations Committee the powers it needs to perform its functions.

Clause 6 - Questions to be decided by vote

4.10 Clause 6 requires a Presidential Nominations Committee to decide questions by a majority of the votes of members present and voting.

4.11 The Convenor may vote and also has a casting vote where necessary.

Clause 7 - Procedures

4.12 Clause 7 empowers a Presidential Nominations Committee to determine its own procedures.

Part 3 - Membership of Presidential Nominations Committee

5.1 Part 3 deals with membership of a Presidential Nominations Committee.

Clause 8 - Committee members

5.2 Clause 8 provides that a Presidential Nominations Committee has 32 members appointed by the Prime Minister (in accordance with the rules set out in the Bill) by written notice. There are 8 Commonwealth members; these are members of the Commonwealth Parliament. There are 8 State/Territory members; these are members of the State and Territory legislatures nominated by the legislatures. The Prime Minister must appoint a person so nominated. The Committee also includes 16 persons who are not members of any legislature.

Clause 9 - Commonwealth members

5.3 Clause 9 requires the Prime Minister to appoint 8 members of the Commonwealth Parliament to a Presidential Nominations Committee. The Prime Minister must make the appointments in accordance with clause 9.

5.4 Clause 9 makes each political party with 5 or more members in the Commonwealth Parliament eligible for at least one place on the Committee.

5.5 If there are fewer than 8 parties with 5 or more members, each party has one place immediately. In order to be entitled to any additional place, a party must have at least 15 members in the parliament. In the case of parties with at least 15 members, each remaining place must be allocated first to the party with the most members, second, to the party with the second highest number of members, and so on, until all 8 places are allocated.

5.6 If there are more than 8 parties with 5 or more members, the first place is allocated to the party with the most members, the second place to the party with the next highest number of members, and so on, until 8 places are allocated. The party or parties with the lowest number of members would not be allocated a place.

5.7 If 2 or more parties are each entitled to be allocated the next available place, and there are not enough places for all of them, the allocation of places is to be decided by lottery.

Clause 10 - State/Territory members

5.8 Clause 10 requires the Prime Minister to appoint to a Presidential Nominations Committee one member of the Parliament of each State, one member of the Northern Territory Legislative Assembly and one member of the Australian Capital Territory Legislative Assembly.

5.9 Persons appointed as State/Territory members must be nominated by the legislature of the State or Territory concerned.

Clause 11 - Community members

5.10 Under clause 11 the Prime Minister must also appoint to a Presidential Nominations Committee 16 persons who are not members of the Commonwealth Parliament or of the legislature of a State or Territory. The Prime Minister's broad discretionary power to appoint community members would permit a diverse membership.

Clause 12 - Convenor of Committee

5.11 Clause 12 requires the Prime Minister to appoint a member of a Presidential Nominations Committee as the Convenor of the Committee.

Clause 13 - Duration of membership

5.12 Clause 13 provides that a person appointed as a member of a Presidential Nominations Committee becomes a member at the time specified by the Prime Minister in the notice appointing the person.

5.13 Clause 13 also provides that a member of a Committee ceases to be a member when the new President's term of office begins. The Committee also ceases to exist at this time (see subclause 4(3)).

Clause 14 - Other terms and conditions

5.14 Subclause 14(1) provides that members of a Presidential Nominations Committee hold office part-time.

5.15 Subclause 14(2) confers on members of a Presidential Nominations Committee an entitlement to be paid allowances prescribed by the regulations.

5.16 Subclause 14(3) also entitles community members to be paid remuneration determined by the Remuneration Tribunal or, if the Tribunal has not determined any remuneration, to be paid remuneration prescribed by the regulations.

5.17 Members of a Presidential Nominations Committee who are members of a legislature of the Commonwealth or a State or Territory (these are the Commonwealth members and State/Territory members) may be granted allowances but are not entitled to remuneration. Those Committee members are remunerated as members of Parliament and it is not appropriate to pay them additional remuneration for service as Committee members.

5.18 Subclause 14(4) provides that subclauses 14(2) and (3) have effect subject to the *Remuneration Tribunal Act 1973*.

5.19 Subclause 14(5) confers power on the Prime Minister to determine other terms and conditions on which a member of a Presidential Nominations Committee holds office. For example, the Prime Minister could determine a term relating to leave of absence.

Clause 15 - Resignation and termination of membership

5.20 Subclause 15(1) provides that a member of a Presidential Nominations Committee may resign in writing given to the Prime Minister. The Prime Minister formally appoints all members (including those nominated by legislatures) and it is appropriate that resignation be effected by notice given to the Prime Minister.

5.21 Subclause 15(2) provides that if a member of a Presidential Nominations Committee is nominated for appointment as President, the person ceases to hold office as a member of the committee. It would be a serious conflict of interest for such a person to continue to sit as a member of the Committee.

Clause 16 - Replacement appointments

5.22 A member of a Presidential Nominations Committee may resign or, for a reason set out in subclause 15(2), cease to be entitled to be a member. Clause 16 therefore makes provision for replacement members.

5.23 If a Commonwealth member needs to be replaced, clause 16 requires the replacement member to be a member of the Commonwealth Parliament nominated by the leader of the political party to which the member being replaced belonged at the time the places were allocated. Even if the member being replaced has ceased to be a member of that party, that party's leader is entitled to nominate the replacement. If the vacancy is for a State/Territory member, the replacement must be a member of the legislature in question nominated by the relevant Premier or Chief Minister.

Clause 17 - Effect of vacancies

5.24 A Presidential Nominations Committee must have at least 16 members in order to be able to operate. However, clause 17 provides that so long as a Committee has at least 16 members (at least 8 of whom are community members), a vacancy in its membership does not affect the work of the Committee.

Part 4 - Nominations

6.1 Part 4 makes provision for nominations for appointment as President of the Commonwealth of Australia to be made to, and considered by, a Presidential Nominations Committee.

Clause 18 - Inviting nominations

6.2 Clause 18 requires a Presidential Nominations Committee, as soon as practicable after it is established, to invite the public to make nominations for appointment as President.

6.3 It is up to each Committee to decide how to invite nominations. The methods used could include invitations placed in newspapers and on Internet, radio and television.

Clause 19 - Nominations from Australian citizens

6.4 Clause 19 provides that any Australian citizen or group of citizens may nominate a person for appointment as President. This provision gives effect to a recommendation made by the Constitutional Convention.

Clause 20 - Content and form of nomination

6.5 Clause 20 requires nominations to be in writing, in the form determined by a Presidential Nominations Committee. However, a nomination must be accompanied by:

- the nominee's written consent to being nominated;
- a written statement in support of the nomination; and
- any other information or material that a Committee requires.

Clause 21 - Withdrawal of nomination

6.6 A nominee or a person or group who nominates a person may withdraw the nomination at any time. The withdrawal must be in writing.

Clause 22 - Committee's report

6.7 If the referendum on the republic is successful, the Constitution will refer to the Prime Minister's consideration of a report of a committee established to invite and consider nominations for appointment as President.

6.8 In accordance with the mechanism that would thus be established by the Constitution, clause 22 requires a Presidential Nominations Committee to give the Prime Minister a written report on the nominations received by the Committee.

6.9 The report must include a short list of nominees whom the Committee considers to be the most suitable candidates for appointment as President. In considering nominations and preparing the short list the Committee must have regard to the following factors:

- the diversity of the Australian community; and
- the ability of nominees to command the respect and support of the Australian community.

6.10 Clause 22 also provides that a Presidential Nominations Committee may have regard to any other matter that it considers relevant to nominees' suitability to hold office as President. It may also have regard to any material it considers appropriate. A Committee may, for instance, request information from a nominee in addition to the information included in the nomination. A Committee is not required to give any person an opportunity to be heard. Decisions of Presidential Nominations Committees are also excluded from review under the *Administrative Decisions (Judicial Review) Act 1977* (by an amendment to that Act to be made by a Bill containing amendments consequential on the establishment of a republic). The Committee must be in a position to deal with a potentially large number of nominations and extremely broad criteria of suitability in an efficient and timely manner.

Part 5 - Confidentiality

7.1 The objective of Part 5 is to comply with the recommendation made by the Constitutional Convention, that the identity of nominees not be disclosed. The Convention considered that if nominations could be disclosed, this would act as a disincentive to persons to nominate.

Clause 23 - Application and definitions

7.2 Clause 23 specifies the persons to whom Part 5 applies. These are members or former members of a Presidential Nominations Committee and staff or former staff

assisting a Committee, who are referred to in the Bill as ‘entrusted persons’. Clause 23 also contains definitions of ‘court’ and ‘disclose’.

Clause 24 - Protection of confidentiality of nominations

7.3 Clause 24 prohibits an entrusted person from making a record of, or disclosing, the identify of, or information that might identify, a person who has been nominated for appointment as President, except where this is done in the course of the person’s duties or the nominee has consented to the disclosure.

7.4 Under subclause 24(3) the prohibition on disclosure without the consent of the nominee overrides any obligation an entrusted person would otherwise have to disclose information to a court (as defined in clause 23). However, an entrusted person may have to disclose information to a court where this is required for the purposes of proceedings in respect of a contravention of, or the performance of functions or exercise of powers under, the Act.

7.5 While Part V does not create new offences, the general law including the *Crimes Act 1914* and *Privacy Act 1984* would apply in relation to the Part according to their terms.

7.6 Clause 24 does not attempt to restrict disclosures about nominations which may be made under the protection of parliamentary privilege by parliamentarians who are members of a Presidential Nominations Committee. However, it is expected that every parliamentary member will act in such a way as to protect the confidentiality of nominations and reports, and that any failure to do so would be dealt with by the legislature concerned.

Clause 25 - Protection of confidentiality of report

7.7 Under clause 25, the obligation of confidentiality about the identity of nominees that is imposed on entrusted persons extends to a report prepared by a Presidential Nominations Committee under clause 22 to be given to the Prime Minister.

Part 6 - Miscellaneous

8.1 Part 6 contains several miscellaneous provisions.

Clause 26 - Staff

8.2 Clause 26 makes provision for the Committee to be assisted by staff. Members of staff are required to be officers or employees of Departments of the Australian Public Service or of Commonwealth authorities, whose services are made available to the Committee.

Clause 27 - Indemnity

8.3 Clause 27 provides that a person is not subject to any liability in respect of anything done, or omitted to be done, in good faith in performing functions or duties or exercising powers under the Bill.

Clause 28 - Regulations

8.4 Clause 28 confers power on the President to make regulations for the purposes of the Bill.

8.5 The Constitution Alteration (Establishment of Republic) 1999 envisages that the first President will take office on 1 January 2001 and therefore that the first President will need to be chosen during 2000. The Presidential Nominations Committee Bill 1999 will therefore also need to be brought into force during 2000 to enable the procedures for choosing the first President to be fully effective. Clause 28(2) therefore empowers the Governor-General to make any regulations that may be required for the purposes of the Bill during 2000.