# Chapter 3 – Subsection 44 (iv)

*Subsection 44(iv) embodies the principles that the executive and the legislature should be separated and the executive should not be in a position to influence unduly the legislature. The provision also seeks to prevent persons from simultaneously holding two offices which give rise to a conflict of duties.*

*It is said that subsection 44(iv) is unfair and discriminatory because it places a heavier burden on public sector employees than on their private sector counterparts. The reluctance of public sector employees to stand for parliament reduces the potential pool of candidates for the federal parliament. Subsection 44(iv) is particularly unfair to senators-elect because it has been interpreted to mean that a senator-elect cannot hold an office of profit under the Crown during the period before he or she takes his or her seat. This may be many months. Further, the scope of the expression 'office of profit under the Crown' is quite uncertain.*

*The final paragraph of section 44 exempts several categories of employee. At the end of the twentieth century most of these exemptions are inappropriate.*

*The Committee emphasises that the principles on which subsection 44(iv) are based are of paramount importance. However, the Committee concludes that, as currently expressed, the provision is both uncertain and unfair and that new arrangements should be made to remove the uncertainty and unfairness.*

## Introduction

3.1 Subsection 44(iv) provides:

> Any person who –
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> ...
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> (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth:
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> ...
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

> But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

3.2 The origins of subsection 44(iv) can be traced to eighteenth century Britain and to fears held by the parliament that the Crown would use its powers of patronage to suborn members of the House of Commons and thereby undermine the independence of the Commons.[91]

3.3 The principle remains valid today. Subsection 44(iv) is intended to prevent the executive from gaining control of the parliament. If a large number of members of parliament were office-holders appointed by the executive, the executive would have disproportionate influence over the parliament.[92] The provision is concerned with the ability of the parliament to hold the executive to account and therefore it is necessary to ensure that enough members of parliament are free from the influence of the Crown to achieve this.[93]

3.4 The second principle that is fundamental to subsection 44(iv) is that some offices are incompatible with membership of the parliament. Incompatibility can arise in two ways. First, there is the risk of a 'conflict of duties' involved in attempting to satisfy the demands of both offices. Second, some offices, for example judicial offices, are considered to be so sensitive that if the holders of such offices become embroiled in political controversy the offices themselves may be damaged.

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91 Associate Professor Sharman, *Submissions*, pp. S79-80.

92 Professor A R Blackshield, *Transcript*, p. 260.

93 Mr Geoffrey Lindell, *Transcript*, p. 110.

3.5 The third principle underlying subsection 44(iv) is the need to maintain the principle of ministerial responsibility by ensuring that officers who make decisions on matters of public policy, and for whom ministers are ultimately responsible, are not themselves members of parliament.[94] Ministerial responsibility requires that a minister should be accountable to the parliament for the actions of public servants within his or her department. It would be inappropriate if those same public servants were members of parliament who must hold the minister to account.

3.6 Most of the evidence that the Committee received agreed that the policy basis for subsection 44(iv) remains sound and should be upheld.[95] However, a good deal of disquiet was expressed in submissions and by witnesses about the operation of the subsection and it was suggested that the provision requires amendment. It was argued that two fundamental considerations ought to inform changes to the words. The first is the need to avoid the perception of 'double dipping' by preventing members of parliament from having two sources of taxpayer funded income. The second consideration is the need to avoid the perception of divided loyalty. As the Constitutional Commission noted in its 1988 report:

> The principle ... is that, apart from the member's salary and reimbursement of reasonable expenses, a member of Parliament should not receive remuneration from the Crown in right of the Commonwealth, a State or a Territory. The prohibition is to avoid 'double-dipping', and the possibility or appearance of divided loyalty. A person who is a member of or employed by ... an authority, body, office or corporation [capable of facilitating the

94 Mr Geoffrey Lindell, *Transcript,* p. 110.

95 See for example Mr Harry Evans, *Submissions*, p. S49 and the Hon Peter Durack QC, *Transcript*, p. 202.

> fact or appearance of double-dipping or divided loyalty] should be disqualified from being a member of Parliament.[96]

## Operation of subsection 44 (iv)

3.7 Subsection 44(iv) has long been considered to be something of a minefield because of its scope and uncertainty and there have been several recommendations to address the problems in recent years. However, the provision did not claim its first victim until 1992 when Mr Philip Cleary, the member for the electorate of Wills, was declared by the High Court to be incapable of being chosen as a member of the House of Representatives.

3.8 Following the 1996 federal election, the eligibility of Miss Jackie Kelly to stand for the seat of Lindsay in NSW was challenged. Since Miss Kelly conceded her ineligibility the High Court did not further elucidate subsection 44(iv).

3.9 A further case arose following the 1996 election relating to Ms Jeannie Ferris.[97] Ms Ferris was employed by the parliamentary secretary to the Prime Minister, Senator Minchin, after the date of nomination and before the writ for her election had been returned. It was argued that because she held the office of profit under the Crown before the process of choosing senators was completed she contravened subsection 44(iv) and consequently she was incapable of being chosen as a senator. Her

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96 Cited in the Attorney-General's Department *Submission,* p. S167. Mr Geoff Lindell agreed that these should be the guiding principles in determining any changes to subsection 44(iv) - *Transcript*, p. 111.

97 The text refers to 'Ms Ferris' rather than to 'Senator-elect Ferris' because she was employed by Senator Nick Minchin before the writs were certified for return and therefore before she became, formally, a 'senator-elect'.

case was not brought before the Court - she resigned before a challenge was initiated and the South Australian parliament appointed her to the casual vacancy that is purported to have arisen as a result of her resignation. However, it was argued before the Committee that Ms Ferris could not resign from her position in the Senate. It was argued that as she was not capable of being chosen in the first place she had no seat from which to resign. Consequently, the election should have been determined on the same principles as those applied in *In re Wood*[98] and the vacancy should have been filled by the further counting or recounting of ballot papers for that state for the election. The Committee makes no comment on these arguments. It cites them only to highlight the complexity and confusion that characterise the operation of subsection 44(iv).

3.10 While subsection 44(iv) did not generate serious problems until recently, three cases have arisen in the last five years, underlining the problems that are created for the political process. For the reasons put by Professor Hughes[99] (set out in Chapter 2) it may be expected that the number of challenges under subsection 44(iv) will increase with the accompanying potential for instability of the parliamentary system and possibly the wider political system.

3.11 The Committee's overriding concern is twofold – the need to preserve the principles underlying subsection 44(iv) and the need to ensure the stability of the parliamentary and political system. In the previous chapter the Committee discussed the danger that challenges to

98 (1988) 167 CLR 145.

99 Professor Colin A Hughes, *Transcript*, p. 161.

the eligibility of parliamentarians represent to the integrity and stability of the parliamentary system. As noted earlier the Committee agrees with Sir Maurice Byers that the stability of electoral procedures is of paramount importance and should not be susceptible to unnecessary challenge. Therefore the provisions dealing with disqualifications and qualifications should be as clear as it is possible to make them.[100]

## Issues

### Subsection 44 (iv) is unfair and discriminatory

3.12 A major criticism of subsection 44(iv) is that it has a harsh and unsatisfactory operation in relation to public servants who are required to resign from their jobs before nominating for parliament.[101]

3.13 A large number of submissions and witnesses criticised the unfair and discriminatory operation of subsection 44(iv) in relation to public sector employees.[102] It applies equally to candidates who have

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100 Sir Maurice Byers, *Transcript*, p.139.

101 Sir Maurice Byers, *Submissions* p. S64, Australian Residents Association, *Submissions,* p. S1; Attorney-General's Department, *Submissions,* p. S166

102 For example, Mr Bob Charles said: ' ...it is unreasonable to ask candidates for public office (House of Representatives or Senate seats) to resign any position or office of profit under the Crown prior to the declaration of the poll', *Submissions,* p. S6; The Liberal Party of Australia, *Submissions*, p. S137; Mr Geoffrey Lindell, *Transcript,* p. 111; Sir Maurice Byers said: 'There seems no good reason why a person desiring to nominate for the Representatives or the Senate but holding, at that time, an office in the public service of the Commonwealth or of a State should be required to resign his office prior to nomination rather than prior to the declaration of the poll or before the results of the Senate election are known', *Submissions,* p. S64; Australian Democrats (ACT Division), *Submissions,* p. S91; the Electoral Reform Society of South Australia stated: 'Section 44(iv) actually discriminates against public servants as they must resign from their employment before nominating as a candidate', *Submissions,* p. S125.

little or no chance of winning a seat as to those with a good chance of success. Public sector employees suffer discrimination because they must give up their employment at least for the duration of the election and in many cases they have no certainty of reappointment if they fail to win a seat. They are deprived of a source of income for the period commencing with the close of nominations and ending when the outcome of the election is known. If unsuccessful in the election, they may also be deprived of reinstatement in their former employment. Neither of these costs is exacted from private sector employees. Such a burden is less severe on a candidate who is successful in the electoral contest. However, for a candidate who is unsuccessful the price of exercising his or her democratic right to stand for election could be very high indeed.

3.14 The Australian Democrats spokesperson on the Attorney-General's portfolio matters, Senator Andrew Murray, argued that it particularly disadvantages Australians who cannot afford to give up income for the election period. Senator Murray stated that this discriminates against about '20 per cent of the work force who are denied the right to stand for election without incurring significant financial penalty'.[103] A substantial proportion of Australian Democrats parliamentarians have been previously employed in the public sector and a number of those have made financial sacrifices to stand for elections.[104]

3.15 Mr Philip Cleary expressed the view that:

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103 Senator Andrew Murray, *Transcript,* p. 17.

104 Senator Andrew Murray, *Transcript,* pp. 17–18.

> Approximately two million people were forced into second-class status in the electoral process by the High Court's ruling that public servants should resign their position to run for parliament. Private school teachers receiving funding from the Commonwealth faced no such encumbrance, nor of course did millionaires...[105]

**Reduced pool of candidates**

3.16 One result of the requirement that holders of an office of profit must resign from the position before nominating for election is that the potential pool of candidates is substantially reduced. Senator Murray commented that the provision causes particular difficulties for the Australian Democrats because on their statistics the provision affects about thirty percent of Australian Democrats members. He said:

> For a small party like ours it is particularly onerous and disadvantageous in terms of getting maximum candidates out of the membership we have.[106]

3.17 Senator Murray told the Committee that in Queensland ten potential Australian Democrat candidates declined to stand because of the onerous requirements of section 44. Of those who stood, three had to resign from their employment. As Senator Murray pointed out, resignation represents a high risk in the present climate. In New South Wales, an average of between six and eight potential candidates do not stand for nomination once they are made aware of section 44.[107] Senator Minchin made a similar point. He told the Committee that, as state

105 Mr Philip Cleary, *Transcript,* p. 125.

106 Senator Andrew Murray, *Transcript,* p. 17.

107 Senator Andrew Murray, *Transcript,* p. 18.

director of the Liberal Party in South Australia, he found that section 44 proved to be a problem in discussing potential candidacy with people.[108]

3.18 It is reasonable to infer that many Australians who are affected by subsection 44(iv) would hesitate to exercise their democratic right to stand for election if required to sacrifice their income at least until the election outcome is known, and if reinstatement is discretionary or non-existent, possibly for a lot longer. Thus subsection 44(iv) operates to reduce the number and quality of candidates who are willing to stand for election to the parliament. This is an unfortunate repercussion and it is in the national interest to expand the pool of high quality candidates.

**Senators-elect**

3.19 Section 13 of the constitution provides that an election for vacant Senate seats (a 'half Senate election') is to occur within one year before the places become vacant. It also provides that candidates elected at a half Senate election take up their seats on the following 1 July. This means that a lengthy period can elapse between the time a candidate is declared elected to fill a vacancy and the time he or she takes up his or her seat. The question arises: is a person ineligible to hold an office of profit under the Crown after he or she has been elected but before his or her term commences?

3.20 A strict interpretation of subsection 44(iv) suggests that a senator-elect could not contravene the provision by occupying an office of profit under the Crown during the period commencing immediately after the return of the writ and concluding on the day before the term

108 Senator Nick Minchin, *Transcript,* p. 91.

begins – that is, the period of being chosen has ended and the period of sitting has not started. However this issue was discussed in 1980 by the then Attorney-General, Senator the Hon Peter Durack, in correspondence to Senator Gareth Evans.[109] Senator Durack wrote:

> ...the mischief intended to be dealt with would be at least as acute in the case of a senator-elect – in fact probably more so – than at the earlier stage of being elected as a senator, to which the disqualification provisions are clearly applicable.

3.21 Senator Durack continued:

> ...my own opinion is that section 44 is applicable to senators-elect. I have concluded that not only is this the safe view to adopt, but that it is also the correct one. I think that the reference to "sitting" in section 44 covers the case of a person who, although not disqualified at the time of his election, comes subsequently under one or other of the disqualifications.[110]

3.22 In oral evidence to the Committee, the Hon Peter Durack reaffirmed his opinion.[111]

3.23 Other witnesses also expressed the view that senators-elect who occupy an office of profit under the Crown risk disqualification.[112]

3.24 This can raise quite serious problems for senators whose terms commence many months after the election. Table 1 shows the date of the election, the date on which the senators' terms commenced and the

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109 *Letter from Attorney-General to Senator Evans regarding employment of Senator-elect as 'Legislative Assistant'*, Senate Standing Committee on Constitutional and Legal Affairs, *Report, The Constitutional Qualifications of Members of Parliament,* Appendix 2, AGPS, 1981.

110 ibid.

111 The Hon. Peter Durack QC, *Transcript,* p. 201.

112 Mr George Williams, *Transcript,* p. 40; Senator Nick Minchin, *Transcript,* p. 47, Mr Geoffrey Lindell, *Transcript,* p. 111.

number of senators affected (ie. the number of new senators who may not be capable of holding an office of profit under the Crown during the interregnum between the election and commencing the term).

**Table 1**

| Number of senators affected (new senators) | Date of election | Date senators' terms commenced |
|---|---|---|
| 10 | 10 December 1977 | 1 July 1978 |
| 11 | 18 October 1980 | 1 July 1981 |
| 4 | 1 December 1984 | 1 July 1985 |
| 9 | 24 March 1990 | 1 July 1990 |
| 9 | 13 March 1993 | 1 July 1993 |
| 9 | 2 March 1996 | 1 July 1996 |

Information provided by the Parliamentary Library.

Note:

1. Double dissolutions were held in 1983 and 1987 and senators' terms are deemed to have commenced on the 1 July preceding the dissolution, therefore the problem did not arise.
2. The number of affected senators was unusually small in 1984 because the size of the Senate was expanded.

## Meaning of 'office of profit under the Crown'

3.25 One of the principal problems associated with subsection 44(iv) is the uncertainty of the expression 'office of profit under the Crown'.

3.26 The Liberal Party of Australia submitted:

> It is clear that there is an unacceptable degree of uncertainty about the scope and application of the term "office of profit under the crown".[113]

Associate Professor Gerard Carney stated:

113 *Submissions,* p. S137.

> I have not found as yet an adequate definition of 'an office of profit under the Crown'.[114]

3.27 In *Sykes v Cleary* the High Court made the fairly obvious point that the expression includes permanent public servants. Their Honours stated:

> the disqualifications must be understood as embracing at least those persons who are permanently employed by the government.[115]

3.28 While a number of issues relating to the expression were settled in *Sykes v Cleary*, such as its application to persons who are on leave without pay and to state public servants, several remain outstanding. For example, to what extent does it apply to the employees and members of the governing bodies of statutory authorities? Does it apply to employees of authorities that are established under the Corporations Law but wholly owned by the Commonwealth? Is the position different if the Commonwealth is partial owner of such a corporation? What is the position of the parliamentary staff employed under the *Members of Parliament (Staff) Act 1984*?[116] Professor Hughes also suggested that the expression could extend to include marriage celebrants. The office of marriage celebrant is created by the Crown and the occupant receives fees for performing his or her duty.[117]

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114 *Submissions,* p. S148.

115 (1992) 67 ALJR 59 at 62, cited in K Cole, *'Office of profit under the Crown' and membership of the Commonwealth Parliament*, Issues Brief No. 5, Department of the Parliamentary Library, 1993, p. 2.

116 See discussion in K Cole, *'Office of profit under the Crown' and membership of the Commonwealth Parliament*, Issues Brief No. 5, Department of the Parliamentary Library, 1993, p. 17-18.

117 Professor Colin A Hughes, *Submissions*, p. S242.

3.29 Associate Professor David Black highlighted the difficulty that the expression poses for individuals:

> At times universities are told that we are not working for the Crown; we are an independent entity altogether. At other times we are told that we are government entities.[118]

3.30 The Committee considers that the uncertainty associated with the expression 'office of profit under the Crown' is one of the most problematic aspects of subsection 44(iv) and requires urgent attention. The reach of subsection 44(iv) remains something of a mystery that can only be fully elucidated by further judicial consideration. This situation is not desirable. Potential candidates, candidates and members of parliament should be able to find out readily whether or not, under the constitution, they are disqualified from being chosen for, or from sitting in, the Commonwealth parliament.

**Application of 'office of profit under the Crown' to local government**

3.31 One of the unsettled issues is whether local government councillors or the employees of local government councils are covered by the provision. The Committee heard differing views on whether it could apply to local government councillors. On one hand Mr Geoffrey Lindell noted a New South Wales case where President Michael Kirby (as he then was, as president of the Court of Appeal) took the view that local government was not part of the Crown.[119] On the other hand, Mr George Williams, senior lecturer in constitutional law at the Australian

118 Associate Professor David Black, *Transcript*, p. 184.

119 Mr Geoffrey Lindell, *Transcript,* p. 115.

National University,[120] and Mr Frank Marris[121] expressed the view that the position of local government councillors is not free from risk of disqualification under subsection 44(iv).

3.32 Senator Minchin told the Committee of the practical difficulties of this uncertainty:

> At one stage, after all our candidates had bulk nominated, we received some advice that any connection with local government might well constitute an office of profit...
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> I think eight of our 12 candidates happened to be local councillors and I had to get all of them to withdraw their nominations. Fortunately, we received this advice and acted on it before the closing of nominations. But we had to get them all to withdraw, all to resign from their council positions and then all to renominate. As you can imagine, when you are running an election campaign that is the sort of headache and nightmare you do not need...That was a bruising and memorable experience.[122]

**Meaning of 'pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth'**

3.33 Under subsection 44(iv) a person who holds 'any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth' is ineligible to be elected or to sit as a senator or a member of the House of Representatives. A strong body of opinion points to the conclusion that the kind of pension contemplated by this expression is one that depends for its continuation on the unfettered discretion of the Crown or the executive government.[123] Consequently,

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120 Mr George Williams, *Transcript,* p. 32.

121 Mr Frank Marris, Attorney-General's Department, *Transcript,* p. 70.

122 Senator Nick Minchin, *Transcript*, p. 46.

123 Report from the Select Committee on Offices or Places of Profit under the Crown, House of Commons, 1941, p. xxvi-xxvii, cited in K Cole, *'Office of profit*

the phrase would not disqualify a person holding a pension payable out of the Commonwealth revenue and under a legislative scheme set down by the parliament.[124] The Attorney-General's Department submitted that:

> ... the existing words would not disqualify a person holding a pension payable out of the revenues of the Commonwealth that depended for its payment only upon conditions laid down by the Parliament in legislation, being conditions under which payment is not payable only during the pleasure of the Crown.[125]

3.34 However, the meaning of the phrase is not absolutely clear[126] and there are divergent views about its effect.[127]

### The last paragraph of section 44

3.35 The last paragraph of section 44 provides:

> But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

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*under the Crown' and membership of the Commonwealth Parliament*, Issues Brief No. 5, Department of the Parliamentary Library, 1993, p. 16.

124 Senate Standing Committee on Constitutional and Legal Affairs, *Report*, *The Constitutional Qualifications of Members of Parliament,* 1981, cited in K Cole, *'Office of profit under the Crown' and membership of the Commonwealth Parliament*, Issues Brief No. 5, Department of the Parliamentary Library, 1993, p. 16.

125 *Submissions,* p. S169.

126 Mr Geoffrey Lindell, *Transcript,* p. 111.

127 Professor Blackshield takes the view that the scope of the expression is not free from doubt and should be clarified: Professor A R Blackshield, *Transcript,* pp. 263-4.

3.36 Like the rest of section 44 the meaning of the last paragraph has been plagued by uncertainty and difficulty. In addition some aspects of it are by now archaic. The last paragraph exempts the following categories of Crown employees from the operation of subsection 44(iv):

- the Queen's ministers of state for the Commonwealth
- the Queen's ministers of state for a state
- the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's (i.e. the British) navy or army
- the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

3.37 Clearly, the first category – ministers of state – must be exempted from the operation of subsection 44(iv). The only question that arises in relation to ministers is whether the category should be extended to include assistant ministers and parliamentary secretaries. The Committee comments on this issue below (see paragraphs 3.101-3.107).

3.38 The Committee sees no justification for retaining the exemption for state government ministers. The Committee agrees with Professor Blackshield that it may have been unobjectionable at federation but:

> It would clearly be impracticable today and it would also be constitutionally inappropriate[128]

128 Professor A R Blackshield, *Transcript*, p. 268.

3.39 Likewise, the Committee can see no justification for a continuing exemption for the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army. According to Quick and Garran, this was included to enable an officer or member of the Imperial Navy or Imperial Army to qualify as a member of parliament.[129] The Committee agrees with the submission of Sir Maurice Byers[130] that this exemption should be deleted. The Committee considers that such an exemption has no place in the Australian constitution.

3.40 Finally the last paragraph of section 44 refers to 'the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.'

3.41 The Committee received a submission questioning whether this exemption in fact operated in the way that has been assumed for many years.[131] Mr Brown submitted that when section 44 was drafted:

> ... the concept of, treatment of and the conditions of service of a Reservist (which is the type of person effectively described in the exception) was quite different to what it is today. Prior to World War II members of the Army Militia were not paid and only received bare attendance allowance. As I understand matters the Commonwealth only paid members of the Militia when they were mobilised, doubtless the same or a similar regime applied for members of the Reserves of the other two Services.

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129 J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth,* 1901, reprinted by Legal Books, Sydney, 1995, p. 494

130 Sir Maurice Byers, *Submissions*, pp. S64-65. Mr Harry Evans also believes that the reference to the imperial forces is completely outdated - see *Transcript,* p. 247.

131 Mr Andrew Brown, *Submissions*, p. S60.

> These days however, Reserve service is somewhat different.[132]

3.42 Mr Brown then gave examples of circumstances where he considered that a reservist may not come within the exemption set out in the last paragraph. Professor Blackshield agreed that the exemption purporting to cover reserve services is ambiguous. He argued that if a person is, for a certain period, wholly employed by the Commonwealth, on the face of it he or she is not covered by the exemption.[133] Sir Maurice Byers also agreed that the provision is far from clear.[134]

3.43 The Attorney-General's Department noted, on the other hand, that the Commonwealth parliament enacted the *Defence (Parliamentary Candidates) Act 1969* (DPC Act) to create a mechanism to allow (part-time) defence force members to nominate for parliament if they should so desire:

> Section 7 of the DPC Act provides for the transfer of officers in the Army, Navy or Air Force to the appropriate 'reserve'. The term 'reserve' is defined in s.5 to cover only three particular reserves of members - one each for the Army, Navy and Air Force. The second reading speech ... suggests that the services of members of the particular reserves identified for the purposes of s.7 would not be 'wholly employed by the Commonwealth'. The speech suggests that s.9 was intended to cover these reserves in which the services of members might be 'wholly employed by the Commonwealth' (ie required on a 'continuous full-time basis). Under s.9, if a member of one of the reserves identified in that section is rendering continuous full-time service, and the member intends to seek election, the service may be terminated.[135]

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132 ibid.

133 Professor A R Blackshield, *Transcript*, p. 280.

134 Sir Maurice Byers, *Submissions*, p. S65.

135 Attorney-General's Department, *Submissions*, pp. S191–2.

3.44 The Department submitted that the effectiveness of section 7 to enable officers to seek election depends on the maintenance of the reserves identified in the definition of 'reserve' in section 5 as reserves that do not require members to render full-time service.

3.45 The Department has no information to suggest that the members of those particular reserves may be 'wholly employed by the Commonwealth'. However, the issue cannot be conclusively determined under Commonwealth legislation and any question of whether the reserve forces come within the exemption must be determined on the facts of each case.[136]

3.46 The Committee concludes that there is sufficient ambiguity in this aspect of the exemption to merit a thorough consideration of its operation and effectiveness.

## Approaches to subsection 44(iv): the 'no change' case

3.47 Associate Professor Sharman submitted that no change is necessary to subsection 44(iv) of the Commonwealth constitution because it embodies an important constitutional principle - namely, the executive should not use public funds or public office to attempt to influence a member of parliament.[137]

3.48 Others advocating 'no change' argued that the difficulties of achieving constitutional amendment mean that constitutional reform is not viable. For example, while agreeing that subsection 44(iv) poses

136 ibid.

137 *Submissions,* p. S81.

problems, Associate Professor Black underscored the obstacles to constitutional change:

> From a long study of Australian constitutional and political history I am convinced that constitutional amendment as a means of dealing with anomalies is only politically feasible in the most extreme circumstances...[138]

3.49 He submitted that the primary remedy could be found in:

> a combination of legislative and executive action guaranteeing or implying a sympathetic attitude to the reemployment of public servants or office holders who resigned before nominating for an election and who were subsequently unsuccessful in the poll.[139]

3.50 In addition he considered that the Australian Electoral Commission (AEC) could take a more active part in giving intending candidates such information.[140]

**Committee's conclusion on the 'no change' option**

3.51 The Committee considers that subsection 44(iv) contains so many uncertain elements that the 'no change' option must be rejected. While the Committee believes that it may be possible to take some action to bring to the attention of potential candidates, candidates and members of parliament the hazards of subsection 44(iv), it regards constitutional amendment as the only means of overcoming the problems of that provision.

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138 Associate Professor David Black, *Submissions,* p. S128.

139 ibid.

140 ibid.

3.52 The Committee concludes that the only way to cure the problems posed by section 44 is by constitutional amendment. Options for amendment are considered below.

## Constitutional amendment options

3.53 There was widespread support in submissions and evidence to the Committee for constitutional amendment. Various options were put to the Committee. These included:

- delete from section 44 the words 'of being chosen or' so that a person who holds an office of profit is required to resign only at some point before he or she takes a seat in the parliament - possibly before the declaration of the poll
- amend the constitution to deem a person who holds an office of profit to have vacated the office either before nomination or before the person takes his or her seat in the parliament, depending on the political sensitivity of the office held.

3.54 Other aspects of subsection 44(iv) that require reform are:

- the need to ensure that senators-elect are permitted to hold an office of profit between the time that the writs are returned and the term of the senator-elect commences
- the need to allow certain office holders (for example, assistant ministers and parliamentary secretaries) to sit in the parliament
- and the need to clarify the content of the last paragraph of section 44.

## Option 1: delete from section 44 the words 'of being chosen or'

3.55 As noted above the Committee received persuasive submissions and evidence criticising the unfair and discriminatory nature of subsection 44(iv) in relation to public sector employees. *Sykes v Cleary* clarified what many had long suspected – namely that the phrase 'incapable of being chosen' requires persons affected by subsection 44(iv) to resign from their positions before nominating for election to the federal parliament.[141] Hence the cost exacted from public sector employees, as compared with their private sector counterparts, who wish to exercise their democratic right to stand for election could be very high indeed (see paragraph 3.13 above). Such candidates are deprived of a source of income from nomination to election and if they are unsuccessful, it is possible that they may not be reinstated in their former employment.

3.56 To overcome the inequities visited on an unsuccessful election candidate one solution proposed was to delete from section 44 the words 'of being chosen or'.[142] If such an amendment were carried the relevant part of section 44 would read:

> Any person who:
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> ...
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> shall be ***incapable of sitting*** as a senator or a member of the House of Representatives.

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141 Sir Maurice Byers, *Submissions,* p. S64.

142 Liberal Party of Australia, *Submissions,* pp. S138-9 and *Transcript,* p. 8, Australian Labor Party, *Submissions* p. S184 , Associate Professor Black, *Submissions,* p. S128 and *Transcript,* p. 183, Senator Nick Minchin, *Transcript*, p. 85.

3.57 Under this proposal a candidate would not need to take steps to remove any disqualification until he or she knew the outcome of the election. A public sector employee would only be required to resign from his or her job if he or she was elected. Unsuccessful candidates would not have to resign at all.

3.58 This solution is superficially attractive: it is a simple, brief amendment and it overcomes the problem of unfairness to public sector employees discussed above. Moreover it would probably face fewer obstacles in being accepted at a referendum than other possible amendments. However, it gives rise to an array of other problems.

**Problems inherent in deleting 'of being chosen or'**

3.59 First, such a change would not address the crucial question concerning the meaning of 'office of profit under the Crown'.[143] While the problems would not arise until a few weeks later than under the existing formulation the uncertainty about the application of the provision to a particular person would remain:

> As long as the words 'office of profit under the Crown' are there, they are going to continue to cause doubts and uncertainties.[144]

3.60 The Attorney-General's Department commented:

> ...there must be some doubt about the value of any amendment directed at overcoming the current shortcomings of s.44(iv) which does not go at least some way toward replacing the language

143 The difficulties associated with the meaning of the expression are discussed above – see paragraphs 3.25-3.32.

144 Professor A R Blackshield, *Transcript*, p. 265.

> which ... originated in British statutes dating back to the early eighteenth century.[145]

3.61 The point is reinforced by Mr Cleary's evidence. He described the circumstances in which he decided to nominate for the Wills by-election in 1992 and the way that the disqualification issue was addressed:

> I am a teacher on leave without pay and have been for four years. On the nomination form there is a clause, 'Do you hold an office of profit?' We stopped for a minute and someone said, 'No it couldn't be an office of profit because you don't have the position at this point in time, having been on leave for such a period of time.' We just made a quick check around, and people seemed to think it was not a problem.[146]

3.62 The Committee considers that the response of Mr Cleary and his campaign workers was quite understandable. At that time the provision had not been tested and it is unlikely that many Australians involved in the immediacy of an election campaign (or otherwise) would have reached the correct conclusion. The Committee considers that independent and minor party candidates, without the support available to candidates from the major political parties, could have grave difficulties in interpreting the meaning of the subsection 44(iv). Indeed, as Mr Cleary pointed out, even the candidates nominated by the major political parties in that by-election were found to be disqualified (although under subsection 44(i)).[147] Miss Kelly, too, was endorsed by a major party. These examples highlight the fact that even the backing and resources of the major parties are not necessarily sufficient to ensure compliance with section 44.

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145 Attorney-General's Department, *Submissions*, p. S222.

146 Mr Philip Cleary, *Transcript*, pp. 125-126.

3.63 Second, it should not be assumed that the meaning of 'sitting' is unambiguous. Does it mean simply the physical act of sitting in the parliament? Could a successful candidate continue to hold his or her job from the declaration of the poll until the person is sworn in? It is likely that further litigation would be required to ascertain the meaning of 'sitting'.

3.64 Third, as Mr Lindell pointed out, if this approach were to be adopted there may be a residue of concern that the Crown could have a potential influence over such people during the election campaign.[148]

3.65 Fourth, it is strongly arguable that persons holding certain positions should resign before nominating for election because such offices could be damaged if their occupants were involved in the political controversy that is part of election campaigns. Examples of the positions that may fall into this category could be judicial offices, the governorship of the Reserve Bank and the heads of Commonwealth public service departments. This problem could perhaps be solved by amending legislation that establishes sensitive positions to require the holders of such offices to resign before nominating.[149]

3.66 The Committee heard evidence that other negative repercussions could result from deleting the phrase 'of being chosen or'.

3.67 First, it could have adverse consequences for the electoral system. Mr Burmester noted that this was one of the reasons given by

147 ibid., p. 128.

148 Mr Geoffrey Lindell, *Transcript*, pp. 112–3.

149 Mr George Williams, *Transcript*, p. 38.

the High Court in *Sykes v Cleary* for holding that 'chosen' refers to the date of nomination.[150] The High Court seemed to consider that an interpretation of subsection 44(iv) that permitted candidates to nominate when they were not eligible to sit could adversely affect the electoral system:

> The interpretation just rejected would, if upheld, enable a public servant who falls within par. (iv) in s. 44 to avoid disqualification by resigning from the relevant office of profit after the polling day but before the declaration of the poll. The public servant could be nominated and stand for election and, if he or she secured a majority of votes, have an option to resign and be declared elected or not to resign and be disqualified. The adverse consequences this would have for the electoral process are an additional reason for rejecting the suggested interpretation. The inclusion in the list of candidates on polling day of a candidate who may opt for disqualification may well constitute an additional and unnecessary complication in the making by the electors of their choice. Furthermore, it is hardly conducive to certainty and speed in the ascertainment of the result of the election that it should depend upon a decision to be made by a candidate on or after polling day.[151]

3.68 An additional undesirable consequence of deleting the term 'of being chosen or' is that it could lead to possible abuse of the system. Mr Williams noted that a person may stand for election as a protest measure in the knowledge that, if successful, he or she would not be eligible to take his or her seat.[152] For example, a person who wished to protest against the prohibition on dual citizens holding seats in the federal parliament could stand for election with the intention of refusing to renounce his or her foreign citizenship. A by-election would then be required. The Attorney-General's Department submitted that a person

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150 Mr Henry Burmester, Attorney-General's Department, *Transcript*, p. 77.

151 *Sykes v Cleary* (1992) 176 CLR 77 at 99-100, cited in Attorney-General's Department, *Submissions*, pp. S221–2.

152 Mr George Williams, *Submissions,* p. S174.

who is convicted and awaiting sentence would be eligible to stand for election even though he or she would not be able to take his or her seat under subsection 44(ii).[153] Something like this occurred in the United Kingdom in 1981. Bobby Sands, a member of the Irish Republican Army who was in prison and at the time was on a hunger-strike, stood for, and won, a seat in the House of Commons. Obviously, he could not take his seat.

3.69 If an elected member, who is under a disqualification, were to delay divesting himself or herself of the disqualification an electorate could be unrepresented for a long period. We have noted above examples of circumstances where a candidate could stand for election while under a disqualification as a protest measure with no intention of divesting himself or herself of the disqualification. However, long delays could also occur if, for example, an elected member holding dual citizenship did not move to divest himself or herself of the foreign citizenship until just before the parliament was to sit. The Department of Immigration and Multicultural Affairs estimated that renunciation of citizenship could, in many cases, take months. Thus under this solution, a dual citizen who is required to divest himself or herself of the foreign citizenship and who has not commenced that process until just prior to sitting may not be able to sit in the new parliament for a lengthy period. It is strongly arguable that it is unfair to constituents and undemocratic to adopt a solution that could leave them without representation possibly for months.

153 Attorney-General's Department, *Submissions*, p. S222.

3.70 Such a solution could also lead to abuse of the system by the majority party or coalition of parties. If the disqualification operated strictly by reference to the point at which a member took his or her seat in the parliament, and an elected member remained under a disqualification, a majority in the parliament could grant permission to protect the member who is subject to a disqualification. This could postpone the risk of disqualification and defer the time when a challenge could be made to the person's capability to sit in the parliament.[154]

**Committee's comments on proposal to delete 'of being chosen or'**

3.71 It seems to the Committee that an approach which merely removes the words 'of being chosen or' would create far more problems than it would solve. If a constitutional amendment is attempted, it should seek to achieve a more workable solution than would be achieved by merely deleting the words suggested.

## Option 2: deem a person who holds an office of profit to have vacated the office at an appropriate time

3.72 The Committee took evidence that public sector employees who stand for parliament should be permitted to retain their job until the election outcome is known. Senator Murray argued that a public sector employee who stands for election should be deemed to have vacated the office the day immediately before the day on which he or she becomes a member of parliament. Such a person should not be required to take leave in order to campaign. Senator Murray said that minor party candidates tend to campaign on a part-time basis. He stated that this

154 Mr Geoffrey Lindell, *Transcript*, pp. 112-113.

proposal would not create a conflict of interest with a person's duties in the independent public service. He argued that if private sector employees are able to retain an income during the election period then the same should apply to public sector employees who stand for election.[155]

3.73 The Committee does not accept that a person could continue to work in the public service and campaign for political office. The Committee considers that at a minimum a public sector employee should be required to take leave for the duration of an election campaign.

3.74 Mr George Williams argued that there should be no barrier to public sector employees taking leave without pay or using some form of paid leave in order to run for parliament. He agreed that such persons should not be required to resign until they are actually elected to parliament.[156]

3.75 Professor Blackshield,[157] the Attorney-General's Department[158] and Mr Lindell considered that the best way to overcome the problems presented by subsection 44(iv) is to replace the general expression 'office of profit under the Crown' with a list of offices that are incompatible with membership of the parliament. Mr Lindell stated that the concept of office of profit under the Crown should be replaced by:

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155 Senator Andrew Murray, *Transcript,* pp. 19-20.

156 Mr George Williams, *Transcript,* p. 29. Associate Professor Gerard Carney agreed that public sector employees should only be required to resign from their positions if they are successful at the election - *Transcript*, p. 157.

157 Professor A R Blackshield, *Transcript*, p. 261.

158 Attorney-General's Department, *Submissions*, p. S159.

> ...a detailed and more specific list of offices and employment which would be regarded as inconsistent with the membership of the parliament....[P]ersons who hold such offices would not be required to resign them in the uncertainty as to whether they were going to be elected; they would just simply cease to hold them if it turned out that they were elected.[159]

3.76 Under such a scheme persons who hold the specified offices would cease to hold the offices before questions relating to conflict of interest and conflict of duties and questions concerning the influence of the executive over the parliament could arise.[160]

3.77 Mr Lindell noted that under a provision of this kind Mr Cleary could have stood for election without having to resign. The constitution would have terminated his employment in the Victorian teaching service on his election. If he had not won the seat he would not have relinquished his job.[161]

3.78 The Attorney-General's Department supported amendments along the same lines, namely:

- a member of Parliament who subsequently becomes the holder of any specified 'public-sector' office or position, or the holder of a position in any specified kind of public-sector organisation, would be disqualified; and
- a candidate holding such an office or position who becomes a member of the Parliament would cease to hold the office of profit at some point before the possibility of 'double-dipping' or divided loyalty could arise.[162]

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159 Mr Geoffrey Lindell, *Transcript,* pp 111-112. Mr Philip Cleary also supported this kind of approach - see *Transcript,* pp. 126.

160 Mr Geoffrey Lindell, *Transcript*, p. 112.

161 Mr Geoffrey Lindell, *Transcript*, p. 112.

162 Attorney-General's Department, *Submissions,* pp. S167-168.

3.79 Mr Burmester noted that this is the basic approach proposed by previous inquiries into section 44.[163]

3.80 While supporting the general thrust of this approach, Professor Blackshield argued that the provision itself should be in the constitution but that the list of positions on which it operates should be left for the parliament to prescribe rather than be included in inflexible constitutional provisions.[164] A list of prescribed positions of this kind should be capable of adjustment from time to time because the subject matter is in constant flux:

> We have had many variations in the past 20 years on corporatisation and privatisation, and the nature of public authorities and their relationship to the Crown is something that has been constantly changing. Whatever provision you make of this kind has to be capable of being adapted to such changes. It should be under the parliament's control, not stuck in the constitution where it can only be changed by referendum.[165]

**Constitutional versus legislative provisions to determine offices that are incompatible with membership of parliament**

3.81 The Committee notes that the general approach of deeming a person holding an office of profit to have vacated the office at an appropriate time had widespread support. In general terms the Committee considers that for most occupants of public sector jobs the question of executive influence on any future parliamentary career is unlikely to be an issue and questions of 'double-dipping' and divided

163 Mr Henry Burmester, Attorney-General's Department, *Transcript,* p. 67.

164 Professor A R Blackshield, *Transcript,* pp. 261-262.

165 Professor A R Blackshield, *Transcript,* p. 268.

loyalty would not come into play until after the polling day when the person was elected.

3.82 It appears to the Committee that within this option two possible courses are available – either:

- to include in the constitution a statement of the *categories* of office that are deemed vacant immediately before an incumbent of one of those positions begins to receive a parliamentary allowance, or

- to provide in the constitution that positions, specified by the parliament, are deemed vacant immediately before an incumbent of one of those positions begins to receive a parliamentary allowance.

3.83 The first approach is similar to that recommended by the Senate Standing Committee on Constitutional and Legal Affairs in 1981 and by the Constitutional Commission in 1988. The two bodies recommended that subsection 44(iv) be deleted and replaced by a new section in the constitution which would list the categories of positions that would be automatically deemed to have been vacated in the event that the occupant of any of the positions mentioned became a member of parliament.

3.84 The Senate Standing Committee on Constitutional and Legal Affairs recommended that the new constitutional provision should provide:

> Any person who -
>
> (i) is employed at a wage or salary in the Public Service of the Commonwealth or in the permanent Defence Force of the Commonwealth;

(ii) holds any position in an authority established under an Act of the Parliament, unless the authority has been prescribed for the purposes of this section, and he or she has been appointed by the Parliament, and receives no remuneration (other than reimbursement of reasonable expenses) from such an appointment;

(iii) is a member of the Parliament of a State or of a Territory;

(iv) is employed at a wage or salary in the Public Service of a State or as Territory; or

(v) holds any position with an authority or a State or of a Territory, unless the authority has been prescribed for the purposes of this section and he or she receives no remuneration (other than reimbursement of reasonable expenses) from such an appointment;

shall be deemed to have ceased such employment or resigned such membership at the date he or she becomes entitled to an allowance under section 48 of this Constitution.[166]

3.85 The Constitutional Commission proposed that the new constitutional provision should provide as follows:

45. Any person who -

(a) holds a judicial office under the Crown in right of the Commonwealth or a State or a Territory of the Commonwealth;

(b) is an officer of or is employed in the public service of the Commonwealth or is a full-time officer or member of the Defence Force of the Commonwealth;

(c) is a public authority or is a member of a public authority;

(d) is a member of the Parliament of a State or of the legislature of a Territory of the Commonwealth;

(e) is an officer of or is employed in the public service of State or Territory of the Commonwealth; or

166 Senate Standing Committee on Constitutional and Legal Affairs, *Report, The Constitutional Qualifications of Members of Parliament,* Appendix 2, AGPS, 1981, p. 60.

> (f) is an officer of or is employed by a public authority which has been declared by the Parliament to be a prescribed authority for the purposes of this paragraph -
>
> ceases to be so employed or to hold that office on the day immediately preceding the day before he becomes entitled to an allowance as a senator or member of the House of Representatives. [167]

3.86 The Constitutional Commission recommendations appear to envisage circumstances whereby the parliament would be empowered to add to the list of positions that are to be declared vacant if the holder of the position is elected to the parliament.

3.87 Each report also recommended that if any member of parliament is employed in any of the positions mentioned, his or her seat is immediately vacated.

3.88 The second course available would be to adopt the suggestion proposed by Professor Blackshield. He suggested that a provision be included in the constitution that would provide for persons who hold certain offices and who subsequently become members of parliament, to be deemed to have ceased to hold any such office immediately before its occupant becomes a member of parliament. The list of positions to which this constitutional provision would apply could be set out in legislation or in a schedule to the constitution which can be amended by the parliament.[168] A list of prescribed positions of this kind should be capable of adjustment from time to time because the subject matter is in constant flux.

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167 Constitutional Commission, Report, 1988, Appendix K, Bill No. 8 (p. 1001).

168 Professor A R Blackshield, *Transcript,* pp. 261-2

3.89 The Committee considers that the approach proposed by Professor Blackshield is in some ways similar to that put forward by the Constitutional Commission. The Commission's recommendation embodied some flexibility in paragraph 45(f) to enable the parliament to prescribe authorities whose officers and members would be deemed to have resigned on becoming entitled to a parliamentary allowance (see paragraph 3.85).

3.90 However, the Committee is disposed towards Professor Blackshield's point that the subject matter is constantly shifting and changing and any list could rapidly become outdated. Further support for this view may be derived from the expression 'is an officer of or is employed in the public service of the Commonwealth...' used in the Commission's draft. The Committee agrees with the Attorney-General's Department that terminology of this kind would encompass persons employed under the *Public Service Act 1922* but may not cover employees of bodies whose staff are employed under other arrangements.[169] The Committee considers that on the one hand this expression is not sufficiently precise, and on the other, could become rapidly out of date in the changing landscape of public sector employment.

3.91 The Committee considers it is very difficult to be sure that terminology that seems appropriate today would be equally applicable in 15 or 20 years time. For these reasons the Committee favours the approach proposed by Professor Blackshield. The Committee notes that

169 Attorney-General' Department, *Submissions*, p. S 168.

this is the kind of approach used in the United Kingdom and in Western Australia.

3.92 One other issue relating to this proposal concerns the Committee. It seems that some public sector positions are so sensitive that their occupants should be required to relinquish the office even before nominating for election. Examples of the offices that may fall into this category would include judicial offices, the governorship of the Reserve Bank, the heads of Commonwealth public service departments and the Director of Public Prosecutions. Therefore special provision should be made to ensure that the occupants of such offices relinquish the office before nominating for election.

3.93 In effect, there may be two categories of public sector employees - those whose positions are compatible with being a candidate for the federal parliament but are incompatible with being a member of parliament and those who should relinquish the office before nominating.[170] For this reason it may be necessary to develop two schedules of public sector offices - those that must be vacated before the holder of the office *nominates* as a candidate for election and those that must be vacated before the holder takes up his or her seat. An alternative to the first list would be to include in legislation creating a sensitive office a provision that would require the holders of those offices to resign before nominating.[171]

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170 See Professor Colin A Hughes, *Transcript*, p. 168; the Hon Elizabeth Evatt, *Transcript*, pp. 176-177; Professor A R Blackshield, *Transcript*, p. 266.

171 Mr George Williams, *Transcript,* p. 38.

3.94 The Committee considers that the most appropriate amendment is to delete the existing subsection 44(iv) and to replace it with a requirement that the parliament enact legislation providing that the occupants of certain positions are deemed to resign from those positions immediately before they begin to receive a parliamentary allowance. As new positions are created and old ones abolished amendments would need to be made to the list of positions that are deemed to be vacated.

3.95 The Committee further considers that some positions must be protected from political controversy at all times. The occupants of those positions deal with such sensitive matters that no conflict of interest - real or apparent - can be allowed to arise. Therefore the occupants of such positions should be required to resign before nominating. This could be achieved in one of two ways. First, the constitutional amendment could require the parliament to make laws to deem highly sensitive positions to be vacated immediately before nomination. The same result could be achieved by statute. Positions of such sensitivity are usually established within a statutory framework. Those statutes could require the occupant of such a position to resign before he or she nominates for election to the federal parliament.

3.96 The separation of powers doctrine in our system makes it imperative that judicial office-holders be required to resign before standing for election. Since this is such an integral element of our constitutional system the Committee considers that the constitution itself should provide that a judicial office holder who wishes to stand for election must resign from that office before nominating for elected office.

Recommendation 3:

The Committee recommends that subsection 44(iv) be deleted and new provisions be inserted in the constitution.

One provision should require a person who holds a judicial office under the Crown in right of the Commonwealth or a state or a territory to resign from the office before he or she nominates for election to the federal parliament.

Under the second provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office nominated for election to the Senate or the House of Representatives.

Under the third provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office were elected to the Senate or the House of Representatives.

Recommendation 4:

The Committee recommends that if a senator or a member of the House of Representatives accepts any of the offices covered by the new provisions he or she should be disqualified from membership of the parliament.

3.97 In making this recommendation, the Committee notes that a similar approach has been adopted in Western Australia in respect of most public employees. However, if the holder of an office in a more limited class of offices is elected to parliament, the election is void.[172] Also, about 40 years ago the British House of Commons took the step of

172 See sections 34-38 of the *Constitution Acts Amendment Act 1899*

codifying the positions that are incompatible with membership of the House of Commons. Disqualification by office or service is regulated by the House of Commons Disqualification Act 1975 which re-enacted the House of Commons Disqualification Act 1957. The latter Act codified the statutory provisions that attached disqualifications to particular positions.[173]

3.98 If recommendations 3 and 4 are accepted there may be a need to reconsider state and/or Commonwealth legislation dealing with the re-instatement of unsuccessful candidates, to determine the need for consequential amendments.

## Other aspects of s44(iv) that require reform

### Allow senators-elect to hold an office of profit between the time the writs are returned and the senator receives a parliamentary allowance

3.99 If recommendation 3 is accepted and the resulting referendum is successful the position of senators-elect would be ameliorated. Only those persons seeking election to the Senate who hold offices in the highly sensitive category would be obliged to resign before nomination. If recommendation 3 is not accepted, the position of senators-elect requires attention.

3.100 The Committee heard a good deal of evidence on the matter of senators-elect. Most evidence suggested that a cautious interpretation of section 44 would prevent senators-elect from holding an office of profit

173 *Halsbury's Laws of England*, Vol. 34, 4th edn., p. 423.

between the time they were elected and the time they took their seats.[174] If this interpretation is correct, the Committee believes that this result is unfair. The political parties could test this interpretation by arranging for a senator-elect to take an office of profit and arranging a challenge. In view of the casual vacancy provision in section 15 of the constitution, the person who was the subject of such a challenge could be assured of being re-appointed to the casual vacancy by his or her party if the cautious interpretation is upheld. However, in view of the small number of persons disadvantaged by this interpretation (see Table 1) the Committee does not propose to recommend a specific amendment to overcome the problem if indeed it is a problem. If the Committee's preferred solution is adopted the problem would be circumvented.

**Clarify the constitutional situation of assistant ministers and parliamentary secretaries**

3.101 Until 1987, the prevailing interpretation of section 44 restricted the capacity of prime ministers to appoint and pay assistant ministers (who were not sworn in as ministers of state) to administer departments of state in order to help discharge the heavy load carried by ministers. It was considered that such appointment and payment would result in the disqualification of those persons as members of parliament. In 1987 the government sought the opinion of the Solicitor-General on a scheme to enable the appointment under section 64 of the constitution, of more

174 Mr George Williams, *Transcript,* p. 40, Senator Nick Minchin, *Transcript,* p. 47, Mr Geoffrey Lindell, *Transcript,* p. 111, Mr Harry Evans, *Transcript,* p. 251, K Cole, O*ffice of profit under the Crown' and membership of the Commonwealth Parliament*, Issues Brief No. 5, Department of the Parliamentary Library, 1993, pp. 18-19.

than one minister to administer a department of state.[175] In the Solicitor-General's opinion:

> ...section 64 enables the Governor-General to appoint more than one Minister of State to administer a department of State...I see no room in section 64 for any implication that only one Minister may administer a department.[176]

3.102 While the re-interpretation of the combined effect of section 44 and section 64 appears to have overcome the difficulties previously considered to prevent the appointment of assistant ministers, problems remain concerning the appointment and payment of parliamentary secretaries. Since the 1950s, various prime ministers have tried to appoint parliamentary secretaries from the Commonwealth parliament to assist ministers with their work loads. To avoid the consequences of subsection 44(iv), parliamentary secretaries have not been remunerated for their work although they have been paid expenses.[177]

3.103 The Committee believes that if constitutional amendment is sought, it would be desirable to clarify the position of assistant ministers and parliamentary secretaries. If the Committee's recommendation to delete subsection 44(iv) and substitute a new provision is successful, there would be no doubt about the compatibility of those offices with membership of the parliament.

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175 The solution had been proposed by Professor Geoffrey Sawer - see K Cole, O*ffice of profit under the Crown and membership of the Commonwealth Parliament*, Issues Brief No. 5, Department of the Parliamentary Library, 1993, pp. 7-8.

176 *In the matter of appointment of ministers and section 64 of the Constitution:* Opinion by the Solicitor-General, Mr Gavan Griffith, 30 June 1987, cited in K. Cole, ibid.

177 For a history of the efforts to establish a system of parliamentary secretaries, see K. Cole, op cit, pp. 9-11.

3.104 The Committee is conscious that, without placing some restriction on the number of parliamentarians who can be appointed to executive positions, the way would be open for the executive to appoint a very large number of persons to such positions thereby giving the executive the opportunity to wield excessive influence over the legislature. Professor Colin Hughes drew attention to this issue, arguing that 'some of the circumstances in which the prohibition was originally developed are returning.'[178] He argued:

> ...past uncertainty about the appointment of Assistant Ministers and/or Parliamentary Secretaries seems to have been resolved...The prohibition should be deleted from the Constitution and replaced by a comparable statutory prohibition in which categories of employment and, possibly, specific offices are proscribed, preferably in one or more schedules.[179]

3.105 Professor Hughes also stated:

> ...there is a case for considering the original mischief: the executive buying itself excessive influence in the legislature which ought to monitor its performance and hold it accountable for actions and policies...In 1981 the question was thought to be how the executive could get more help with its expanding responsibilities by recruiting (and paying) more Members of Parliament, but it may be that overturning the old perception that the Constitution forbade such things has allowed too much help to be acquired and the optimum balance between two of the branches of a balanced constitutional system has been put at risk. Undoubtedly there is a place for junior Ministers and/or Parliamentary Secretaries in the political system; the question is how many will be too much for maintaining that balance.[180]

3.106 He continued:

> ...unless there is a limit, scenarios could be devised under which an obviously excessive part of the governing party (or coalition of

178 *Submissions,* p. S95.

179 *Submissions,* p. S95.

180 *Submissions,* pp. S95–6.

> parties) is locked into uncritical support of the executive and all its works.[181]

3.107 The Committee notes that if recommendations 3 and 4 are adopted the problems that until 1987 were thought to prevent the appointment of assistant ministers and the problems that presently prevent payment of parliamentary secretaries would disappear. The impediments would be eliminated because those offices would not be on the list of offices deemed to be vacated in the event that the holder of a listed office nominated for or was elected to the federal parliament. There would therefore be no limit on the number of members of parliament who could be appointed to the positions of minister, assistant minister or parliamentary secretary and paid accordingly. The Committee considers that there should be a constitutional restriction on the number of such positions to ensure that the executive does not gain undue influence over the legislature. As at late June 1997, approximately 17 per cent of all members of parliament hold positions of minister, assistant minister or parliamentary secretary. Under the Keating government, 17.9 percent of all members of parliament held such positions in the executive government.[182] In the Committee's view it is not unreasonable that 20 per cent of parliamentarians should hold executive office. However, the Committee believes that the proportion of parliamentarians who are also members of the executive should not exceed this number.

Recommendation 5:

181 *Submissions,* p. S96.

182 Information provided by the Parliamentary Library.

The Committee recommends that the number of members of parliament who hold executive office (ministers, assistant ministers and parliamentary secretaries) should be limited, under the constitution, to a maximum of 20 per cent of the total membership of the parliament.

**Other changes to section 44: amend the last paragraph**

3.108 The Committee notes that if recommendations 3 and 4 are successful there would no longer be a need to retain the last paragraph of section 44 and it would therefore be deleted as part of the referendum to delete subsection 44(iv) of the constitution. Parliament could retain exemptions in relation to some offices (for example for ministers and assistant ministers) simply by excluding those offices from the list of positions that are deemed vacated at a particular time. However, if those recommendations do not proceed the Committee considers that the exemption for state ministers and for members of the imperial armed services should be deleted. Finally, as noted earlier, the Committee considers that the exemption that is currently interpreted as applying to reservists should be thoroughly reviewed to ensure that it is effective to exempt members of the armed forces reserves from the operation of subsection 44(iv).[183]

Recommendation 6:

The Committee recommends that:

- the exemption that covers ministers of state for a state should be deleted

183 If the amendment does not proceed some Committee members considered that section 64 of the constitution should be reviewed to make explicit that more than one member could administer a department of state.

- the exemption that currently exists for members of the imperial armed services should be deleted.

## Legislative action

3.109 The Committee's terms of reference direct it to inquire into and report on action, including legislative or executive action, to address the problems relating to the operation of subsection 44(iv).

3.110 There is a body of opinion that suggests that the limits to legislative changes that might ameliorate the effects of subsection 44(iv) have been reached. The Attorney-General's Department emphasised that legislation has already been enacted to deal with the problems and there is limited scope for further legislative initiatives.[184] Mr Lindell said:

> ...there is very little scope left indeed for resolving or alleviating the problems that exist in this area by the legislative or administrative route. I am in that camp of people who believe that constitutional amendments are still necessary in this area.[185]

3.111 Professor Blackshield put the view that there may be some possibility of alleviating the problems with some legislative tinkering, but these would only touch on one problem 'in a nest of problems', and the whole of section 44 needs to be replaced and that can only be achieved by constitutional amendment.[186]

3.112 The Attorney-General's Department noted that two kinds of approach have been adopted to try to relieve the problem for Commonwealth public sector employees. One approach seeks to

184 Attorney-General's Department, *Submissions,* p. S170.

185 Mr Geoffrey Lindell, *Transcript,* p. 105.

186 Professor A R Blackshield, *Transcript,* p. 275.

prevent payment to public office holders at the relevant time. The second approach provides for resignation and reappointment. The first approach is demonstrated in the *Remuneration Tribunal Act 1973*. It includes provisions that seek to prevent the subsection 44(iv) disqualification from applying to public office holders who are also members of parliament or candidates by precluding the payment of remuneration to such persons. However, this provision only applies to those office holders who are remunerated under that Act - clearly a limited class of public sector employees.

3.113 A similar approach is taken in the *Parliamentary Secretaries Act 1980*. It provides that parliamentary secretaries may be reimbursed for expenses but may not be remunerated. The *Defence (Parliamentary Candidates) Act 1969* provides for the discharge and reinstatement of members of the Defence Forces who have stood for election to the legislatures specified in that legislation.[187]

**Problems with legislative action**

3.114 The legislative route is problematic. One problem relates to the fact that in order to comply with subsection 44(iv) a candidate must ensure that his or her resignation is effective. So for instance Miss Kelly apparently failed to comply with subsection 44(iv) because her resignation did not take effect until after the close of nominations.[188] The constitutional amendment recommended above (that the 'office of profit' should be deemed to be vacated at a relevant point) would circumvent

187 Attorney-General's Department, *Submissions,* pp. S171-172.

188 Attorney-General's Department, *Submissions,* p. S172.

this problem because the employee in question would not need to take any action himself or herself.

3.115 A second problem arises because increasingly public sector employees are employed under a variety of arrangements. The Attorney-General's Department alluded to this problem:

> ...amendments...would not affect persons who were not employed or appointed pursuant to one of the Acts in question.[189]

3.116 The Committee agrees that the legislative path is beset with problems and is not a satisfactory solution to the problems posed by subsection 44(iv).

## Uniform legislation

3.117 *Sykes v Cleary* confirmed that subsection 44(iv) also applies to state and territory public sector employees. The Commonwealth can do little to overcome the problems for such employees because they are outside the legislative reach of the Commonwealth. One solution suggested to the Committee was to encourage the enactment of uniform legislation in all jurisdictions to give all public sector employees the right to be reinstated in their jobs if they stand for election but fail to win a seat.

3.118 The possibility of uniform legislation was referred to the Standing Committee of Attorneys General in 1993 and model provisions were drafted for consideration by the states and territories.[190] The Attorney-General's Department advised the Committee that although the

189 *Submissions,* p. S173.

190 AEC, *Submissions*, p. S31, AEC, *Transcript*, p. 63.

model provisions were not adopted by all jurisdictions, legislation does exist in all states and territories to facilitate the reappointment of public servants who resign in order to stand for election. There are no plans to raise the matter before the Standing Committee of Attorneys General again.[191]

3.119 The Committee has some concerns about some of the state legislation that provides for reinstatement. Some state legislation appears, in effect, to guarantee reinstatement. For example, under the Victorian provisions an unsuccessful candidate is deemed not to have ceased to be an officer. In NSW, reappointment seems to be virtually mandatory - an unsuccessful candidate is deemed to have continued to be an officer as if he or she never resigned. In other states for instance Queensland, Tasmania, Western Australia, South Australia, the ACT and the Northern Territory, reappointment is discretionary.

3.120 The Attorney-General's Department suggested that legislation that guarantees reinstatement risks infringing subsection 44(iv).[192] It is arguable that if a person utilised such provisions he or she had not really vacated the office and therefore did not comply with the requirements of subsection 44(iv).[193] Mr Lindell said:

> The problem...is that the more you make that a right, the more it looks as though you have not relinquished your office of profit. The High Court would see that as a problem, I think .[194]

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191 Attorney-General's Department, *Submissions*, pp. S193-4.

192 Attorney-General's Department, *Submissions*, p. S172.

193 Mr Geoffrey Lindell, *Transcript,* p 117; Associate Professor Gerard Carney, *Transcript*, p. 157.

194 Mr Geoffrey Lindell, *Transcript,* p. 117.

3.121 The Committee is not concerned that there is some variation among the states and territories in the provision that is made for the reinstatement of unsuccessful candidates for parliamentary office. This legislation also applies to candidates for state legislatures and it is understandable that not all legislatures would want the same conditions. However, the Committee is concerned that the legislation in some states may proceed so far down the path of guaranteeing reinstatement that a successful candidate for the Commonwealth parliament could be challenged on the ground that he or she had not in fact resigned from his or her 'office of profit'. Again, the Committee emphasises that its primary concern is to ensure the stability and integrity of the parliamentary system.

Recommendation 7:

If the constitutional amendment to delete subsection 44(iv) does not proceed the Committee recommends that the Attorney-General write to those states where there is a concern that the legislation guarantees reinstatement and request that state parliaments take such action as is necessary to ensure that the relevant legislation does not infringe subsection 44(iv).