

## CHAPTER 1

# Introduction

### TERMS OF REFERENCE

#### 1.1 On 7 March 1979 the Senate resolved as follows:

That the following matter be referred to the Standing Committee on Constitutional and Legal Affairs:

- (a) the desirability of amending s.44(iv) of the Constitution in the terms proposed by the Constitution Alteration (Holders of Office of Profit) Bill 1978 or otherwise; and
- (b) the desirability of changes to other provisions of the Constitution relating to the qualification and disqualification of Members of Parliament.<sup>1</sup>

On 28 February 1980 Senator Mason, by way of a motion in the Senate, sought a re-examination by the Government of

the requirement, contained in Public Service General Order 3/D/4, that an officer or employee of the Public Service who wishes to nominate for election to a House of Parliament must resign 'before nomination', on the ground that the wording and effect of that provision may be contrary to the provision of section 44(iv) of the Constitution, which provides that any such person, holding an office of profit under the Crown, shall be incapable of being 'chosen or of sitting' as a Senator or member of the House of Representatives, in relation to which a conditional resignation, contingent upon being chosen, might be regarded as sufficient.<sup>2</sup>

On the motion of Senator Missen, Chairman of this Committee, the motion was amended so that, instead of a request being made to the Government for re-examination of General Order 3/D/4, the question was referred to this Committee to be considered as part of the reference on the qualification and disqualification of Members of Parliament. The motion, as amended, was passed.<sup>3</sup>

### CONSTITUTIONAL PROVISIONS

1.2 The constitutional provisions with which we have been primarily concerned during the course of the inquiry are sections 16, 34, 44 and 45. They are the provisions directly concerned with the qualification and disqualification of members and with the effect of a disqualification, and provide as follows:

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

- (i) He must be of the full age of twenty- one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:
- (ii) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

44. Any person who—

- (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

- (ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or
- (iii) Is an undischarged bankrupt or insolvent: or
- (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: or
- (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons: 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.

45. If a senator or member of the House of Representatives—

- (i) Becomes subject to any of the disabilities mentioned in the last preceding section: or
- (ii) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or
- (iii) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

**1.3** It may be thought that a consideration of the qualifications of members of Parliament should give some attention to the question of the practical qualifications of members to carry out the duties of their office and, particularly, those of a minister. We refer here to such matters as educational qualifications, relevant vocational experience and management training. While we acknowledge that it is arguable that these considerations may be significant in improving the quality of membership of Parliament, they are not within the terms of reference of this inquiry. It may be that Parliament should consider examining this issue separately.

## NATURE OF PROBLEMS AND BACKGROUND TO INQUIRY

**1.4** *Offices of profit.* As indicated in the original terms of reference, the impetus to the inquiry was the Constitution Alteration (Holders of Office of Profit) Bill 1978, a Private Member's Bill, introduced into the Senate on 15 November 1978 by Senator Colston.<sup>4</sup> The purpose of the Bill is to amend the Constitution by adding at the end of s. 44 the following paragraph:

Sub-section iv. shall not prevent a person who holds an office of profit under the Crown from being chosen as a senator or as a member of the House of Representatives but a person who holds such an office shall be incapable of sitting or of receiving any allowance as a senator or as a member of the House of Representatives.

The Bill lapsed at the dissolution of the House of Representatives on 18 September 1980 and, on 5 March 1981, Senator Colston introduced the Constitutional Alteration (Holders of Office of Profit) Bill 1981 which is in the same form as the 1978 Bill.<sup>5</sup>

**1.5** Senator Colston's concern is for the disadvantaged position of public servants, both Commonwealth and State, who wish to seek election to the Commonwealth Parliament. To comply with s. 44 (iv), and in line with the prevailing interpretation of the word 'chosen' in s. 44, all persons who hold an office of profit under the Crown must resign before contesting a Commonwealth election. However, except in New South

Wales, the re-appointment of all such office-holders is a discretionary one. The effect of such a situation is to severely disadvantage public office-holders who, in order to seek election, must place their livelihood in jeopardy. This issue is discussed in detail in Chapter 5 and we make recommendations for constitutional change to overcome these problems. In Chapter 5 we also discuss the position of senators-elect and, with one exception, the several categories of persons who are excluded from s. 44 (iv) by the proviso.

**1.6 Assistant ministers.** The exception, Ministers of the Crown, is dealt with in Chapter 6. Chapter 6 addresses itself particularly to the issue of assistant ministers or parliamentary secretaries in the context of s. 44 (iv) and other relevant constitutional provisions, principally s. 64. In that chapter we discuss, in their historical context, the difficulties which have been experienced throughout the existence of the Commonwealth in appointing and, more especially, adequately remunerating, assistant ministers. Having discussed several options which exist within the present constitutional framework, we point out the effect which the constitutional amendments we propose in Chapter 5 will have in enabling appointment and proper remuneration of assistant ministers.

**1.7 Age, citizenship, residence and allegiance.** The remaining chapters each discuss a single ground of disqualification as set down in s. 44 or s. 45. In Chapter 2 our major concern is with the problem of unsought dual nationality, which is currently a bar to membership of the Parliament. Having discussed the complexities of this problem, we make recommendations which, in our view, will overcome the current unsatisfactory elements of the problem, yet still provide the necessary safeguards to ensure the allegiance to Australia of candidates and members of Parliament. We also discuss age, residence and the status of British subjects, as they affect candidature for, and membership of, Parliament, and make some recommendations in relation to them.

**1.8 Criminal offences.** Chapter 3 deals with s. 44 (ii), disqualification on grounds of treason or conviction for a criminal offence. We are here concerned especially with the relevance of the criterion set down in relation to criminal offences, given the considerable changes which have occurred in the criminal law since Federation. A further concern is the lack of consistency in setting penalties within the several Australian jurisdictions and the effect this has on the operation of this criterion. In addition, Chapter 3 discusses the imprecision of the expression 'attainted of treason' and makes recommendations for constitutional amendment to make the disqualifications currently in s. 44 (ii) more relevant to modern conditions.

**1.9 Bankruptcy and insolvency.** Chapter 4 deals with those provisions disqualifying candidates and members of Parliament who become bankrupt or insolvent (s. 44 (iii)) and with members and senators who take the benefit of any law relating to bankrupt and insolvent debtors (s. 45 (ii)). Both of these provisions appear to have an uncertain scope of operation because of the difficulties of interpreting the language used therein. While there are persuasive practical reasons for clarifying the meaning and scope of these provisions, we have come to the conclusion that they should both be deleted from the Constitution. The prevailing attitude towards debt, and the increasing uncertainty of economic conditions, make both provisions inappropriate as a disqualification. Furthermore, we consider that they no longer indicate the suitability or otherwise of a candidate or member of Parliament, and hence no longer serve any useful purpose.

**1.10 Pecuniary interests.** Chapter 7 is concerned with the rather vexed and complex issue raised by s. 44 (v) and s. 45 (iii): the pecuniary interests of members of Parliament. The provisions in s. 44 (v) disqualify members who are government contractors, whereas s. 45 (iii) is directed at professional service rendered to the Commonwealth or

other services rendered in the Parliament for a fee, viz. bribery. We focus on s. 44 (v), noting the uncertainties surrounding the scope and intendment of the provision, referring to the decision by Barwick C. J. in the *Webster* case<sup>6</sup> which severely restricted its application and was subsequently widely criticised, and comment on the provision's still-wide area of potential application. We conclude that the whole question of members' pecuniary interests is best dealt with by legislation rather than entrenched constitutional provisions and recommend that the present provisions be replaced by a head of power enabling Parliament to legislate on the whole question of pecuniary interests and improper influence.

**1.11 Procedural questions.** Chapter 8 examines the various procedural questions which arise as a consequence of a breach of ss. 44 and 45 and notes the different effects of a breach as between the two sections. The mechanisms by which an alleged breach may be tested, viz. ss. 46 and 47 of the Constitution, are discussed, as is legislation enacted pursuant to those provisions. Some difficulties and anomalies relating to the various provisions are alluded to, and we make a recommendation in relation to the common informer provisions and s. 203 of the *Commonwealth Electoral Act*, 1918.

## OUTCOME OF INQUIRY

**1.12** Our detailed consideration of the constitutional provisions relating to the qualification and disqualification of members of Parliament has led us to make a series of recommendations which, if implemented, will have the effect of removing almost all of the existing provisions. Those few provisions whose purpose requires retention within the constitutional framework are, according to our recommendations, to be replaced by clearer and more explicit language. A useful comparison, in table form, of the existing constitutional provisions and those which would result from the implementation of our recommendations can be found at pages xii–xiii.

**1.13** In deciding to recommend a substantial simplification of the constitutional provisions relating to qualification and disqualification, our motivation has been to achieve a less rigid arrangement so that the question of suitability for parliamentary office can be determined in accordance with changing social conditions. In many cases, we seek to achieve this simply by leaving the matter of a particular person's suitability to the judgment of the electorate. In others, our recommendations seek to deal with some aspects of the matter of suitability by means of legislation, which can, if necessary, be amended to meet changing social conditions and perceptions. The nature of the problems we have been considering during this reference, and the approach which we have taken in reaching solutions, was aptly stated by Professor Sawyer in his submission to us:

The subject of qualifications and disqualifications of senators and members is in general not suited for inclusion in the rigid parts of the Constitution. It is necessarily intricate and technical, and has to operate in relation to a body of public and private law (for example, statutory governmental corporations and commercial private corporations) and to social conditions which are in constant flux. If general in form, such provisions give rise to numerous problems of interpretation, and if precise they rapidly become out of date and irrelevant.<sup>7</sup>

## CONDUCT OF INQUIRY

**1.14** In April 1979, we placed advertisements in the national press seeking submissions from the public on the terms of reference. In addition, we wrote to a wide

range of organisations such as State and Federal public service employees' unions, relevant State and Federal departments, and academics. The response, some 18 submissions, which are listed in Appendix 2, was disappointing; nevertheless, among the submissions received were some valuable insights into the problems with which the inquiry has been concerned, and we have referred to them where relevant in our deliberations.

**1.15** To assist us in our discussion of the important question of assistant ministers, we appointed Mr David Solomon as our adviser. His contribution has been of great assistance to us. We also wish to acknowledge the assistance of the Secretary to the Committee, Christopher Fogarty, and the Research Officer, Tim Dodson. We are grateful to the staff of the Parliamentary Library who have, as usual, provided ready assistance on many occasions.

### **Note on terminology**

**1.16** Throughout this Report, unless the context otherwise makes clear, 'member' indicates both senators and members of the House of Representatives.

### **Notes and References**

1. Australia, Senate, *Journals*, 1978-79, No. 84, p. 597.
2. Australia, Senate, *Journals*, 1978-79-80, No. 153, p. 1163.
3. *ibid.*
4. Australia, Senate, *Journals*, 1978, No. 70, p. 472.
5. Australia, Senate, *Journals*, 1980-81, No. 13, p. 128.
6. *In re Webster*, (1975), 6 ALR 65.
7. Submission No. 5, p. 1.