CHAPTER 5

Offices of profit: public servants and other public office holders (s. 44 (iv))

OFFICES OF PROFIT UNDER THE CROWN

(a) Constitutional terminology

5.1 Section 44 (iv) of the Constitution is expressed in the following terms:

> Any person who—
> (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:
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Section 44 also contains a proviso to sub-section (iv) as follows:

> 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.

In this chapter we consider the operation of s. 44 in relation to offices of profit generally. In the next chapter we consider the specific problems which arise in relation to the Queen's Ministers of State.

(b) Problems of definition

5.2 The expression 'office of profit under the Crown' is one which is uncertain in scope and application. It originates from British statutes dating back to the early eighteenth century which sought to prevent the use of Crown patronage to win the support of members of the House of Commons and has been described as a 'relic of a bygone age in government administration'.[1] The imprecision of the language employed has resulted in some problems of definition relating to some of the major elements in the expression. Professor Lane describes an 'office' as a public position having a certain tenure, duties and emolument, and that definition appears uncontroversial.[2] The meaning of 'profit' is a little more elusive and best explained negatively: it appears that an office is not one of profit if it has never had attached to it anything in the nature of a salary or fee, and no holder of the office could claim payment of such emolument under any circumstances. Payment of reasonable expenses incurred in carrying out an office does not make it one of profit.[3] However, the fact that the holder of an office is not paid any emolument which otherwise attaches to the office does not affect his position as the holder of an office of profit.[4] The major practical difficulties which arise in relation to the element of profit are discussed in Chapter 6, dealing with the appointment of assistant ministers.

5.3 The major definitional problem which arises in the context of this chapter is whether a particular office is 'under the Crown'. In both the Commonwealth and the States there are some classes of office which are clearly offices of profit under the Crown. These include ministers and public servants.[5] The uncertainty lies at the margins of government employment. Thus, in the area of public authorities and other

offices of a semi- government nature, both State and Commonwealth, there is often considerable doubt as to whether a particular office is one of profit under the Crown. Professor Sawer, in his submission, raises the question whether the expression 'under the Crown' introduces ' . . . the conception of the "shield of the Crown" and the jungle of conflicting decisions of the highest courts in which that aspect is considered';[6] if a particular public authority is 'within the shield of the Crown', then presumably, such an argument would run, a person working for that authority can be said to hold an 'office of profit under the Crown' within the meaning of s. 44 (iv).

5.4 Hogg[7] in his study states that the use of the expression 'within the shield of the Crown' has the effect of falsely suggesting that the legal issue is whether the public authority is the Crown or a part of the Crown. He continues:

> In fact, of course, this is never the issue. The corporation cannot be the Crown or a part of the Crown in any legally meaningful sense. The legal issue is whether the nature of the relationship between the corporation and the Crown entitles the corporation to the particular Crown attribute which is claimed.[8]

The major question in cases where a public authority claims Crown attributes is usually whether the authority is a servant of the Crown. To decide this question, courts apply the 'control test': that is, what is the extent of ministerial control over the authority?[9] If the authority can carry on its functions with considerable freedom from ministerial control, it is not a Crown servant. If, however, the minister's control over the corporation is similar to that which he has over a government department, then it is a Crown servant. Hogg notes generally here that:

> It is not possible to specify precisely what degree of control is required to make a public corporation a servant of the Crown, but the trend of the decisions seems to be against finding that public corporations are servants of the Crown.[10]

5.5 Most cases in this area concern claims by authorities to immunity from statutes which do not bind the Crown. In addition to determining whether the authority is the servant of the Crown, there is a further issue: will the application to the corporation of the statute in question impair some interest or purpose of the Crown? Hogg states that if the authority is a Crown servant, it is usually obvious that the application of the statute in question to it will impair some interest or purpose of the Crown. A perusal of the cases, however, reveals Professor Sawer's 'jungle of conflicting decisions' as to the application of the control test to particular authorities performing particular functions. The matter is further complicated, in that the cases suggest an authority may be a Crown servant in the exercise of certain of its functions and an independent body in the exercise of others.[11]

5.6 The uncertainty concerning the meaning of the expression 'office of profit under the Crown' is well illustrated, albeit in a different context, by the parliamentary debate over the proposed appointment of Senator Gair as Ambassador to the Republic of Ireland in 1974. On that occasion, the principal matter at issue was the precise time at which Senator Gair had assumed (or would assume) the ambassadorship. On the answer to that question turned the further question of whether he was disqualified as a senator, because he held an office of profit before the issue of the writ by the Governor of Queensland, on 2 April 1974, for the half-Senate election in that State. The answer to that question in turn would decide whether his place should be filled as a casual vacancy or under the normal processes for election to the Senate, except that there would be six places, rather than the usual five, to be filled.[12] A doubt has been expressed whether an ambassadorship is an office of profit under the Crown, a view which derives from statements in May's *Parliamentary Practice* at the time of Federation.[13] Professor Sawer argues convincingly against the view in May stating that

under the conditions of today, an ambassadorship is *par excellence* an office of profit under the Crown, the appointee being in every sense a servant of the central executive government and paid a salary.[14]

5.7 There is, then, little or no judicial guidance in determining whether particular offices are 'under the Crown' for purposes of s. 44 (iv). Certainly, we know of no case where the specific question of parliamentary qualification in this context has come before the courts for decision. Because of this uncertainty, and also because of the effect of the present officially prevailing interpretation of the word 'chosen' in s. 44, that it is wide enough to include nomination (as to which see paras 5.15—5.22), candidates who have regarded themselves as possible holders of an office of profit have, naturally enough, tended to err on the side of caution and resigned before nominating. The result of such action may be severe personal disadvantage if their quest for parliamentary office is unsuccessful.

(c) Justification of the concept

5.8 The difficulties which have arisen from the use of the expression 'office of profit under the Crown' have largely been ones of definition. We have in fact concluded that they are of such magnitude that the traditional constitutional language is inadequate for today's conditions and should be discarded. But we regard the core concepts behind the present language as being of utility and requiring retention in some form, and it is those with which much of our discussion in the rest of this chapter is concerned. In our discussion of this aspect of s. 44 (iv) we deal with the various categories of offices which are generally considered to be, or have the potential of being, offices of profit. Our primary concern is to determine those offices whose occupancy is incompatible with membership of Parliament and to devise a clear and detailed statutory statement on the matter, so that public office-holders seeking parliamentary office and members of Parliament will be able readily to ascertain their position. We fully endorse the view of the Law Reform Committee of Western Australia that:

> . . . qualification for membership of Parliament should be on as wide a basis as possible and that any restriction in membership should be contained in legislation which is easily interpreted by those who may be affected.[15]

5.9 The exclusion of holders of offices of profit under the Crown from membership of Parliament has its roots far back in our parliamentary history. The traditional considerations which have governed decisions as to which offices should disqualify a person from membership of Parliament have been usefully summarised in the Report of the Law Reform Committee of Western Australia as follows:

(a) The need to limit the control or influence of the Executive over Parliament which could otherwise exist if an undue proportion of members of Parliament were office-holders;

(b) The incompatibility of certain offices with membership of Parliament. This covers not only the physical impossibility of fulfilling both the duties of the office and the duties of a member of Parliament (including the member's duties to his constituents) but also the need to prevent certain offices, such as judicial offices and offices held by senior public servants, being held by persons who are, as members of Parliament, engaged in political controversy;

(c) The need to maintain the principle of Ministerial responsibility by preventing office-holders whose duties involve the making of decisions on matters of public policy and for whose decisions a Minister is ultimately responsible to Parliament, being themselves members of Parliament.

5.10 We do not dispute the validity of (a), recognising that there may still be opportunities for Executive patronage. To (b) we would add an additional consideration by

way of corollary. This is the expectation that members of Parliament owe a duty of impartial judgment in the interests of their electorate. The capacity to influence public affairs which stems from this would be severely affected if members were able to hold official positions. The same can be said, of course, about the holding by members of certain private offices but they do not come within the purview of this Report. As to (c), while we can see the validity of the point being made, it is, in our view, of less significance than the other two considerations. As will be seen from our recommendations, we take the view that there is a role, in certain clearly specified offices, for members of the Parliament to contribute to the decision-making process as representatives of the Parliament.

5.11 In this chapter three major questions arise for consideration and are recurring themes in what follows. The first is whether the constitutional prohibition should apply to all classes of office of profit or whether there should be some exceptions. If there are to be exceptions, on what basis should they be decided? The second major question is the time during which the prohibition should apply and, in particular, whether it should apply from the date of nomination of the candidate, from the date of his actual election or, where this is different, from the date on which he takes office. Thirdly, are there any other offices which, by their nature, should exclude a person from membership of the Commonwealth Parliament, even though they are outside the scope of the existing prohibition in s. 44 (iv)? An example to be considered here is State polititicans. These themes and concerns form the basis of our analysis of the issues and consequent recommendations in this chapter.

THE POSITION OF PUBLIC SERVANTS

(a) Commonwealth public servants

5.12 *Present position.* Concern about the effect of s. 44 (iv) on the ability of public servants to seek elective office in the national Parliament was the catalyst which resulted in the referral to this Committee of the broader question of the qualifications and disqualification of members of, and candidates for, the Parliament (see Chapter 1). The major concern here is that Commonwealth and State public servants do not have equal rights with other citizens to seek election to the Commonwealth Parliament. Under the law as presently interpreted, public servants must generally resign before seeking nomination for a place in the Commonwealth Parliament. If they are unsuccessful in the election, they do not (except in New South Wales) have a right of reinstatement to their former public service position. At best, they may seek to be reappointed subject to the exercise of a discretion by, in some instances, the relevant Public Service Board or in others, the State Government.

5.13 This is the basis of Senator Colston's concern and the impetus for his Private Member's Bill to amend s. 44 (iv). We fully share this concern and are strongly of the view that public servants should not be disadvantaged in their employment when they seek to exercise their legitimate right as citizens to stand for the Commonwealth Parliament. There was a good deal of support for this view in the submissions we received.[16] Thus, referring to s. 44 (iv) and s. 73 of the *Commonwealth Electoral Act* 1918, the Queensland State Service Union commented:

> In our view, this is an exclusive discrimination against Public Servants and a considerable deterrent against Public Servants who may otherwise seek to aspire to be chosen as a Parliamentary Representative in the Commonwealth Parliament.[17]

The Law Council of Australia, on the other hand, through its Constitutional Law Committee, took the view, although unsupported by detailed argument, that it 'is neither necessary nor desirable that there should be any amendment to any of sub-sections (i) to (v) of section 44 of the Constitution'.[18] The submission continued:

> It has not been shown that the present system has caused any particular hardship to any person holding an office of profit under the Crown.[19]

5.14 We do not share the Law Council's satisfaction. Rather, as we have already stated, there is genuine cause for concern at the disadvantaged position of public servants seeking to exercise their democratic right to stand for the Commonwealth Parliament. In our view, the criterion which must prevail is that no member of Parliament should be in a position to receive two salaries, one as a parliamentarian and the other as a public servant or other public office-holder. It is possible, as we show later in this chapter, to achieve a position where this criterion is met without discriminating against public servants.

5.15 *Possible amendment of Public Service Act and General Orders.* As we related in the introductory chapter of this Report, the second aspect of this reference arises out of a motion placed before the Senate by Senator Mason. His motion sought re- examination by the Government of the requirement in Public Service Board General Order 3/D/4 that an officer or employee of the Public Service who wishes to nominate for election to Parliament must resign 'before nomination'. Re-examination was sought on the ground that the wording and effect of General Order 3/D/4 may be contrary to the requirement of s. 44 (iv) that persons holding an office of profit under the Crown shall be incapable of being 'chosen or of sitting' as a member of either House of the Parliament. It was suggested in the motion that a conditional resignation, contingent upon being chosen, might suffice. This motion came up for discussion in the Senate on 28 February 1980 and, following acceptance of an amendment moved by Senator Missen, Chairman of this Committee, the matter was referred to this Committee for consideration as part of the wider question of the qualification and disqualification of members of Parliament.[20]

5.16 The Public Service Board, in its submission in April 1980[21] indicated that General Order 3/D/4 and related General Order 5/F/14 were in the process of amendment. These amendments are being drafted in conjunction with amendments to the *Public Service Act* 1922 which will make the re-appointment of unsuccessful public service candidates who wish it mandatory. It is a matter of concern to us that these foreshadowed amendments have still not been introduced into the Parliament, and we urge the Public Service Board to take all necessary steps to ensure their immediate introduction.

5.17 At present, s. 47C of the Public Service Act provides that, where the Public Service Board is satisfied that a permanent officer resigned from the Service in order to become a candidate for a Federal or State parliamentary election, that he was a candidate, that he failed to be elected, and that his resignation was effective not earlier than one month before the close of nominations, the Board may, upon application within two months of the declaration of the result of the election, re- appoint him to the Service at his previous salary. Section 82B provides in similar terms for temporary employees. The proposed amendments to the Act will, therefore, provide Commonwealth public servants who have been unsuccessful at an election with a statutorily guaranteed right of re-appointment. To some extent, this overcomes the problem with which Senator Colston is concerned—but only in the case of Commonwealth public servants. State public servants are unaffected and must still rely on the situation which obtains in their particular State.

5.18 The amendments to the General Orders, like those to the Act, arise in the context of the Report of a Sub-committee of the Joint Council of the Australian Public Service (a joint staff-management consultative body established under the Public Service Act), which examined the issue of the parliamentary candidature of public servants in 1973.[22] The Sub-committee formed the view that the only requirements for resignation should be those laid down in Federal or State laws. Accordingly, it recommended that General Order 3/D/4 be amended:

(i) to indicate that an officer or employee who wishes to contest a Commonwealth or State parliamentary election, or an election of the Northern Territory Legislative Assembly, should ensure that he ascertains whether there are any legislative provisions that may require resignation from the Service, e.g. before nomination;

(ii) to give guidance to staff members on the legislative provisions relating to elections for the Commonwealth Parliament and the Northern Territory Legislative Assembly.[23]

5.19 Referring to this recommendation in its submission, the Board comments:

> This was accepted, and the Board's General Orders, which currently direct resignation before nomination, will consequently be amended.[24]

Nevertheless, it is clear that the Board still views resignation at the time of nomination as a constitutional necessity in the case of public servants seeking election to the Commonwealth Parliament.[25] This view was also held by the Sub-committee and is based on legal advice to the effect that the meaning of the word 'chosen' in s. 44 is probably wide enough to include the nomination of a candidate.[26] It is this interpretation which is the basis of Senator Mason's motion.

5.20 The Sub-committee's Report also refers[27] to s. 73 of the *Commonwealth Electoral Act* 1918 which provides in part:

> 73. No nomination shall be valid unless —
> (a) the person nominated consents to act if elected, and declares that he is qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator or a member of the House of Representatives as the case may be; . . .

The Report states that legal advice indicates that s. 73 '. . . refers to a declaration by the person nominated that he is presently qualified' and that this construction accords with the view that the meaning of 'chosen' in s. 44 is probably wide enough to include the nomination of a candidate. The Sub- committee's Report further states that there is legal advice to the effect that

> a member of the Australian Public Service cannot properly make such a declaration until he has resigned. It would be legally possible to amend section 73 in this respect, but any amendment made would not alter the effect of section 44 of the Constitution, that is to say it would still be necessary for him to resign before nomination.[28]

5.21 In our view, this interpretation of s. 44 is not persuasive, despite the authority which it appears to have commanded. We note that s. 82 (1) of the *Commonwealth Electoral Act* 1918, which has a marginal note 'proceedings on nomination day', provides that, if the number of candidates nominated in a Senate election is not greater than the number to be elected, the Commonwealth Electoral Officer shall declare the candidate or candidates elected. There is a similar provision in s. 82 (2) in the event that only one candidate nominates for a Division in a House of Representatives election. These provisions may be the origin of the interpretation of 'chosen' as extending in some cases back to the date of nomination. However, it may be argued that the nomination process, which does not involve the mass of the electors at all (under s. 71 (b) of the Commonwealth Electoral Act the nomination must be signed by at least six persons entitled to vote at the election for which the candidate is nominated), is not in fact a process of 'choice' by the electors except in a highly technical and artificial sense. If this

is so, it can be further argued that the qualifications of the nominee would not matter within the terms of s. 44. In our view, no real process of choice occurs until one candidate is favoured ahead of others by receiving more votes than his opponents on the day of the poll. It is unfortunate that the wide view of the meaning of 'chosen' has resulted in a requirement that public servants resign before nominating with the possibility, as a result, of severe personal disadvantage. In this context, we note that the occasions on which s. 82 of the Commonwealth Electoral Act has applied have been infrequent, the last occasion being a by- election for the House of Representatives seat of Cunningham in 1956. In any event, the case of a candidate who holds what is currently termed an office of profit under the Crown, and who is elected unopposed, is covered by our recommendation, which provides that his office would be vacated at the time he becomes entitled to a parliamentary allowance.

5.22 If our view of the meaning of 'chosen' is correct, the only legal requirement for public servants wishing to seek election to the Commonwealth Parliament is that they tender their resignation with effect from the date of election. It can be argued, of course—at least in the case of Commonwealth public servants—that the amendments to the Public Service Act which are foreshadowed in the Board's submission will effectively remove any insecurity as to employment, and hence, any limitation on the exercise by public servants of their civil rights. Nevertheless in our view, this is not a satisfactory solution to the present situation, not least because it does not, and indeed cannot, deal with the position of State public servants, which we discuss in detail below. In addition, it still impedes the exercise by Commonwealth public servants of their right to stand for parliamentary election by depriving them of salary from the time of resignation until election day. Nor is the taking of recreation or long service leave a satisfactory solution under the prevailing interpretation of the provision, as the candidate would still be in receipt of salary and therefore holding an office of profit. There will be circumstances in which it is undesirable for a public servant seeking political office to continue working during the election campaign, if his job involves him in areas of government policy of a sensitive nature with the potential for political controversy. In other situations there may be no such reason for a public servant to absent himself from his job if he decides that he does not need the extra time for purposes of conducting a campaign. In that situation, of course, it would be necessary to ensure that the Government's time and facilities were not being used to assist the candidate in his bid for election. As for those public servants who feel obliged, because of the nature of their work, or the pressures of the campaign, to be absent from their job during an election campaign, if our recommendation is accepted, there will be no impediment to their taking accrued leave until the day of the election.

5.23 *Recommended approach.* We have concluded that there are two important principles to be upheld:

(a) to ensure that a member or senator is not simultaneously a member of the Commonwealth Parliament and a Commonwealth public servant and in receipt of two salaries as a result; and

(b) to ensure that Commonwealth public servants are not effectively discouraged from standing for the Commonwealth Parliament.

If these principles are accepted, a simple but effective solution lies in taking as the crucial date the date at which a person elected to Parliament becomes entitled to a parliamentary allowance and providing for the resignation of a public servant candidate, who is elected, to be effective from that date. If the Constitution is amended to provide that a person who holds what is presently termed an 'office of profit' is to be deemed to have vacated that office at the date that he becomes entitled to payment of a parliamentary

allowance, these two principles will be satisfied. As a corollary, we provide for the immediate vacation of his place by any member who becomes employed in the Commonwealth Public Service. We discuss this solution in greater detail in the final section of this chapter.

(b) Members of the Defence Force

5.24 *Present position.* Full-time members of the Defence Force, like public servants, come within the terms of s. 44 (iv) as holders of offices of profit. Accordingly they are, while the holders of such offices, 'incapable of being chosen or sitting'. However members of the various Reserve Forces—that is, the Naval Emergency Reserve Forces, the Citizen Naval Forces, the Regular Army Emergency Reserve, the Citizen Military Forces, the Citizen Air Force or the Air Force Emergency Force—who normally serve only part-time in those forces are, by operation of the proviso, excluded from the disqualifying effect of s. 44 (iv). (We refer to this matter again in paras 5.64—5.70). Special legislation, the *Defence (Parliamentary Candidates) Act* 1969, has been enacted to provide for the situation of a member of the Defence Force who wishes to seek election to the Parliament and, if unsuccessful, to subsequently return to the Defence Force.

5.25 The Act takes account of three different classes of Defence Force members —officers, enlisted members and members of the Reserve Forces in continuous full-time service —and makes provision for each in a different way. First, s. 7 provides that where an officer of the Permanent Naval Forces, the Australian Regular Army, the Regular Army Supplement or the Permanent Air Force applies to the chief of staff of his arm of the Defence Force to be transferred to the appropriate Reserve and he satisfies the chief of staff that he intends, if he is transferred, to become a candidate for election as a member of, among others, one of the Houses of the Commonwealth Parliament at an election which he specifies in his application, the chief of staff may so transfer him. Section 10 provides for an officer transferred to a Reserve under s. 7 to be reinstated, upon application, in the force of which he was a member before his transfer to the Reserve. Secondly, s. 8 provides in similar terms for the discharge of enlisted members of the Defence Force if they satisfy their chief of staff that they intend to become a candidate for election. Finally, s. 9 provides that the appropriate chief of staff may upon application terminate the service of a member of the Reserve Forces who is rendering continuous full-time service, if he is intending to seek election. There are reinstatement provisions for these two classes also, which provide for them to be restored to their former position upon application to the chief of staff within a specified time of the end of the election (ss. 11 and 12).

5.26 In addition, ss. 13 and 14 relate to the compulsory re- instatement of officers and enlisted members. The purpose of these provisions is to enable the Defence Force to require a member of the forces who was not successful at an election to complete the period of service on which he was engaged before he became a candidate. They are generally used in the case of persons whose skills are in demand within the Defence Force. Section 13 provides that where an officer has been transferred to a Reserve under s. 7 and the appropriate chief of staff is satisfied that he was not nominated in the relevant election or that, although nominated he was not elected, and he has not applied for reinstatement, the appropriate chief of staff may serve on him a notice requiring him to apply for re-instatement within two months of the 'declared date'. (This is a date published in the *Gazette* on which the Minister declares that he is satisfied that the result of the election is certain). If such a person does not apply for re-instatement within the two months he is, by sub-s. 13 (2), deemed to have made such an application on the

last day of the period of two months. Thereafter, s. 10, which deals with voluntary applicants for re-instatement and gives a chief of staff discretion on the actual decision to re-instate or not, applies. Section 14 makes similar provision to s. 13 for enlisted members. Although these provisions allow for compulsory re-instatement, they are selective in their operation, as the whole process is only set in train at the discretion of the relevant chief of staff. It is not relevant to our inquiry whether the Defence Force has the power, at its own choosing, to selectively force unsuccessful candidates to apply for re-instatement.

5.27 Re-instatement under ss. 10, 11 or 12 is at the discretion of the chief of staff. As such, it is subject to the same objections which we raised about ss. 47C and 82B of the *Public Service Act* 1922 in relation to public servants. As a minimum requirement, we would expect that ss. 10, 11 and 12 would be amended in conjunction with the foreshadowed amendments to the Public Service Act so that re-instatement of unsuccessful candidates will be mandatory. Such an amendment will remove from members of the Defence Force the additional disability of possible loss of livelihood if they are unsuccessful at the election—a disability which, we have already indicated, we regard as contrary to the democratic right of all citizens to seek parliamentary office.

5.28 There is another aspect of these provisions which causes us concern. It is the discretion, vested in a chief of staff, as to whether to grant the application for transfer, discharge or termination, as appropriate, when it is made by a person and that person satisfies the chief of staff that he will, if the application is granted, become a candidate. While we are confident that abuses would not generally occur, the nature of these provisions does leave open the potential for abuse. Refusal of an application would prevent a member of the Defence Force from seeking election. There is, therefore, an opportunity for interference with the exercise of political rights, which should not be left on the statute books.

5.29 *Recommended approach.* In accordance with our general approach in this chapter, we propose that members of the Defence Force, like public servants, should not be required to resign until they are sure of election to the Commonwealth Parliament. In that way, principles which have guided us in our consideration of the issues in this chapter—that members of Parliament cannot at the same time be in government employment and receiving two salaries as a result and that members of the armed services should not be effectively discouraged from standing for Federal Parliament—will be upheld. The extensive constitutional provisions which we recommend at the end of this chapter to replace s. 44 (iv) and its proviso, and s. 45, will achieve this result. They provide that, upon becoming entitled to a parliamentary allowance, a member of the permanent Defence Force shall be deemed to have ceased employment as such.

5.30 Until such constitutional changes are effected—and in the event that they are not accepted—two amendments to the *Defence (Parliamentary Candidates) Act* 1969 should be enacted. First, for the reasons we suggested above, re-instatement of unsuccessful candidates who apply under ss. 10, 11 and 12 should be made mandatory rather than discretionary as now. Secondly, ss. 7, 8 and 9 should be amended so as to remove from a chief of staff the discretion which he currently has to grant the transfer, discharge or termination that is sought. As we have already indicated, such a discretion is, on the face of it, anti- democratic and should be replaced by a provision which makes the granting of the application mandatory once the applicant establishes to the satisfaction of the relevant chief of staff that he intends to be a candidate.

5.31 Recommendations: 1. Sections 7, 8 and 9 of the *Defence (Parliamentary Candidates) Act* 1969 should be amended so as to make the grant by a chief of staff of a

transfer, discharge or termination, as the case may be, mandatory once the applicant satisfies the chief of staff that he intends to become a candidate for election to the Parliament.

2. Sections 10, 11 and 12 of the *Defence (Parliamentary Candidates) Act* 1969 should be amended to make re-instatement of a person who has been granted a transfer, or a discharge or whose continuous full-time service has been terminated because that person was a candidate for election to the Parliament, mandatory.

(c) State public servants

5.32 *Present position.* All the States make provision in some way for the situation of a State public servant seeking election to the House of Representatives or the Senate. In four States, South Australia, Tasmania, Victoria and Queensland,[29] a public servant who resigns to contest a Federal election and is unsuccessful may be re-appointed at the discretion of the Governor-in-Council. The application for re-appointment must be made within a specified period of the declaration of the results of the election (three months in Queensland, two months in the other States). Upon re-appointment, the person is treated as though he had been on leave without pay, so that his continuity of service is not affected by the resignation. The practical effect of these provisions is that the power of re-appointment is at the discretion of the State Cabinet. We do not regard the legislative position in these four States as satisfactory. The matter can be politically sensitive and the potential for abuse cannot be ignored. Indeed, Senator Colston has charged the Queensland Government with just such an abuse of this discretion.[30]

5.33 The Public Service (Commonwealth Elections) Act 1943 of New South Wales provides for automatic re-appointment of unsuccessful candidates for the Commonwealth Parliament who resigned from the public service within three months of the election and re-apply within two months of the declaration of the poll. Upon re-appointment the period of resignation is to be treated as though the officer had been on leave without pay. This is much to be preferred to the position in the four States referred to in the above paragraph and, except that it deprives the officer concerned of income for the period of the election campaign, is quite satisfactory.

5.34 In Western Australia, an Administrative Instruction of 18 February 1981 from the Public Service Board requires a State public servant who wishes to seek election to the Commonwealth Parliament to resign no later than the date of nomination. If unsuccessful, the public servant may, within one week of the declaration of the result of the election, apply for re-appointment, and the Public Service Board has a discretion whether to re-appoint him. It is worth noting that this new Administrative Instruction replaces an earlier one which provided for leave of absence to be granted to public servants wishing to contest a Commonwealth election. The change is based upon the view that the word 'chosen' in s. 44 is wide enough to encompass the process of nomination.

5.35 *Recommended approach.* State public servants, of course, hold offices of profit under the various State Crowns. In Western Australia there is a positive requirement that they resign before nominating for the Commonwealth Parliament. Provisions in the other States do not contain a requirement that public servants resign; they do, however, seem to contain an underlying presumption that public servants will resign before contesting a Commonwealth election. We assume that the presumption that public servants will resign is based upon the wide interpretation of the word 'chosen', which we discussed in paras 5.19-21 and with which we do not agree.

5.36 In four States, the re-employment of public servants who resign to contest a Commonwealth election and are unsuccessful rests upon the exercise of a discretion

vested in the State Cabinet. In another State, Western Australia, the discretion is vested in the Public Service Board. Senator Colston, speaking in the Senate in May 1978, expressed particular concern at the situation of State public servants.[31] We have given considerable attention to the position of the States in this matter, and are gravely concerned about the impediments placed in the way of an unfettered exercise by public servants of their right to seek public office.

5.37 In our deliberations, we have kept in mind two clear principles:

(a) any person who holds a State or Commonwealth public service position should be ineligible to sit in Parliament; and

(b) there ought not to be any additional disabilities on State public servants seeking election to the Commonwealth Parliament than those laid down in the Constitution.

A requirement, such as that in the Western Australia Public Service Board's Administrative Instruction amounts to such a disability. So, too, in our view, does the threat of loss of livelihood posed by a discretion to re-appoint vested in a State Cabinet. It is essential in a democratic society that every citizen should have a clearly established right to seek parliamentary office without being subjected to the threat of loss of livelihood. We call to the attention of those State Governments which place in the way of their public servants the sort of disability to which we refer in (b) above, that they are denying this right to a significant number of citizens. Indeed, in our view, it is incumbent upon the States, as constituent parts of the Federation, to recognise the right of all citizens, including public servants, to seek parliamentary office, unfettered by the fear of loss of livelihood. We urge the States concerned, at least as an initial step, to amend their legislation to give public servant candidates who are not elected to Parliament a guaranteed right of re-appointment, instead of the existing discretion vested in State Government. Such action will at least remove the fear of loss of livelihood.

5.38 We realise that the presumption that public servants will resign before nominating for the Commonwealth Parliament, which is implicit in the provisions of five States (Western Australia is the exception: it has a positive requirement of resignation) is based on the prevailing interpretation of the word 'chosen' in s. 44. This interpretation is to the effect that the process of choice can occur at the time of nomination, so that any disability attaching to a candidate at or after that time (such as holding an office of profit) will disqualify. If our recommendations for constitutional change are accepted, this problem will be at an end. Our recommendations provide that several specified classes, among them State public servants, who are elected to the Commonwealth Parliament will be deemed to have ceased their employment with the State at the time they become entitled to an allowance under s. 48 of the Constitution. We wish to stress that nothing in our recommendations is intended to prevent State governments from legislating to provide that their public servants may take accrued leave during the course of their election campaign.

(d) The Colston Bill

5.39 We are indebted to Senator Colston for his initiative in introducing, in the form of a Private Member's Bill, an amendment to s. 44 (iv). Although Senator Colston's Bill is clearly intended to deal with situations beyond that of public servants, it is convenient to discuss it here because it was in the context of the disadvantages faced by public servants that the Bill was introduced. The Constitution Alteration (Holders of Offices of Profit) Bill 1978[32] proposes that the Constitution be amended 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. Clearly the purpose of amending s. 44 in this way is to allow a public servant to retain his office from the time of nomination right up until such time as, following his electoral success, he is required to take his seat.

5.40 Several submissions[33] were critical of the Colston Bill, suggesting that it would not achieve the purpose intended, or that it would be open to abuse. It was pointed out that the wording of the amendment is open to an interpretation whereby an office-holder may retain his office, stand for election and be chosen, yet continue in office without taking his seat. The Law Council sees the solution to this in a provision that an office- holder elected to Parliament should automatically lose his office of profit upon election.[34] Mr P.D. Mayo, General Secretary of the National Country Party (WA) suggests the addition of a provision requiring an office-holder to resign his office of profit within three months of his election.[35] Both seek to achieve the same end by differing methods.

5.41 Professor Lane, however, sees the problem in a slightly different way.[36] He points out that an office-holder (public servant, etc.), although elected in that capacity would, while still an office-holder, 'be incapable of sitting or of receiving any allowance as a senator or as a member of the House of Representatives'. This disability to sit would attract s. 45 (i) with the effect that his 'place shall thereupon become vacant'. Professor Lane then points out that if the person involved is a senator, the resulting casual vacancy would have to be filled by the appropriate State Parliament under s. 15 of the Constitution. He asks whether this was intended to be the effect of the Colston amendment or whether it is preferable for the appropriate State governor to cause a writ to be issued for the election of a new senator. To achieve this effect, he suggests that the following words should be added at the end of the proposed amendment: 'and the election so far as it affects that person shall be void and of no effect and the seat is vacant.' While the solution put forward by Professor Lane may have the effect of overcoming needless casual vacancies, it would nevertheless not solve the basic problem. The obvious implication which arises from Professor Lane's interpretation of the Colston amendment is that an office-holder —in order to avoid the immediate creation of a disability upon election —must resign before election. Such a requirement puts an unsuccessful candidate in exactly the same position as he is without the Colston amendment.

5.42 Clearly there is an anomaly in the amendment proposed by Senator Colston. We have carefully considered the proposals to remedy this anomaly put forward in submissions. But we have concluded that none of them —with the exception of the Law Council's proposal which is similar to our recommendation —is a satisfactory method of ensuring the establishment of what we regard as the basic principle which lies behind s. 44 (iv) and which needs to be maintained: that no member of Parliament is in receipt of two salaries from the Crown. What is important is that no one should be entitled to take a seat or, if already a member, continue to sit, while holding an office which entitles him to receive an additional salary from the Crown, or be in receipt of a continuing benefit from the Crown. The Bill introduced by Senator Colston has acted as a catalyst for numerous other changes recommended by us in this Report. These changes will require comprehensive legislation to set in train the necessary referendum process to amend the Constitution accordingly. As a result it is not appropriate, in our view, that the Bill should proceed any further.

5.43 Recommendation: The Bill entitled the Constitution Alteration (Holders of Offices of Profit) Bill 1981 should not proceed.

THE POSITION OF OTHER PUBLIC OFFICE HOLDERS

(a) Commonwealth authorities

5.44 *Present position.* Our concern here is with those persons who are employed by, or are members of, Commonwealth authorities. The distinction which we are here seeking to make is between persons who are members of the board or executive committee of an authority and those who are employed on the staff of that authority in a master/servant relationship. This distinction acquires significance when examining the appropriateness of members of the Commonwealth Parliament being members (as opposed to employees) of an authority, and we discuss that question below. It is in the area of public authorities that a good deal of the confusion arising out of the expression 'office of profit under the Crown' has arisen. As we noted in the early part of this chapter (para. 5.3), in the area of Commonwealth authorities and other offices of a semi-Government nature, there is often considerable doubt as to whether a particular office is one of profit 'under the Crown'. By way of illustration, we simply refer to the fact that employees of an independent statutory authority may be included in the disqualification, even though appointed by the authority itself. The fact that payment is made from non-Government funds is apparently irrelevant.[37]

5.45 Another consideration, referred to by Professor Sawer in his submission,[38] is that there are other types of employment by statutory authorities, clearly *not* 'under the Crown', which may be just as objectionable in terms of the policy behind s. 44 (iv). Such employment would not be caught under the current provision, despite its incompatibility with membership of Parliament. If our recommendations with regard to statutory authorities are accepted, the position of office-holders in these authorities will be put beyond doubt.

5.46 *Recommended approach.* In considering this area, we have concluded that employment by a statutory authority is incompatible with membership of Parliament. There are, however, some statutory authorities where the advice and experience of a parliamentarian, as a member of the governing body, would be of great benefit, and on which the Parliament has a legitimate right to representation. It would be a condition of appointment of a member of the Parliament to such a body that he would not receive any remuneration, other than reimbursement of reasonable expenses. In these cases, membership by a parliamentarian should be possible without danger of disqualification.

5.47 In the period before election day, however, there is no reason, in our view, for an employee or member of a public authority of the Commonwealth to resign. In that regard such a person is in the same position as a public servant. In accordance with these views, our recommendations provide that where a person is employed by a public authority of the Commonwealth, or is a member of such an authority, he shall be deemed to have ceased such employment or membership at the date he becomes entitled to an allowance under s. 48 of the Constitution. In addition, our recommendation allows for the appointment to an authority established under Commonwealth legislation of a member of the Parliament, if the following two criteria are met:

(a) the member is nominated by the Parliament; and

(b) no remuneration attaches to the holding of the position on the statutory authority by the member, other than reimbursement of reasonable expenses.

Our recommendation envisages that the statutory authorities to which appointment of Members of Parliament is considered appropriate should be prescribed by legislation.

5.48 In this regard the continuing work of the Senate Standing Committee on Finance and Government Operations, in systematically reviewing the level and extent of accountability of public authorities, may be of benefit. As this exercise proceeds, it may be that sufficient information will emerge to enable decisions to be made as to which public authorities can properly include parliamentarians among their membership. In general terms, and without making a firm recommendation, we would suggest that the following guidelines could be used in making such decisions:[39]

(a) membership of the particular authority will not involve the member in political controversy;
(b) membership will not make it physically impossible for the member to fulfil his duties (including those to his constituents) as a member of Parliament;
(c) the member's duty of impartial judgment, in the interests of his electorate, will not be affected by his membership of the authority; and
(d) membership of the particular authority is not of such a nature as to increase the influence or control of the executive government.

5.49 It is significant that at present the following public authorities have Commonwealth parliamentarians among their membership: Advisory Council for Inter-Governmental Relations, Advisory Council of the CSIRO, Council of the Australian National University, Council of the National Library of Australia and Parliamentary Retiring Allowances Trust. These are all of a research or advisory nature, and it may be that those public authorities engaged in operations of a commercial character would be considered too politically sensitive to permit of representation from the Parliament.

(b) State authorities

5.50 *Present position.* Following the trend of modern government, all the States, since the Second World War, have established a proliferation of public authorities. The same uncertainty as to whether they hold offices of profit under the Crown applies to employees and members of these authorities as does in the Commonwealth. Given the prevailing interpretation of the word 'chosen' and probably faced with uncertainty as to whether they hold offices under the Crown, employees and members of State public authorities are placed in an invidious position. They must make a decision whether to resign before nominating for a Commonwealth parliamentary election, weighing up their chances of re-appointment should their bid for election fail. It appears that only Tasmania and Queensland have legislation covering the position of employees and members of public authorities who resign and then seek re-appointment.[40] In the other States the position is obscure. Mostly, they are not covered and have no opportunity for re-appointment, either as of right or by discretion.

5.51 *Recommended approach.* The concern we have expressed in relation to other categories of office-holders—that of threatened loss of livelihood—is equally strong in relation to this particular category. Indeed, because they do not in most cases have even the right—at least in legislation—of re-appointment subject to the exercise of a statutory discretion, their situation is the more deplorable. Our proposed constitutional amendments will enable employees and members of State public authorities to retain their employment until, upon being elected, they become entitled to a parliamentary allowance. This will remove the uncertainty caused by the possibility of a loss of livelihood, which at present operates to inhibit the exercise by these citizens of their civil rights. Until the necessary referendum can be held to effect this change, we strongly urge the State governments concerned to provide, as a minimum, the same rights by way of re-appointment to the employees and members of public authorities as they provide for their public servants.

5.52 We have concluded that it is not appropriate for a member of the Commonwealth Parliament to continue, after his election, as an *employee* of a State authority. There may, however, be different considerations where a member of the Commonwealth Parliament was a member of a public authority in a State. There may also be situations where a member of the Commonwealth Parliament is subsequently given the opportunity to serve as a *member* of a public authority in his State. Depending upon the nature and functions of the particular authority, there may be no incompatibility between membership of the authority and membership of the Commonwealth Parliament. This is clearly a matter for determination on a case-by-case basis. Generally speaking, however, we would envisage that there would be relatively few State authorities on which it would be appropriate for a Federal parliamentarian to serve. With these considerations in mind, we have drafted provisions which allow for the prescription of those State authorities on which membership by a Federal parliamentarian is considered appropriate. It would be an essential criterion of prescription that the member receive no remuneration other than reasonable expenses. Prescription would be achieved by regulations subject to disallowance by the Parliament under the *Acts Interpretation Act* 1901.

(c) State politicians

5.53 *Present position.* The proviso to s. 44 (iv), which excludes from the operation of that paragraph any of the Queen's Ministers of State for the Commonwealth, also excludes the Queen's Ministers for a State (that is, ministers in the State governments). These ministers hold an office of profit under the State Crown and would, without the proviso, be caught by s. 44 (iv). It was envisaged by members of the 1897 Constitutional Convention that State politicians, including State Ministers, would be able to sit in the Commonwealth Parliament while retaining their membership of a State Parliament. The reference in the proviso to the Queen's Ministers for a State is intended to allow them to do so. State parliamentarians are now prevented from nominating for either House of Commonwealth Parliament by the *Commonwealth Electoral Act* 1918, s. 70, which is in the following terms:

> 70. No person who—
>
> (a) is at the date of nomination a Member of the Parliament of a State; or
>
> (b) was at any time within fourteen days prior to the date of nomination a member of the Parliament of a State; or
>
> (c) has resigned from the Parliament of a State and has the right, under the law of the State, if not elected to the Parliament of the Commonwealth, to be re- elected to the Parliament of the State without the holding of a poll,
>
> shall be capable of being nominated as a senator, or as a member of the House of Representatives.

5.54 *Difficulties of s. 70.* While we endorse the legislative intent behind s. 70, we have reservations about some of its effects in practice. Some of these practical difficulties were drawn to our attention in a submission by Mr Barry Jones,[41] a Member of the House of Representatives, who referred to the 'oppressive and unnecessary problems' raised, in particular, by paragraph (b). Mr Jones claims, with justification, that the requirement in paragraph (b) that a member of a State parliament should resign fourteen days before nominating for the Commonwealth Parliament amounts to a discrimination against State parliamentarians compared to the position of a member of one House of the Commonwealth Parliament seeking election to the other House. That is certainly so, as in that case the present requirement appears to be that the member has resigned from the one House by the time of nomination for the other. Nevertheless,

even this is not a satisfactory position, and later in the chapter (paras 5.60-61) we discuss an alternative approach to the question of a member seeking election to the other House and recommended accordingly.

5.55 *Recommended approach.* No question of an office of profit under the Crown arises in the case of members of State parliaments and we can see no good reason why there should be a requirement of the sort contained in s. 70 (b) of the Commonwealth Electoral Act. In our view, the only requirement should be that State members resign by the time of taking their Commonwealth seat if they are successful, and we provide for this in our recommended amendment. We would urge the States to adopt this view also and resist the course of restoring the position under s. 70 (b) by means of their own legislation. In our view this would have the effect of adding a further disability to those laid down in the Constitution and, arguably, could also be unconstitutional as an attempt to set down grounds for membership of the Commonwealth Parliament additional to those in the Constitution.

5.56 We do not share the view of the majority at the 1897 Constitutional Convention that it is appropriate, or indeed possible, for one person to simultaneously serve in both Commonwealth and State parliaments. The authors of the Constitution lived in more leisurely times and it is evident from a reading of the debates[42] that some of them at least did not envisage a very busy role for the new Parliament which they were setting up. They were also concerned that a prohibition on simultaneous membership of two Parliaments would, given what they considered was a dearth of political talent, deprive one or other Parliament of membership of the necessary calibre. As we do not share the Convention's view, and as a practical need for the exception in favour of State Ministers has never arisen, and cannot while s. 70 of the Commonwealth Electoral Act exists, we propose that simultaneous membership be prohibited.

(d) Senators-elect

5.57 It is relevant at this point to refer to an area of difficulty stemming from the imprecise notion of 'office of profit' which causes us particular concern, because it highlights the intimidatory and quite unfair effect which the uncertainty as to the meaning of this provision can produce. Sections 44 and 45 do not purport to deal with the position of a senator-elect: that is, a person who has been chosen but who has not yet taken his place in the Senate. Section 44 deals with the grounds of disqualification of *candidates* for the Senate, and s. 45 with the grounds of disqualification of *senators*. The in-between position—that of senators-elect—who, on the face of it, have ceased to be candidates and who are not yet senators is not implicitly dealt with. One view is that there is a hiatus, perhaps unforeseen. Another view is that senators-elect are in fact within the terms of s. 44. We are aware of situations in the past where persons have, during this period between election and taking their place in the Senate, declined offers of re-employment in the public service or as research assistants to serving members of the Parliament, choosing to err on the side of caution lest they put their newly-acquired parliamentary place in jeopardy. The area of research assistance to a member of Parliament is one of particular relevance because, in addition to its obvious benefits to the member, it can be of inestimable value to the senator-elect as a means of familiarising him with the institution of Parliament and its procedures, and with the sorts of issues which will confront him when his own term commences. A person holding such a position can be regarded as essentially a servant of the Parliament or of a member, and not of the Executive, and he should not be precluded from accepting such an opportunity to gain valuable experience by an over-cautious interpretation of the expression 'office of profit under the Crown'. Even more disadvantaged is a public servant who resigns to

contest a Senate election and then has a period of several months before taking his place in the Senate. He is not eligible for re-appointment under State or Commonwealth provisions, yet may find himself without employment for up to twelve months. This is an unacceptable price to pay for the right to serve in the Senate.

5.58 The Attorney-General has, however, taken the cautious approach in this matter. In reply to a recent inquiry by Senator Evans, about the appointment of a senator-elect to a temporary position on the staff of a member of Parliament, the Attorney-General stated his view that s. 44 is applicable to senators-elect. While noting the absence of judicial authority on the subject, he further stated that, even though it would be a highly technical conclusion that the position of temporary research assistant constituted an office of profit under the Crown, such a possibility should not be ignored. The complete opinion of the Attorney-General is set out in Appendix 2.

5.59 If our recommendations are accepted, the difficult situation of senators-elect will be overcome. Senators-elect who take any office of profit under the Crown, whether as public servants, employees of public authorities or the more ambiguous position of research assistants to members of Parliament, will be deemed to have ceased such employment at the time they became eligible for an allowance under s. 48 of the Constitution.

(e) Member of one House elected to the other

5.60 *Present position.* Section 43 of the Constitution is another area which has often given rise to difficulty and confusion. It provides:

> 43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

Due to the prevailing interpretation of the word 'chosen'—which we have discussed at length earlier in this chapter (paras 5.19-21)—members of one House who decide to seek election to the other have generally been advised to resign from their place in the first House before they nominate for election to the second House. This means that, if they are unsuccessful in their bid for election to the other House, they have lost their place in the first House.

5.61 *Recommended approach.* Consistent with the approach we have adopted with respect to holders of offices of profit and members of State parliaments seeking election to the Commonwealth Parliament, we take the view that a member of one House should not have to vacate his place until he is sure of his election to the other House. This would be at the time of the declaration of the poll. A useful side-effect of this change would be the avoidance of the need for a by-election for the House of Representatives or the implementation of the casual vacancy provisions for the Senate if the member was unsuccessful in his bid for election to the other House. We have therefore decided to recommend the removal of the existing s. 43 and its replacement by a provision which would achieve the result which we regard as preferable.

THE PROVISO TO SECTION 44 (IV): EXEMPT CATEGORIES

5.62 The proviso to s. 44 (iv) is in the following form:

> 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.

(a) Commonwealth and State ministers

5.63 The first category mentioned in the proviso, Commonwealth ministers, is discussed in detail in Chapter 6 and need not be further referred to here. We have discussed the second category, State ministers, earlier in this chapter, from paragraphs 5.53 to 5.56.

(b) Military personnel and pensions

5.64 The third category of exclusion from the operation of s. 44 (iv) is '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'. This part of the proviso excludes from the disqualifying effect of s. 44 (iv) present or past members of the British armed forces (so long as they qualify under the Commonwealth Electoral Act, e.g. on grounds of residence), thereby allowing them to become members of the Australian Parliament. Yet full-time members of the 'naval or military forces of the Commonwealth' are excluded from parliamentary office.[43] The provision is clearly discriminatory and, in our view, quite unacceptable. Its original rationale, as explained to the Constitutional Convention by Edmund Barton, lay in the fact that persons in receipt of pay, half pay, or pension, in the Queen's navy or army

> . . . are not holding an office of profit under the Commonwealth at all, but their pay comes from the Imperial Government. It is obvious that there is no necessity whatsoever on the ground of interest to exclude them from having positions in the Parliament of the Commonwealth, because they are not servants of the Commonwealth, and have no interest whatever springing from the Commonwealth such as under the previous branch of the section disqualifies anybody.[44] Whatever appeal such an argument may have had at the end of the nineteenth century, it is quite inappropriate today. Accordingly, our proposal for a redrafted s. 44 abolishes this discriminatory provision.

5.65 We accept, of course, the need to prevent the conflict of interest which would arise if full-time members of the Australian Defence Force were able at the same time to hold seats in the Parliament. While there can be no doubt about the validity of excluding full-time members of the Defence Force from Parliament in peacetime, different considerations may apply in time of war. Should Members of Parliament who wish to join the Defence Force in the special circumstances of war be given leave from Parliament or should they resign their seats? While it is arguable that members who, from motives of patriotism and in defence of the nation, join the armed forces should not thereby be disqualified from Parliament, two other compelling arguments must be considered.

5.66 The first difficulty is the matter of authority and loyalty which, of course, gives rise to the same considerations as in peacetime. A soldier is subject to the final authority of the Executive Government and must, in any situation involving his military role, acquiesce in that authority, subject, of course, to the constraints of international law. As a member of Parliament, his responsibility is to his electorate and to the Parliament. On occasions, the demands which the Executive Government and the Parliament place on his loyalty may be in conflict. We doubt whether even the emergencies of war are such as to warrant the risk of such a conflict of interest. Indeed, it can be argued that it is especially when the nation is imperilled by war that the possibility of such conflict of interest must be avoided.

5.67 The other consideration is that, if members were able to absent themselves from the Parliament to fight in a war, their constituents would be effectively disfranchised for the duration of their service in the armed forces. Such a situation is not really satisfactory, and inclines us to the view that, when all the factors are considered, it is generally undesirable for members of Parliament to seek leave to serve in the armed forces in time of war. Indeed, it needs to be emphasised that, in a democratic society, no moral obliquy attaches to members of Parliament who stay in the Parliament while the nation is at war. Their work is an essential part of the national war effort and should be recognised as such.

5.68 Nevertheless, we recognise that there may be members who feel compelled to take up arms during a major war and their decision should be accommodated by a grant of leave under ss. 20 or 38 of the Constitution. In such a case they should be paid the salary which they are patently earning, that of a member of the armed forces, and their parliamentary salary should be forfeited. This should not, however, affect the continuity of their pension rights as members of Parliament.

5.69 During the Second World War a number of members of the Commonwealth Parliament served in the armed forces. In reply to a question from Senator Tangney, Senator Keane on behalf of the Minister for Defence provided to the Senate, on 19 July 1944, details of the service pay and allowances of eleven members and senators who were then serving or who had served. It appears that these members and senators received their parliamentary allowances as well as their military pay and allowances.[45] There are also instances in the Hansard record of members of Parliament being granted leave of absence to enable them to enter or continue military service.[46]

5.70 We wish to make it quite clear, however, that we do not intend to suggest that members of the Parliament should be barred from membership of the Citizens' Reserve which is, of course, a part-time force. A member of the Reserve who entered Parliament should be able to continue in the Reserve without loss of rank or opportunity for promotion. He should not, however, take any remuneration, other than reimbursement of reasonable expenses, for his service in the Reserve.

(c) Pensions payable during pleasure

5.71 The other disqualification contained in s. 44 (iv) applies to persons in receipt of 'any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth.' Concern has been expressed as to whether these words apply to pensions granted under statute, in particular to pensions paid under the *Social Services Act* 1947 and similar enactments.

5.72 It seems quite settled that they do not so apply. Rather the disqualification is directed against a peculiar —and now largely defunct —class of pensions whose payment rests entirely upon royal, or vice-regal, pleasure. Such payments are now primarily of historical interest. The draftsmen of the Constitution appear to have regarded the provision's main purpose as one of safeguarding against abuse of Parliament by way of pensions at pleasure. This concern was expressed by Kingston at the Sydney session of the Convention in April 1891:

> Although it seems improbable that there will be a case of a pension created during the pleasure of the governor-general, still it seems to me highly desirable to provide against such a contingency. To permit a member to sit in the federal parliament whilst he was liable to be controlled by the governor- general by the withdrawal of his pension, would be a great mistake, and, as provisions similar to this are contained in the various local constitutions, I trust that this will be retained.[47]

Sir George Grey, referring to the wide usage in the past of pensions at pleasure in England and to the fact that they were 'a vast abuse', continued

> . . . one object in putting these words in is that they would make it impossible to resume this practice here without due warning that an illegal act was about to be done.[48]

5.73 Certainly the authors of the Constitution did not envisage that, for example, civil servants who have retired on pensions would be disqualified on the basis of this provision. Sir Samuel Griffith specifically rejected such a interpretation, stating that 'the only pensioners during pleasure are military pensioners'.[49] The W.A. Law Reform Committee expressed the view that all existing pensions fell outside the equivalent provision in the Constitution of Western Australia, 'since they are granted as of right and not at the discretion of the Crown', quoting in support an opinion of the State Solicitor-General.[50]

5.74 We sought the views of the Attorney-General's Department, and the Department stated in its submission the view that the words in question

> . . . 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. It is difficult to envisage such a case occurring. Even where the legislation allows for a discretion, that discretion normally if not invariably would be required to be exercised in accordance with the purposes and object of the legislation, and not simply in accordance with the wishes of the Government.[51]

In particular the Department excluded social service type benefits from the disqualifying words.[52]

5.75 It is clear, therefore, that the only pensions to which the disqualification applies are those entirely dependent upon Crown pleasure or whim. Historically, such pensions were paid to highly successful military officers. They have no real relevance in Australia today, and, in our view, their retention serves no useful purpose. Accordingly, our proposed redraft omits reference to them.

CONCLUSIONS AND RECOMMENDATIONS

(a) Candidates

5.76 In our consideration of the issues which arise out of s. 44 (iv) and the related aspects of s. 45, we have been concerned to emphasise that the present situation, whereby public servants, both Commonwealth and State, and employees and members of public authorities of the Commonwealth and States must place their employment in jeopardy when seeking election to the Commonwealth Parliament, should not continue. On the other hand, we are also concerned to preserve the traditional concepts: that it is inappropriate for members of Parliament, once they take their places in the Parliament, to hold public positions which might be thought either to expose them to undue influence by the Executive in the exercise of their parliamentary duties or to place undue burdens as to time upon them, so that they cannot fulfil their parliamentary and constituency duties. In addition, we have been concerned to preserve the concept that it is necessary to prevent certain offices, such as judicial offices and those held by senior public servants, being held by persons who are, as members of Parliament, engaged in political controversy. Allied with this is the duty of members of Parliament to make impartial judgments in the interests of their electorate. Finally, we have been conscious of the need to maintain the principle of ministerial responsibility by preventing office-holders, concerned with the making of policy decisions for which a minister

must ultimately accept parliamentary responsibility, being themselves members of Parliament. Accordingly, we have concluded that the constitutional provisions should be amended so that the present s. 44 (iv), with its reference to the holding of an office of profit, and its proviso, should be replaced by a provision which spells out in clear and unequivocal terms the two principles which have guided us in our consideration of this aspect of the reference. In simple terms, this means that candidates who are employed in the public service of the Commonwealth or of a State, or who are members of the Permanent Defence Force, or who are employed in, or are members of, a public authority of the Commonwealth or of a State, or who are members of a State Parliament, shall be deemed to have vacated that office at the time they become entitled to a parliamentary allowance. This allowance is provided for in s. 48 of the Constitution, which states that an allowance is '. . . to be reckoned from the date on which the member or senator takes his seat'.

5.77 The Parliament has passed the *Parliamentary Allowances Act* 1952 to give more detailed effect to s. 48. In s. 5 (iv) of that Act it is stated that the allowances of a member of the House of Representatives are to be reckoned from and including the day of his election. In the case of senators, provision is made by sub-s. (iii). There are three possible dates at which a senator becomes entitled to an allowance, depending upon the circumstances of his becoming a senator. The possibilities are election after a double-dissolution, in which case an allowance is payable from and including the day of election; election to a vacancy occurring in rotation, in which case allowance is payable from and including the first day of July following the day of his election; and being chosen or appointed to fill a casual vacancy, in which case allowance is payable from and including the day of his choice or appointment. If the Constitution is amended to provide that a candidate who is in one of the several categories which are currently described as offices of profit under the Crown is to be deemed to have vacated that office at the date he becomes entitled to receipt of a parliamentary allowance, our two concerns will be satisfied.

5.78 Finally, our amendment to s. 44 removes the discrimination effected by s. 70 of the Commonwealth Electoral Act against members of a State Parliament wishing to seek election to the Commonwealth Parliament, by allowing them to retain their State seat until they receive an allowance as a Commonwealth parliamentarian. This means, of course, that if their bid for the Commonwealth Parliament is unsuccessful, they can retain their position in the State Parliament.

(b) Sitting members

5.79 Our concern about sitting members is to ensure that members of the Commonwealth Parliament should not be able to take up appointments that are incompatible with their continued membership of the Parliament. The positions which we have felt it necessary to exclude are those in the Commonwealth Public Service, the Defence Force of the Commonwealth, the public service of a State and the Parliament of a State. In addition, we have excluded, on grounds of incompatibility, employment in a public authority of a State or the Commonwealth. Nevertheless, we have decided that there may be some Commonwealth authorities where the Parliament could well be served by having a parliamentarian among the members of the authority. In such cases, our recommended provisions specify that certain conditions, namely, that the authority has been prescribed, that the member has been appointed by the Parliament and that he receives no remuneration other than reasonable expenses, must be met.

5.80 As regards State authorities, we have reached similar conclusions. There may be occasions, albeit rare, when membership of a State authority will not be incompatible

with membership of the Commonwealth Parliament. In such cases, the authority must be prescribed under Commonwealth regulations for this purpose and the member must receive no remuneration other than reimbursement of reasonable expenses.

(c) Senators-elect

5.81 We have earlier discussed the ambiguous position in which senators-elect are placed under the existing constitutional provisions, and referred to the personal hardship and loss of valuable experience which the current situation can entail. We have indicated that our proposals, by abolishing the ambivalent reference to offices of profit and providing for the automatic vacation of offices in the public service once a candidate becomes entitled to a parliamentary allowance, will overcome the present unfortunate situation.

(d) Member of one House elected to the other

5.82 Our final recommendation in this chapter is intended to alter the position of a member of one House who seeks election to the other. At present, s. 43 of the Constitution is interpreted as requiring that such a member must resign before nominating for the other House. In our view, this is an unnecessary and unfair requirement and we propose an amendment to s. 43 which will enable a member to retain his place in the first House until his election to the second House is certain. This approach is also consistent with our general approach in this chapter to holders of offices of profit and State politicians.

5.83 Recommendations:

1. Section 44 (iv) of the Constitution and the proviso to section 44 should be deleted and a provision to the following effect inserted in their stead:

44A. 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 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 of a Territory; or

(v) holds any position with an authority of 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 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.

2. Section 45 of the Constitution should be deleted and a provision to the following effect inserted in its stead:

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

(i) becomes subject to the disability mentioned in section 44;

(ii) becomes employed at a wage or salary in the Public Service of the Commonwealth, or the permanent Defence Force of the Commonwealth;

(iii) accepts any position with 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 renumeration (other than reimbursement of reasonable expenses) from such appointment;

(iv) becomes a member of a Parliament of a State or of a Territory;

(v) becomes employed at a wage or salary in the Public Service of a State or of a Territory; or

(vi) accepts any position with an authority of 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 appointment,

his or her place shall thereupon become vacant.

3. Section 43 of the Constitution should be deleted and a provision to the following effect inserted in its stead:

43. A member of either House of the Parliament who is elected to the other House shall be deemed to have vacated his or her place in the first House upon the declaration of the poll in respect of his or her election to the second House.

Notes and References

1. See discussion by Professor Enid Campbell in her paper 'Ministerial Arrangements', Royal Commission on Australian Government Administration (Dr H.C. Coombs, Chairman), *Appendix Vol. One*, Parl. Paper 186/1976, Canberra, 1977, p. 196.
2. *The Australian Federal System*, 2nd edn, The Law Book Co. Ltd., Sydney, 1979, p. 43. But see the discussion in Campbell's paper of the meaning of 'office' in the context of assistant ministers—ibid, pp. 196-199.
3. Geoffrey Sawer, 'Councils, Ministers and Cabinets in Australia', (1956), *Public Law*, p. 110 at p. 127.
4. See *Re The Warrego Election Petition (Bowman* v. *Hood)* (1899) 9 Q.L.J. 272.
5. As to the position of diplomatic personnel, which one might think constitute an equally clearcut case, see para. 5.6.
6. No. 8, p. 2.
7. P.W. Hogg, *Liability of the Crown*, The Law Book Co. Ltd., Sydney, 1971, pp. 204 ff. What follows is based on material from this work.
8. ibid, p. 205.
9. Hogg notes that the test was firmly established by *Fox* v. *Government of Newfoundland* [1898] A.C. 667.
10. Cited fn. 7, p. 208.
11. Hogg, cited fn. 7, p. 210 ff.
12. A valuable discussion of the issues is contained in G. Sawer, *Federation Under Strain*, MUP, Melbourne, 1977, pp. 25-41. See also Editorial Note, 'Words 'holds any office of profit under the Crown' and 'agrees to take any fee or honorarium for services rendered to the Commonwealth' in ss. 44 and 45 of the Constitution', (1974) 48 ALJ 221.
13. Erskine May, *Parliamentary Practice*, 10th edn, 1893, p. 612.
14. Federation Under Strain, cited fn.12, pp. 36-37.
15. Project No. 14, *Disqualification for Membership of Parliament: Offices of Profit Under the Crown and Government Contracts, Report*, March 1971, p. 11.
16. e.g. Submission No. 4 (Victorian Secondary Teachers Association); No. 5 (Queensland State Service Union); No. 10 (Railway Salaried Officers' Union of Queensland); No. 1 (James R. Croasdale).
17. Submission No. 5, p. 1. (For discussion of s. 73 of the Commonwealth Electoral Act see para. 5.20).
18. Submission No. 12, p. 1.
19. ibid.
20. Australia, Senate, *Journals* 1978-80, No. 153, p. 1163.
21. No. 17, p. 6.
22. Joint Council of the Australian Public Service: *Report of the Sub-committee on Parliamentary Candidature of Public Servants*, (hereafter 'Sub-committee Report'), November 1973.
23. ibid, para. 2.11.
24. No. 17, p. 6.
25. ibid, p. 7, where reference is made to 'the constitutional requirement for resignation at the time of nomination'.
26. *Sub-committee Report*, para. 2.4. Prof. Lane appears to share this view: in his *The Australian Federal System* cited fn. 2, at p. 44, he cites the case of a Commonwealth public servant who resigned to seek election to the Senate 'as he must under s. 44 (iv) or (v) . . .' Shortly thereafter, however, at p. 48, he states, in an explanatory aside to a discussion of s. 45: '(Notice the following stages: an election is held; in due course the poll is declared and *at this point the senator or member is 'chosen' as s. 44 has it*, [emphasis supplied], that is, he has been elected; usually there will be yet a third stage, namely, when the senator or member has an opportunity of 'sitting' in the Chamber—see s. 44 again—on the first day that

the Chamber sits after the poll has been declared.)' In a supporting footnote he refers to the *Webster* case (1975) 132 C.L.R. 270 at 276. This apparent conflict of views serves to emphasise the obscurity which surrounds the meaning of 'chosen'.

27. ibid, para. 2.5.
28. ibid.
29. The relevant provisions are as follows: South Australia —Public Service Act 1967, s. 44; Tasmania —Crown Servants' Reinstatement Act 1970 — s. 3 (the provision does not specify who has the power of re-appointment but the Public Service Board Department stated that it is a decision of the Governor-in-Council); Victoria —The Constitution Act Amendment Act 1958 s. 49; Queensland —The Crown Employees Act of 1958, s. 3.
30. Australia, Senate, *Hansard*, 29 May 1978, pp. 2018-2019.
31. ibid.
32. This Bill has been superceded by the Constitution Alteration (Holders of Office of Profit) Bill 1981, which is in identical terms.
33. No. 13 (Acting Premier of Western Australia); No. 9 (Mr P.D. Mayo, General Secretary, National Country Party (WA)); No. 12 (Law Council of Australia); No. 2 (Professor Lane).
34. Submission No. 12, p. 2.
35. Submission No. 9, p. 1.
36. Submission No. 2, pp. 3-4.
37. *Clydesdale* v. *Hughes* (1934) 36 W.A.L.R. 73.
38. No. 8, p. 2.
39. They are based in some degree on the views of the UK House of Commons Select Committee on Offices or Places of Profit Under the Crown (1941) as to which non-ministerial office-holders should be exempted from disqualification for membership of the House of Commons. See *Report*, 1941 (No. 120), para. 29. They were adopted by the W.A. Law Reform Committee in its report, cited fn. 13, p. 11.
40. Both the Crown Servants' Reinstatement Act 1970 (Tas) (s. 2) and the Crown Employees Act of 1958 (Qld) (s. 2) are sufficiently broad to cover employees and members of public authorities.
41. No. 11.
42. Convention Debates, Sydney, 1897, pp. 996 ff.
43. This follows the generally accepted interpretation that the phrase 'Queen's army or navy' refers to the Imperial forces. However, the Law Council of Australia (Submission No. 12) makes the valid point that the expression in the proviso 'Queen's Ministers for the Commonwealth' seems to detract from this interpretation. A reading of the Convention Debates supports the usual interpretation, although the Law Council's argument, that tidying up is called for, is well made.
44. Convention Debates, Adelaide, 1897, pp. 7754 ff.
45. Senate, *Hansard*, 19 July 1944, pp. 183-184.
46. See e.g.: House of Representatives, *Hansard*, 21 June 1940, p. 133 and 20 August 1940, p. 420.
47. Convention Debates, Sydney, 1891, p. 661.
48. ibid.
49. ibid, p. 893.
50. *Report*, cited fn. 13, p. 14.
51. Submission No. 18, pp. 7-8.
52. ibid, p. 8.