CHAPTER 6

Offices of profit: assistant ministers and parliamentary secretaries (s. 44 (iv))

THE NATURE OF THE PROBLEM

6.1 The proviso to s. 44 excludes from the operation of that section 'the office of any of the Queen's Ministers of State for the Commonwealth' so as to enable ministers to be paid remuneration for their ministerial duties without making them liable for disqualification under s. 44. Section 64, which has the marginal note 'Ministers of State', is in the following form:

> 64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.
>
> After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Thus the Ministers of State who are exempt from the operation of s. 44 are defined as officers who 'administer departments of State'. The practical difficulty which arises is that this description does not on the face of it include assistant ministers, parliamentary secretaries, ministers without portfolio and other office-bearers of this kind who, whatever else they may do, do not administer departments of State in their own right. There is support for the view that such officer-holders are not exempt from the constitutional prohibition on holding offices of profit—at least to the extent that they are remunerated for such offices—in Quick and Garran's *The Annotated Constitution of the Australian Commonwealth* where it is stated:

> In some of the Australian colonies the practice has grown up of including in the Cabinet one or more "Ministers without portfolios;" that is to say, members of the Executive Council who join in the deliberations of the Ministry, and represent it in one of the Chambers, but who do not administer any department. This practice is especially resorted to in order to secure the adequate representation of a Ministry in the Upper House; but it does not appear to be contemplated by this Constitution. The heads of the chief departments are to be 'the Queen's Ministers of State'—a phrase which appears to mean not only that these officers are to be Ministers of the Queen, but that they are to be *the* Ministers of the Queen; in other words, that all the Ministers of State are to administer departments of State.[1]

It follows therefore that, while there is nothing in the Constitution to prevent the appointment of members of parliament with the designation of assistant minister or parliamentary secretary, any attempt to remunerate them over and above their parliamentary allowance gives rise to considerable difficulty.

6.2 There are three options which have generally been regarded as desirable ways of achieving a system of assistant ministers, whether or not they are constitutionally possible. They are, first, the appointment of assistant ministers without protfolio; secondly, the appointment of several ministers to administer one department; and, finally,the

appointment of a 'Minister Assisting the Minister for . . .' with his own (possibly one-man) department, entitled the 'Department of the Minister Assisting the Minister for . . .' In addition, there is the option of appointing parliamentary secretaries. The rest of this chapter explores these options and examines the extent to which they have been affected by constitutional prohibitions and difficulties.

THE HISTORICAL CONTEXT

6.3 Australian Governments of all political persuasion have formed administrations which have included in the formal government structure members of the Commonwealth Parliament who were not full Ministers of State, as that term is used in s. 64 of the Constitution. For over half the period since Federation, governments included such designated officers as assistant ministers, ministers without portfolio and honorary ministers, and many governments included a Vice President of the Executive Council who held no other portfolio. Some governments have also appointed parliamentary secretaries or parliamentary under-secretaries to assist ministers. Most recently, on 2 November 1980, the Prime Minister announced the appointment of two Parliamentary Secretaries, one to assist the Prime Minister and the other to assist the Minister for Primary Industry.[2] Nevertheless, doubt as to the constitutional validity of at least some of these appointments has tended to surround the practice with a good deal of uneasiness. It cannot be doubted, however, that there are sound political and administrative reasons supporting such appointments; moreover, most such appointments involve the appointee in substantial additional work for which he should not be denied appropriate renumeration. As things stand, however, this does not occur because of the fear that the member in question will be disqualified.

6.4 Despite the views expressed by Quick and Garran (see para. 6.1), early Commonwealth ministries did use the same devices as had been used by the colonial governments. The first Commonwealth ministry, that of Sir Edmund Barton, included two Ministers without portfolio and a Vice-President of the Executive Council who had no departmental responsibility.[3] The next three Commonwealth ministries all contained a Vice-President of the Executive Council, while Deakin's second ministry also included a minister without portfolio. Indeed, in Deakin's third ministry (1909-10), he was Prime Minister without portfolio.[3a] It is noteworthy in this context that Deakin and Barton were both major participants in the pre-Federation Convention Debates, and Deakin was the first Attorney-General of the Commonwealth. There were two assistant ministers in the third Fisher ministry, an innovation which Hughes maintained in his first two ministries and then expanded upon by including an honorary minister as well.[4] One or more honorary ministers, assistant ministers or ministers without portfolio and/or a Vice-President of the Executive Council appeared in most of the ministries until the end of World War II. All were members of the Executive Council, could countersign Executive Council minutes and perform some other administrative acts. All were members of Cabinet. According to Professor Crisp, it was recognised that they were not Ministers of State within the meaning of ss. 65-66 of the Constitution and therefore could not be paid out of the Cabinet Fund provided for in s. 66—not directly. He says the payments they received were 'deemed to have been paid not out of the Cabinet Fund itself but out of the shares which each Minister of State had received from the Fund, the deduction being represented as a payment for the help rendered to the Minister of State by the Assistant-Minister . . . The payment was then deemed not to be a payment from the Crown and hence an office of profit . . .'[5]

6.5 These payments were also made to the so-called 'Honorary Ministers'. Professor Encel quotes a letter written by Prime Minister S.M. Bruce to the South Australian Premier in 1924 in which he described the system:

> Honorary Ministers do not draw any emolument under the Ministers of State Act, but an amount is paid to them —varying with the circumstances of each particular case —out of the salaries paid to Ministers with portfolio. The latter amount is represented by a lump sum specially provided for by the Act, and which is allocated in accordance with the wishes of each Administration.[6]

6.6 That the practice of paying assistant ministers in this roundabout manner was common and well-known is apparent from the remarks of Maurice Blackburn in a debate in the House of Representatives in 1941. He was deploring the fact that experiments in 1921-23, 1932-36 and 1938-39 with the appointment of parliamentary under-secretaries to help ministers with their parliamentary work, particularly their relations with members and senators, had been abandoned. Prime Minister R.G. Menzies replied to Blackburn that if under-secretaries were to be paid, the Constitution would first have to be amended, to which Blackburn retorted that the payment of assistant ministers was not a violation of the Constitution and he saw no reason why parliamentary under-secretaries should not be paid out of the Cabinet Fund in the same way as assistant ministers.[7]

6.7 After World War II, Commonwealth Governments used the Cabinet Fund only for the purpose of paying Ministers of the Crown. From the mid-1950s the practice was adopted of giving some ministers with lighter portfolios additional responsibilities as ministers assisting more senior ministers. There were also several experiments with unpaid parliamentary secretaries and unpaid executive counsellors and these experiments prompted debate about the constitutional validity of the appointments. Perhaps the most fundamental review of the constitutional position was touched off by the report of the Moreshead Committee (the Advisory Committee on the Organisation of the Defence Group of Departments) in 1958. This recommended the amalgamation of the four service departments under a single Minister of Defence who would be assisted by two Associate Ministers of Defence. The committee faced the constitutional problem of assistant ministers, and recommended that the two associate ministers be given other minor portfolios with light duties and paid by that means.

6.8 The Government obtained a series of legal opinions on the proposals from senior counsel and the Solicitor-General. These dealt with such issues as the legality of paying ministers without portfolio, the possibility of appointing more than one minister to administer the one department, and the appointment of assistant ministers. However the issue did not become a matter of public controversy because the Government did not adopt the recommendations of the Moreshead Committee, the Prime Minister telling the House that advice received by the Government indicated that it would be unsafe to appoint salaried assistant ministers.[8]

6.9 There was, on the other hand, considerable public debate over the various proposals to appoint unpaid parliamentary assistants for ministers. Mr Menzies announced in 1949 that he would be establishing the office of Parliamentary Under-Secretary and did so early the following year, making three such appointments. In 1952 the Speaker of the House of Representatives, A. G. Cameron, claimed that the appointments were unconstitutional, that ministers did not have the power to delegate their authority, and that administrative acts by the parliamentary under-secretaries were unconstitutional and illegal. He said,

> Furthermore, I hold the view that a Member of this House who accepts a position as an Under-Secretary, renders himself liable to the vacation of his seat under the constitution,

and also liable to the penalties entailed for wrongly holding a seat in this House, having accepted an office of profit under the Crown. It is also my view, and I have stated it in the right quarters, that the position of the Under-Secretaries has not been altered by the failure of the Government to pay them salaries. The test is that the office has been accepted and not that the holder of the office has made a profit. I also hold, and I have said so, that the payment of expenses to these Honourable Members is completely unconstitutional and unlawful.[9]

6.10 In Mr Menzies' absence overseas at that time, the Acting Prime Minister, A.W. Fadden, replied that in the view of the Attorney-General the Under-Secretaries held neither an 'office' nor an 'office of profit', nor did they perform any functions which entailed wrongful delegation of ministerial authority. On 27 August, the Prime Minister expanded on that explanation. The Prime Minister stressed that Parliamentary Under-Secretaries were not members of the Executive Council, could not sign Executive Council Minutes, and could perform no executive act for which the law required ministerial signature. They were paid no salary in this capacity, and received only out-of-pocket expenses. The true analogy was not with the British Parliamentary Under-Secretaries who were appointed and paid salaries under Statute, but with British Parliamentary Private Secretaries who were co-opted in an honorary capacity by Ministers to help them personally. Menzies stressed that, on the positive side, the duties of each of the Parliamentary Under-Secretaries were essentially only 'under the direction of his Minister, to make enquiries, to conduct correspondence when authorised to do so, and, from time to time, to receive deputations on behalf of his Minister'.[10] The Prime Minister's statement was approved by the House in a vote on party lines. The Leader of the Opposition, Dr H. V. Evatt, had disputed some of Menzies' claims.

Dr Evatt questioned the Prime Minister's contention that the position of the under-secretaries was analogous to that of parliamentary private secretaries in Great Britain, and in that connection pointed out that they had been appointed not by ministers but by the Cabinet. The significant questions were he said, what the under-secretaries did, why they were appointed, whether they held an office of profit and if so, whether that office was one of profit under the Crown. He continued:

> The Prime Minister, quite logically from his point of view, has said that they perform some services for their Ministers. That is partly correct. Each of these gentlemen, acting for a Minister, no doubt performs services for the Minister. However, I venture to suggest, without expressing any final views, that, on the facts before us, there is a strong reason to support the view of Mr Speaker that they are also performing a service for the Crown. Indeed, in the correspondence that they sign, they describe themselves as parliamentary under-secretaries to certain Ministers. Even the function of dealing with requests by other honourable members is a Crown function—a government function. That is not a personal service rendered to a Minister such as might be rendered to a Minister by a private secretary. I submit that these honourable gentlemen have held themselves out, in some respects, as holders of offices under the Crown. That is why they insist upon the description of parliamentary under-secretary. The seriousness of the position is shown by the Prime Minister's statement that they are not entitled to criticise the Ministers whom they are assisting. That is contrary to all the functions of a member of this Parliament. It is because an honourable member is not merely entitled, but bound, to criticise any Minister that he holds his office quite separate from the office of Executive Councillor and Minister of State (P.D. 218, 622-3)[11]

In May 1956 the Prime Minister said he thought the term parliamentary under-secretaries was not appropriate and that he proposed instead to appoint some parliamentary secretaries.[12]

6.11 The issue emerged again in 1971 when the then Prime Minister, Mr W. McMahon, announced that six unsalaried assistant ministers (members of the Executive Council) would be appointed to assist ministers. On this occasion the Labor party

did not oppose the appointments on constitutional grounds. During the debate, Mr T.E.F. Hughes QC told the House that when he was Attorney-General he had advised the Government on these possible appointments in these terms:

> A Member of Parliament not appointed to administer a Department of State—
>
> (a) may be appointed to be a member of the Federal Executive Council under section 62 of the Constitution;
>
> (b) may be designated by the Prime Minister to be an Assistant Minister or a Minister without portfolio or a Parliamentary Under-Secretary—but this does not make him a Minister of State in the constitutional sense;
>
> (c) cannot be paid any emoluments in respect of his duties as a member of the Federal Executive Council or as Assistant Minister, Minister without portfolio or Parliamentary Under-Secretary, other than travelling expenses incurred in performing his duties;
>
> (d) may, as a member of the Federal Executive Council, exercise functions on behalf of a Minister of State, if authorised to act on behalf of that Minister, by virtue of section 19 of the Acts Interpretation Act. This would include approving of appointments and performing other functions expressly conferred on the Minister by legislation;
>
> (e) may be a member of Cabinet and may make inquiries, conduct correspondence as authorised by the Minister of State whom he is appointed to assist any may receive deputations on behalf of that Minister.[13]

6.12 As Professor Campbell remarks in her paper, the essential point of this advice was that a member of Parliament who was appointed as a minister, but not to adminster a department of state in his own right, avoided disqualification under s. 44 of the Constitution only if he was not paid emoluments in respect of his ministerial duties.[14]

6.13 Most recently, on 2 November 1980, the Prime Minister, announcing the new ministry following the general election, also announced the appointment of two Government members as Parliamentary Secretaries to Ministers.[15] Their role, it was stated,

> will include assistance to the Minister with a range of his duties, including with his correspondence, liaison with other Members of Parliament, and meetings with delegations and clients of the Department and authorities within the portfolio, and other representational activities.

This announcement was followed by the passage of the *Parliamentary Secretaries Act* 1980. In the Second Reading Speech, Mr Viner, Minister for Employment and Youth Affairs and Minister Assisting the Prime Minister, having listed the functions quoted above, continued:

> For constitutional reasons the position of Parliamentary Secretary is not to be an office of profit. The Bill makes it clear that a Parliamentary Secretary is not to be remunerated beyond his salary as a member of Parliament and it displaces the ordinary application of the Remuneration Tribunals Act. Clause 4 does enable a Parliamentary Secretary to be reimbursed such expenses as are reasonably incurred. The amount of such expenses is not to exceed such allowance as is prescribed by regulation or by the Remuneration Tribunal.[16]

THE CONSTITUTIONAL ISSUES

6.14 The constitutional problem as regards assistant ministers and parliamentary secretaries arises only in relation to remuneration beyond reimbursement of ordinary expenses, and we discuss this aspect later in this chapter. Both Professor Campbell and Professor Geoffrey Sawer have commented on the debate over the constitutionality of assistant ministers and parliamentary secretaries, though the 'debate' has been unsatisfactory in that some of the important opinions of senior counsel obtained by the

Government have not generally been made available. Some of these opinions, notably those of D.I. Menzies QC and G.E. Barwick QC were available to us and were of assistance is our discussion of the issues. The major issues which arise from these commentaries and opinions relate to the options which we raised in paragraph 6.2, and we now turn our attention to them.

(a) Assistant ministers

6.15 *Ministers without portfolio.* There appears to be no dissent[17] from the view expressed in the submission to us by the Attorney-General's Department:

> It appears clearly from section 64 that to be a minister of state for the Commonwealth, the person must be appointed to administer a department or departments of state. This rules out the practice that has been followed in other jurisdictions of appointing Ministers of State or Assistant Ministers 'without portfolio'.[18]

This is in line with the view expressed by Mr T.E.F. Hughes QC (see para. 6.11) and subsequently endorsed by Mr N. Bowen QC. In the Opinion prepared by Douglas I. Menzies QC in 1958 he stated:

> It is my opinion that a person cannot be a Minister of State except by appointment to administer a Commonwealth Department.[19]

G.E. Barwick QC stated:

> . . . it is to my mind certain that an officer assisting the Minister who occcupies the office of administering a Department of State cannot be said himself to occupy the office itself.[20]

These views bear out the opinion expressed by Quick and Garran which we quoted in paragraph 6.1.

6.16 *One department, one minister*? An important issue arises as to whether more than one minister can be appointed to administer the one department, in terms of s. 64 of the Constitution. As the submission of the Attorney-General's Department states, 'there is room for differences of view on this point'.[21] The submission says that the interpretation 'one Department, one Minister' is clearly a possible one. It adds that, in the case of a minister appointed to assist another minister to administer a department, there is the added difficulty that on the strict use of language the assisting minister is not a person who administers the department. 'That role is performed by the chief or principal Minister concerned, and the Assistant Minister would merely assist him in that task.'[22] The Barwick Opinion took a similar view, based on the fact that the exception in s. 44 to the prohibition against members holding an office of profit under the Crown refers to 'the office' of any of the Queen's Ministers of State. The Opinion states:

> This, in my opinion, is quite different from excepting the Queen's Ministers of State from the opening general words 'any person'. It is the office which is removed from the operation of the sub-section.
>
> The office of a Queen's Minister of State is not described as such in the Constitution. Its identity is to be gathered from sections 64 and 65. The Governor-General may appoint officers who hold office during pleasure. If such an officer is a Minister of State, his office is that of a Minister of State. The office is that of administering a Department of State. It is that office to which the sub- section does not apply. Not only is the singular used in the text of the sub-section, but in the nature of things it seems to me the office of administering a Department is a single office. The form of the sections (64 and 65) further suggests that the office should be occupied by one incumbent, though there may be some room logically for admitting the possibility of a joint occupancy of the office of officers jointly responsible for the admistration of the department in question.

In my opinion, however, the right construction of the Constitution requires that there should be a sole occupant of the office, and but one officer responsible for the administration of a department.

But, whatever the propriety of that view, it is to my mind certain that an officer assisting the Minister who occupies the office of administering a Department of State cannot be said himself to occupy the office itself. The very description of 'assistant' denies the possibility.[23]

6.17 However, D.I. Menzies QC took the contrary view. He said he did not read s. 64 as

> . . . requiring that only one person may be appointed to administer a department and I consider that the Governor-General could appoint a number of officers to administer a department and in particular the Department of Defence. I would see no objection to one Member of Parliament being appointed Minister of Defence and other members appointed Assistant or Junior Ministers of Defence provided that the appointment in each case is to administer the Department. In my opinion to administer a department includes to take part in the administration of a department. The division of labour among the Ministers would I think properly be a matter ultimately for arrangement by the Prime Minister who is responsible for advising the Governor-General to make the appointments. Any officer so appointed could of course participate in the sum provided by Parliament under s. 66 without incurring any disqualification under s. 44.[24]

6.18 Sawer, writing before the two opinions quoted above were sought by the Government, came down firmly in favour of more than one minister administering one department. He said:

> Even if interpreted with the greatest of strictness, section 64 of the Constitution does not require that only one person be appointed to administer a Department of State, nor does it say anything as to the allocation of authority between several persons so appointed. Hence, there is no constitutional obstacle to appointing a Minister and an Assistant Minister to administer the Department of Defence, both being 'officers' and their respective authority being such as Parliament, or the commonsense of Cabinet, dictates, and both paid.[25]

6.19 Campbell, reviewing the Menzies Government's decision not to proceed with the Moreshead reorganisation, wrote that, while there might be practical difficulties in having more than one minister to a department, she, like Sawer, doubted whether the Constitution required that only one minister be appointed to administer a department.

> Joint responsibility for administration of a department would not, I believe, be inconsistent with an internal division of responsibilities among the associated ministers, or even with an arrangement whereby one of those ministers assumed a supervisory and co-ordinating role vis a vis the other ministers . . .
>
> Thus if departments were fewer in number and administered by ministerial colleges of directorates, there would be many statutory discretions vested in the individual ministers making up a directorate which could quite properly be exercised having regard either to the policies of the directorate as a whole, of the co-ordinating minister or of the Cabinet. For purposes of legal and parliamentary accountability the minister entrusted with the statutory power would be the responsible minister.[26]

In 1958 K. H. Bailey, the then Solicitor-General, took the view that it was probably possible to appoint more than one minister to each department.[27] Clearly, the balance of opinion—which we share—is overwhelmingly in favour of the view that it is possible to appoint more than one minister to administer a single department.

6.20 *Department of minister assisting.* This option is based on extremely cautious view of the constitutional requirement. It would involve the appointment of one or more persons with the title 'Minister Assisting the Minister for . . .' They would be appointed under s. 64 and remunerated as ministers, yet in practice their role would be one of assistance. In addition, to avoid any possibility of breaching s. 64 in its narrowest interpretation, (i.e. that every minister has to have his own department of

State), there could be established a 'Department of the Minister Assisting the Minister for . . .' It seems that such a department need not necessarily have any public servants, or certainly no more than a handful.

6.21 A less extreme version of this option and one in regular use is mentioned in the submission of the Attorney-General's Department.[28] This is the practice whereby a minister appointed to administer a department (usually one with less onerous responsibilities) is designated to assist another minister in the latter's administration of his department. The current ministry contains seven examples of this method of operation. In his assisting role the minister can act for or on behalf of the other minister. Section 19 of the *Acts Interpretation Act* 1901 allows for this as regards statutory powers and functions.[29]

(b) Parliamentary secretaries

6.22 The 1952 debate about the appointment of parliamentary under-secretaries has been reviewed in detail by Professor Sawer and Professor Campbell. Their conclusions are similar. Professor Sawer believes that the under-secretaries did hold office 'under the Crown', because of their method of appointment—with Cabinet approval. But he thought there was no 'office of profit', because of the nature of the expenses paid (out-of-pocket expenses). And the Government was legally right because its majority in the House of Representatives enabled it to determine the qualifications of the members to sit in the House under s. 47 of the Constitution, in the event of those qualifications being challenged under s. 44 of the Constitution. Among his conclusions were:

1. If an office has never had attached to it any sort of salary or fee whatsoever, so that no holder of the office could under any circumstances claim payment of such emolument, then it is not an office of profit.
2. Payment of reasonable expenses in relation to carrying out an office does not make the office one of profit.
3. If an appointment is made personally by a Minister to provide political assistance for that Minister, it is not a Crown appointment; but if an appointment is made under the authority of the Crown or of a Chief Minister to the Crown, or of the body of Ministers collectively, and the substantial purpose is to facilitate the work of a Department of the Crown, it is a Crown appointment.[30]

6.23 In a subsequent letter to Professor Campbell, which she published in her paper,[31] Professor Sawer made a further important distinction on the work which a parliamentary secretary might carry out.

> When a Minister superintends a Bill through the House of Representatives or the Senate, he is not in any sense acting as a servant of the Crown. His status is simply that of a member of Parliament, entitled as such to move, speak, etc. By parity of reasoning, there is no reason why a special salary should not be provided for persons who might be called (using an American expression) 'Majority Leaders', who by convention assist the individuals otherwise known as Ministers in the piloting of measures through the Houses. 'Majority Leader for Bills originating with the Minister for Labour' etc. The position of such officers would be most clearly seen in the case of the ALP because of its caucus principles; they would lead for a party view. But this way of looking at the situation applies in truth to all parties supporting a Cabinet. They could then without difficulty be used to discharge one of the functions envisaged by the Menzies Parliamentary (Under) Secretaries. It would be a matter of convention that they would support the ministerial view on Bills, and would be required to resign . . . if they tried to act against the ministerial view. They should be appointed by resolution of the relevant House.

The same distinction was made by D.I. Menzies QC in his Opinion, when he said that

if the duties are parliamentary duties then the office is not one falling within s. 44 (iv) even if the office carries a salary to be paid under the authority of Parliament because such a salary is in truth an allowance authorised by s. 48. On the other hand if the duties are not Parliamentary duties but are, for instance, those of a private secretary to a Minister then I am disposed to think the office is an office under the Crown and, if a salary is paid, an office of profit under the Crown. Where there is no payment of salary but expenses are allowed I think difficult questions could arise. I think that a daily allowance of a fixed amount to cover expenses might well be regarded as constituting an office of profit within the meaning of s. 44 (iv) but I would not think so if there were nothing beyond the reimbursement of actual out-of-pocket expenses.[32]

REMUNERATION OF ASSISTANT MINISTERS AND PARLIAMENTARY SECRETARIES

6.24 Despite the questioning in parliament of the appointment of parliamentary under-secretaries by the Menzies Government and of assistant ministers by the McMahon Government, it seems that both systems avoided infringing the s. 44 provision through the non-payment of salaries. And, as regards the most recent appointments, the Parliament enacted the *Parliamentary Secretaries Act* 1980 which, specifies in s. 4 that parliamentary secretaries are not to be paid any remuneration (except expenses) outside their normal parliamentary salary. The critical factor is remuneration —or rather, the lack of it.

6.25 It may be possible to devise a system under which parliamentary secretaries would be paid for their parliamentary duties on behalf of ministers, as suggested by Sawer and Douglas Menzies. Yet there is, in our view, little equity in this. If work is performed which is of value to the Government, it should be made possible for that work to be properly rewarded. In 1951 the Nicholas Committee, which investigated and reported on parliamentary salaries, approved the work then being done by the parliamentary under-secretaries and recommended a payment of $1,000 (the Committee was aware of the 'office of profit' problem).[33] At the same time, the Committee recommended a basic salary for MPs of $3,500.

6.26 Professor Sawer has said that governments have perhaps been 'unduly timorous' over devising ways of avoiding the possible restrictions in s. 44 and that the purely legal difficulties might be circumvented 'comparatively easily'.[34] However the threat of disqualification in s. 44 explains the attitude of caution which has prevailed. Given this mood, the one clear means of avoiding the difficulties of s. 44, which is currently available, is for governments to use the 'minister assisting' method of appointment —i.e. the appointment of persons as ministers in charge of minor (perhaps even one-man) Departments of State, their secondary duty being to assist some other minister (see our discussion at para. 6.19.).

THE NEED FOR CHANGE

6.27 Governments of every political persuasion have realised the need for greater flexibility in ministerial arrangements than is allowed by the existing constitutional situation. There is also recognition that if people are to be appointed to do the work of ministers they should be properly remunerated. A system of assistant ministers without the need for their own department would have enormous advantages. Dr Patrick Weller in his submission[35] listed the potential administrative improvements as:

- a reduction in the number of departments;
- a reduction in the support staff required at present in each of the departments;
- a reduction in the need for excessive interdepartmental communication, committees, etc. and hence a reduction in delays in the provision of services (that assumes that it is easier to consult with the single department);
- greater consistency and coherence in the delivery of services and the provision of advice.

However, Dr Weller adds a note of caution:

> None of these advantages would flow naturally; they could be developed only after careful analysis of systems, estimates of workloads and good management both by the departments and by the Public Service Board. But at a time when the size, efficiency and cost of the federal bureaucracy is a source of concern, it is worth remembering that the interpretation of section 64, and the resulting requirement for a department for each minister, is a major cause of inflexibility.

6.28 In addition, Dr Weller sees the following 'distinct political advantages' from changes in ministerial arrangements:

- greater awareness among ministers of the detail of the more onerous portfolios and the capacity of a group of well-briefed ministers to discuss the common problems of their portfolio;
- less departmentalism among ministers and a greater breadth of vision for senior ministers;
- the reduction of ministers currently heading 'mickey-mouse' departments;
- a useful training ground for ministers;
- greater flexibility in the allocating and reshuffling of ministers, to provide maximum political impact without having to demand disruptive machinery of government changes in their wake.

We share Dr Weller's view. With the ever-increasing complexity of government administration, the gains, both political and administrative, to be made from the flexibility allowed by a system of assistant ministers and parliamentary secretaries should not be under-estimated.

CONSTITUTIONAL CHANGE

6.29 Governments should not have to resort to the technique of appointing 'ministers assisting' in the way we have suggested in paragraph 6.26. The only acceptable long-term solution is to amend the Constitution. We have looked at several alternatives.

6.30 The first possibility is to insert at the beginning of s. 44 the words 'until the Parliament otherwise provides'. Such an amendment would permit the Parliament to introduce a full code along the lines of the U.K. House of Commons Disqualification Act 1975. This Act which we have also discussed in the context of Chapter 6, reverses the principle of s. 44 (which provides a general exclusion of persons who hold an office of profit under the Crown, with some named exceptions). Instead the Act states in s. 1 (4)

> Except as provided by this Act a person shall not be disqualified for membership of the House of Commons by reason of his holding an office or place of profit under the Crown or any other office or place.

This amendment, of course, envisages that the code which resulted would not include holders of the office of assistant minister or parliamentary secretary among those who were disqualified.

6.31 A second alternative would be to insert additional words in the proviso to s. 44. After the words, 'the Queen's Ministers of State for the Commonwealth' the following could be inserted:

'or of any of the Queen's Assistant Ministers of State for the Commonwealth, or any person holding a like office.'

It would probably be neither necessary nor desirable to insert a further amendment in s. 64 to define 'Assistant Minister of State'. Nor would it be necessary to amend ss. 65 or 66, unless it was thought desirable to provide for the payment of assistant ministers and other similar offices out of the same fund as is provided for ministers.

6.32 If the extensive constitutional amendments which we have recommended in Chapter 5 to replace s. 44 (iv) and s. 45 are accepted, neither of these alternatives would be necessary. Our recommendations in that chapter spell out in quite clear terms those offices which, if assumed by a member, will cause him to vacate his seat. They thereby abolish the uncertain expression 'office of profit under the Crown', which has the potential to disqualify assistant ministers or parliamentary secretaries if they receive remuneration in addition to their parliamentary allowance. Nor will it be necessary, in accordance with s. 64, to have one department/one minister in an attempt to bring every minister within the existing proviso to s. 44 (iv). Thus, it flows from the acceptance of our recommendations in Chapter 5, that there will be no constitutional problem about appointing assistant ministers or parliamentary secretaries.

6.33 If the recommendations for extensive constitutional amendment which we propose in Chapter 5 are not accepted, we urge the adoption of a constitutional amendment such as we discussed in paragraph 6.31. Although much less satisfactory than the 'package' of reforms which we recommend as the only method of clarifying the whole area of parliamentary qualfications, it would at least put beyond doubt this one area of assistant ministers and parliamentary secretaries.

6.34 Recommendation: If the recommendations which we propose in Chapter 5 in respect of section 44 (iv) are not accepted, the proviso to section 44 (iv) of the Constitution should be amended by inserting after the words, 'the Queen's Ministers of State for the Commonwealth' the following words: 'or of any of the Queen's Assistant Ministers of State for the Commonwealth or any person holding a like office' so as to enable the appointment and remuneration of assistant ministers, parliamentary secretaries and the like without causing their disqualification under section 44 (iv).

Notes and references

1. at p. 711.
2. Press Release by Prime Minister, 2 November, 1980.
3. It was not until 1971 that a Department titled the Department of the Vice-President of the Executive Council was created and it survived only two months. From the first Menzies ministry it became common for the Vice-President also to be given a portfolio with departmental responsibilities.

3a. There was no Prime Minister's Department until 1911 and, unlike all his predecessors and most of his successors, Deakin did not hold any other portfolio.

4. A useful list of all Commonwealth ministries is contained in the *Parliamentary Handbook of the Commonwealth of Australia*, 20th edn, 1978, AGPS, pp. 286 ff.
5. L.F. Crisp, *Australian National Government*, 1974, p. 384.
6. S. Encel, *Cabinet Government in Australia*, 1962, p. 267.
7. ibid, p. 274.
8. See Enid Campbell, 'Ministerial Arrangements', Royal Commission on Australian Government Administration' (Dr H.C. Coombs, Chairman), *Appendix, vol. 1*, Parl. Paper 186/1976, Canberra, 1977, pp. 201-2; see also Crisp, cited fn. 5, at p. 385.
9. House of Representatives, *Hansard*, 22 May 1952, p. 717.
10. Crisp, cited fn. 5, p. 388.
11. Campbell, cited fn. 8, p. 195.
12. J.B. Odgers, *Australian Senate Practice*, 5th edn, 1976, p. 614.
13. House of Representatives, *Hansard*, 20 August 1971, p. 440.
14. cited fn. 8, p. 196.

15. Press Release of 2 November 1980, p. 3. The members were Mr I. Wilson MP (Parliamentary Secretary to the Prime Minister) and Mr B. Lloyd MP (Parliamentary Secretary to the Minister for Primary Industry); on March 16, 1981 the Prime Minister announced that Mr Wilson was to be sworn as Minister for Home Affairs and Environment and that Mr A. Cadman MP would replace him as the Prime Minister's Parliamentary Secretary.
16. House of Representatives, *Hansard*, 26 November 1980, p. 81. 17.R.D. Lumb and K.W. Ryan, *The Constitution of the Commonwealth of Australia Annotated*, 2nd edn, 1974, states, 'There is, however, no constitutional necessity for a portfolio to be allotted to a minister: since Federation there have been instances of the appointment of ministers without portfolio' at p. 217. A footnote then refers to Crisp. However the authors do not address themselves to the question of payment of such ministers.
18. Submission No. 18, para. 5.
19. p. 1.20. p. 3.
21. No. 18, para. 6.
22. ibid.
23. At para. 3.
24. At p. 2.
25. Geoffrey Sawer, 'Councils, Ministers and Cabinets in Australia', *Public Law*, 1956, p. 124.
26. Cited fn. 8, pp. 202-3.
27. Opinion dated 17 February, 1958.
28. Submission No. 18, para. 9.
29. It provides: 'Where in an Act any Minister is referred to, such reference shall unless the contrary intention appears be deemed to include any Minister or member of the Executive Council for the time being acting for or on behalf of such Minister.' Geoffrey Sawer, cited fn. 23, p. 127.
30. Cited fn. 23, p. 127.
31. Cited fn. 8, p. 127.
32. At pp. 2-3.
33. Crisp, cited fn. 5, p. 387.
34. Sawer, cited fn. 23, p. 124, p. 128.
35. No. 7 at p. 2.