THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE CONSTITUTIONAL QUALIFICATIONS OF MEMBERS OF PARLIAMENT

Report by the Senate Standing Committee on Constitutional and Legal Affairs

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Recommendations

Age, citizenship, residence and allegiance (ss. 16, 34 and 44 (i))

1. Section 34 of the Constitution should be deleted and a section to the following effect inserted in its stead:

34. A member of the House of Representatives must be at least eighteen years of age and must be an Australian citizen (paras 2.5, 2.13).

2. As an immediate measure the following amendments should be made to section 69 of the *Commonwealth Electoral Act* 1918:

(i) section 69 (1) (b) should be amended by omitting the words 'a British subject' and substituting the words 'an Australian citizen' (para. 2.13).

(ii) section 69 (1) (c) should be deleted (para. 2.8).

(iii) section 69 (1) (d) should be deleted (para. 2.23).

3. Section 44 (i) of the Constitution should be deleted (para. 2.19).

4. Following the deletion of section 44 (i) of the Constitution, a new provision should be inserted in the *Commonwealth Electoral Act*, 1918 along the following lines:

73A. (1) A person shall declare at the time of nomination whether, to his knowledge, he holds a non-Australian nationality.

(2) If the declaration made pursuant to subsection (1) is in the affirmative, he shall further state:

(a) that he has taken every step reasonably open to him to divest himself of the non-Australian nationality; and

(b) that for the duration of any service in the Australian Parliament, he will not accept, or take conscious advantage of, any rights, privileges or entitlements conferred by his possession of the unsought nationality (para 2.20).

Criminal offences (s. 44 (ii))

5. Section 44 (ii) of the Constitution should be amended by repealing the words 'is attainted of treason' and substituting the following words: 'has been convicted under the law of the Commonwealth, and not subsequently pardoned, of the offence of treason' (para. 3.11).

6. Section 44 (ii) of the Constitution should be amended by omitting the words 'or has been convicted and is under sentence or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer' (para. 3.30).

Bankruptcy and insolvency (ss. 44 (iii) and 45 (ii))

7. Sections 44 (iii) and 45 (ii) of the Constitution should be deleted (para. 4.45).

Offices of profit: public servants and other public office-holders

8. 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 (para. 5.31).

9. 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 (para 5.31).

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

11. 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;

(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 (para. 5.83).

12. 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 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 (para. 5.83).

13. 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 place in the first House upon the declaration of the poll in respect of his election to the second House (para. 5.83).

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

14. 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) (para. 6.34).

Pecuniary interests (ss. 44 (v) and 45 (iii))

15. Sections 44 (v) and 45 (iii) of the Constitution should be deleted and a provision to the following effect inserted in their stead:

45A. The Parliament may make laws with respect to:

(a) the interests, direct or indirect, pecuniary or otherwise, which shall not be held by a senator or member of the House of Representatives;

(b) the circumstances which constitute the exercise of improper influence by or in relation to a senator or member of the House of Representatives and the action which shall be taken with respect to such an exercise; and

(c) the procedures by which any matters arising under such laws may be resolved (para. 7.37).

16. Upon acceptance by referendum of a constitutional amendment along the lines recommended in paragraph 7.37, the Parliament should, pursuant to the constitutional amendment, enact legislation which encompasses within its terms the sorts of considerations with regard to conflicts of interests and improper influence discussed in this chapter (para. 7.45).

Procedural questions (ss. 15, 33, 46 and 47)

17. Section 203 of the *Commonwealth Electoral Act* 1918 should be amended along the following lines:

Any question respecting the qualifications of a senator or of a member of the House of Representatives or respecting a vacancy in either House of the Parliament may be determined by the House in which the question arises or may be referred by resolution of the House to the Court of Disputed Returns and the Court shall thereupon have exclusive jurisdiction to hear and determine the question (para. 8.12).

18. The *Common Informers (Parliamentary Disqualifications) Act* 1975 should be amended, deleting the penalty provisions, and providing simply for an action for a declaration to be brought in the High Court of Australia at the suit of any person as to whether or not a senator or member of the House of Representatives is disqualified (para. 8.19).

Summary

The table below shows the existing constitutional provisions and proposed provisions which, if the Committee's recommendations are accepted, will replace them.

Existing Provisions	*Proposed Provisions*
34. Until the Parliament otherwise provides the qualifications of a member of the House of Representatives shall be as follows:— (i) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen: (ii) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.	34. A member of the House of Representatives must be at least eighteen years of age and must be an Australian citizen.
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.	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.
44. Any person who— (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or (ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or (iii) is an undischarged bankrupt or insolvent: or (iv) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or (v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons: shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.	44. Any person who has been convicted under the law of the Commonwealth, and not subsequently pardoned, of the offence of treason shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. 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; (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.

Existing Provisions	*Proposed Provisions*
45. If a senator or member of the House of Representatives— (i) becomes subject to any of the disabilities mentioned in the last preceding section: or (ii) takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or (iii) directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State: his place shall thereupon become vacant.	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 remuneration (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. 45A. The Parliament may make laws with respect to— (a) the interests, direct or indirect, pecuniary or otherwise, which shall not be held by a senator or member of the House of Representatives; (b) the circumstances which constitute the exercise of improper influence by or in relation to a senator or member of the House of Representatives and the action which shall be taken with respect to such an exercise; and (c) the procedures by which any matters arising under such laws may be resolved.

CHAPTER 1

Introduction

TERMS OF REFERENCE

1.1 On 7 March 1979 the Senate resolved as follows:

> That the following matter be referred to the Standing Committee on Constitutional and Legal Affairs:
>
> (a) the desirability of amending s.44(iv) of the Constitution in the terms proposed by the Constitution Alteration (Holders of Office of Profit) Bill 1978 or otherwise; and
>
> (b) the desirability of changes to other provisions of the Constitution relating to the qualification and disqualification of Members of Parliament.[1]

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

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

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

CONSTITUTIONAL PROVISIONS

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

> 16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.
>
> 34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—
>
> (i) He must be of the full age of twenty- one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:
>
> (ii) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.
>
> 44. Any person who—
>
> (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii) Is an undischarged bankrupt or insolvent: or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

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

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

(i) Becomes subject to any of the disabilities mentioned in the last preceding section: or

(ii) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

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

NATURE OF PROBLEMS AND BACKGROUND TO INQUIRY

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

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

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

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

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

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

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

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

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

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

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

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

OUTCOME OF INQUIRY

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

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

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

CONDUCT OF INQUIRY

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

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

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

Note on terminology

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

Notes and References

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

CHAPTER 2

Age, citizenship, residence and allegiance (ss. 16, 34 and 44 (i))

CONSTITUTIONAL AND OTHER LEGISLATIVE PROVISIONS

2.1 The basic provisions governing the affirmative qualifications of persons to nominate for, or sit in, the Commonwealth Parliament are ss. 16 and 34 of the Constitution and s. 69 of the *Commonwealth Electoral Act* 1918. Sections 16 and 34 are as follows:

> 16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.
>
> 34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—
>
> (i) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:
>
> (ii) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

2.2 The Commonwealth Parliament has 'otherwise provided', as was anticipated in s. 34, by enacting s. 69 of the *Commonwealth Electoral Act* 1918 in the following terms:

> 69. (1) The qualifications of a Member of the House of Representatives shall be as follows:—
>
> (a) He must be of the full age of eighteen years;
>
> (b) He must be a British subject;
>
> (c) He must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen; and
>
> (d) He must be either—
>
> (i) an elector entitled to vote at the election of Members of the House of Representatives; or
>
> (ii) a person qualified to become such an elector.
>
> (2) To entitle a person to be nominated as a Senator or a Member of the House of Representatives he must have the qualifications specified in the last preceding sub-section.

2.3 In addition to these affirmative qualifications, a number of disqualifying provisions are set out in ss. 44 and 45 of the Constitution. The only one of these grounds of disqualification which is dealt with in the present chapter, as distinct from later chapters, is s. 44 (i), the subject matter of which is intimately connected with other matters here discussed. It is in the following terms:

> 44. Any person who—
>
> (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power:
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Insofar as this provision disqualifies persons who have an allegiance to, or are citizens of, a foreign power, it thereby modifies the operation of s. 69 (1) (b) of the Commonwealth Electoral Act, and raises for consideration the rather uncertain area of dual-nationality or citizenship.

AGE

2.4 In 1973 the minimum voting age was reduced to eighteen years. At the same time the age requirement for membership of Parliament in s. 34 of the Constitution was reduced from twenty-one years to eighteen years by s. 69 (1) (a) of the Commonwealth Electoral Act. While we have no objection to the present qualifying age, the issue has been keenly debated in other countries. In Britain the formal qualifying age is twenty-one years even though the voting age was reduced to eighteen years in 1970.[1] Considerable pressure was brought to bear upon the British Government to reduce the qualifying age, but to no avail. Arguments employed in support of retaining the status quo in the main contended that eighteen year-olds were too immature and inexperienced to be allowed to stand for election. The fact that eighteen year-olds were now able to vote was not, it seems, seen as significant by the proponents of this argument; one member of the House of Commons reconciled opposition to lowering the election age with the newly-lowered voting age by suggesting that between the ages of eighteen and twenty-one a person would be able to vote and concentrate upon issues and hence gain some brief measure of experience before the age of twenty-one.[2]

2.5 Although it is most unlikely that any Australian government would now attempt to change the qualifying age for nominating for the Commonwealth Parliament, we feel it is appropriate to make some comments on the matter, in view of the differing qualifying age in Britain and in other countries.[3] We concede that many eighteen year-olds may be immature and inexperienced, but there are more important considerations at stake. Eighteen year-olds are old enough to marry, to pay tax, to contract for goods and services, to serve overseas in the Defence Force and to vote. This society has made eighteen years the age of majority, and in the Committee's view it is a matter of principle that these youths should be able to exercise all their civic responsibilities, both social and political, at the same time. Furthermore, we view a qualifying age in excess of eighteen years as a restriction on the members of the electorate themselves, which fetters both the choice of the party branches and the constituency to choose the member they may wish to have.

RESIDENCE

2.6 Both s. 34 of the Constitution and s. 69 of the Commonwealth Electoral Act contain a strong residential requirement, viz. that a person 'must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen'. It is clear that this provision only assumes substantive significance in association with the requirement that a representative be a 'subject of the Queen' (s. 34) or a 'British subject' (s. 69). Because of the inherent width of the concept of British subject-status, described more fully below, it was no doubt felt necessary that a potential member of the Commonwealth Parliament have some demonstrated physical connection with Australia, and the residency requirement played this role.

2.7 If, as we recommend below, the requirement of status as a British subject is deleted in favour of a requirement of Australian citizenship, then the present residency

qualification becomes virtually redundant: most Australian citizens would already satisfy this qualification, including naturalized citizens. One of the prerequisites for obtaining a grant of Australian citizenship is that a person must have been resident for a specific period of time (two years in the eight years preceding the application), including a continuous period of at least one year before the application is lodged.[4] Further, as the residency qualification in s. 69 (1) (c) can be acquired at any time, this section by itself does not offer any real protection to the institution of Parliament, nor does it give any indication as to the prospective member's commitment to his country. A person may earlier in life live for three years in Australia without obtaining citizenship and, much later return to Australia and immediately stand for Parliament. The deletion of s. 69 (1) (c) from the Commonwealth Electoral Act may technically enable some Australian citizens who have obtained Australian citizenship by birth or descent, to nominate and sit in the Commonwealth Parliament, although they have only resided in Australia for a short period. In practice, this would not be a significant problem as such citizens would almost certainly not gain pre-selection and even if they did, it would be a matter that could quite properly be left in the hands of the electorate.

2.8 We consider that the acquisition of Australian citizenship, especially in the case of naturalized citizens, denotes not only a strong intention of permanent residency, but in most cases represents a more accurate gauge of a person's commitment to a country than any set period of residence. Consequently, and contingent upon the adoption of the test of citizenship which we propose below, we recommend that the period of residency required by s. 69 (1) (c) of the Commonwealth Electoral Act be deleted.

SUBJECT-STATUS AND CITIZENSHIP

2.9 Section 34 of the Constitution requires that a member of the House of Representatives must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth or of a State. Section 69 (1) (b) of the Commonwealth Electoral Act substituted the word 'British subject' as a shortened version of the constitutional requirement, and this expression has attained a specific legal meaning. The term 'British subject' is defined in s. 7 of the *Australian Citizenship Act* 1948 as follows:

> 7.(1) A person who, under this Act, is an Australian citizen or, by a law for the time being in force in a country to which this section applies, is a citizen of that country has, by virtue of his Australian citizenship or his citizenship of that country, as the case may be, the status of a British subject.

The countries to which s. 7 (1) applies are contained in s. 7 (2) and the regulations thereunder.[5]

2.10 In the Committee's view, the requirement in s. 69 (1) (b) of the Commonwealth Electoral Act that a member of the House of Representatives must be a British subject is no longer appropriate: it is excessively broad in scope[6] and arbitrary. We are not aware of any special qualities in British subjects which would make them more suitable to be members of Parliament than non-British subjects. While Australia still has historical ties with Britain and the Commonwealth countries, its trade and foreign policy have become more closely linked with other countries, and there does not appear to be any pressing social, economic or political reason, for retaining this qualification.

2.11 Although other relevant criteria could be substituted in the Commonwealth Electoral Act instead of the present requirement of British subject-status, for example

domicile or nationality, the Committee considers that a more appropriate method of determining eligibility should be that a member of Parliament is an Australian citizen. This is a status that can be easily ascertained, and obviously is more in accord with the functions of a parliamentarian than the present requirement in s.69(1)(b). This criterion has been adopted in other countries and perhaps is most evident in the United States Constitution: a Senator must have been a citizen of the United States for not less than nine years (Article 1, Section 3, Clause 3), and a Representative must have been a citizen for not less than seven years (Article 1, Section 2, Clause 2). The Australian Citizenship Act lays down the conditions for the acquisition of Australian citizenship by means of birth within Australia, by descent and by grant. Once acquired, this status can be relinquished in only a limited number of circumstances: primarily, by the voluntary acquisition of another citizenship or nationality,[7] by dual nationals who renounce Australian citizenship,[8] or those who serve in the armed forces of a country at war with Australia,[9] or by ministerial order in cases where a naturalized citizen has been convicted of making false representations or concealing material facts in his application for citizenship.[10]

2.12 The suggestion that a member of Parliament should be an Australian citizen has already been broached and accepted in principle in Australia. The Australian Constitutional Convention at Hobart in 1976 passed a motion recommending that the Constitution be altered to remove outmoded and expended provisions which contained, among others, the following recommendation:

> Section 34 —Qualifications of Members This section should be repealed and some section along the lines that follow should be enacted in its place: 'Until Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows: He must be 18 years of age, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such an elector, and must be an Australian citizen.'

2.13 We agree with the principle inherent in the recommendation made by the Australian Constitutional Convention at Hobart that the requirement of Australian citizenship should be embodied in the Constitution and we *recommend* accordingly. However, without labouring the point, it is manifestly obvious from the record of past unsuccessful referendums, that constitutional change is extremely difficult to achieve. Until such change is possible, we *recommend*, as an interim measure, that the qualification of Australian citizenship be implemented immediately in the Commonwealth Electoral Act in substitution for the present requirement of British subject-status in s. 69(1)(b).

ALLEGIANCE

2.14 Although there has been a long standing Australian policy of favouring single nationality, the Australian Citizenship Act recognises that the holding of dual nationality by some Australian citizens is unavoidable because of the differences between various nationality laws, and this fact alone has not been made a bar to obtaining Australian citizenship. At first sight, however, s.44(i) of the Constitution appears to place an absolute bar against persons with dual nationality from nominating, or sitting, in the Commonwealth Parliament. The provision states:

> 44. Any person who—
>
> (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

The intention behind this constitutional provision is fairly obvious. It was to ensure that members of Parliament did not have a split allegiance and were not, as far as possible, subject to any improper influence from foreign governments. So far as the Committee is aware, however, no person has ever been disqualified under this provision.

2.15 The provision first disqualifies Australian citizens who by their actions have clearly transferred their allegiance and loyalty to a foreign country. Such allegiance would usually be evidenced by the adoption of a foreign citizenship, although Lumb and Ryan[11] extend this disqualification to cover cases where a '*de facto* allegiance' is conferred without even taking on formal citizenship, e.g. accepting a foreign passport or serving in the armed forces of a foreign country. The second part of this paragraph embodies a purely objective test, so that the only question is whether a person, albeit an Australian citizen, is a subject or a citizen or entitled to the rights and privileges of a subject or a citizen of a foreign power. In our view it is unlikely that a court would construe this provision as requiring a person to have *voluntarily* retained his formal allegiance to his previous country before he breaches s.44(i).[12]

2.16 The fact that an Australian citizen is also a national of another country ought not in itself to be a bar to entry into the Commonwealth Parliament, unless it had been voluntarily acquired, or appropriate steps have not been taken to relinquish the non-Australian nationality so far as the candidate is able. In this respect, the minimum requirement ought to be the giving up of any rights or privileges available or accruing to the person by reason of their other nationality. To be an Australian citizen is to owe allegiance to the Commonwealth of Australia, either naturally or by explicit choice. An Australian citizen should not have his right to take the fullest part in our representative democracy impaired by the ascribing to him of a status by a foreign system of law, when it is shown that that system does not permit him to voluntarily relinquish that status.

2.17 It is an internationally accepted principle that each country has the right to detemine for itself whom it will regard as its nationals, and under what conditions its nationality can be acquired or lost. The Joint Committee on Foreign Affairs and Defence in its 1976 report, *Dual Nationality*, referred to the differences between the various nationality laws and stated:

> Rules governing nationality generally range from the automatic loss of a former nationality on acquisition of another, to making it impossible to surrender a former nationality. Some countries confer their citizenship on successive generations regardless of the country of birth. A consequence of this latter situation is that many Australians are unknowingly dual nationals and there is no way of determining with certainty who or how many are in this category.[13]

The problems posed by dual nationality are not merely academic, as there are also large numbers of Australian citizens who definitely fall within this category.[14] The Joint Committee notes that:

> . . . the large migration programme followed by Australia since the end of World War II has resulted in a large proportion of the 1,069,500 people granted Australian citizenship also being classified as dual nationals by virtue of the domestic legislation of their former homelands.[15]

The consequences of holding dual nationality are further complicated because many countries have strong views on the obligations of their citizens, and Australian citizens can find themselves unexpectedly confronted with these obligations when they revisit their former homelands. The Joint Committee comments:

> As dual nationals they can be expected to contribute to the general wealth, or gross national product of the country, and to fulfil compulsory requirements such as national service. Obligations can also include taxation, social services and various property law obligations. They can be placed at a serious disadvantage when visiting the country of their other nationality if either willingly or not, they should come into conflict with the domestic law of that country.[16]

These difficulties are compounded, however, when the former homeland either does not recognise renunciation of nationality[17] or permits renunciation only upon compliance with imposed conditions which may be difficult or impossible to fulfil.[18] The Joint Committee also noted that most of the submissions it received during the inquiry opposing the retention of dual nationality tended to be from people of European origin. The Committee stated:

> It was predominantly those from Czechoslovakia, Hungary, Poland, Yugoslavia, Estonia, Latvia, Lithuania, Italy and Greece who wanted only Australian citizenship. Many were war refugees who fled their former country for political reasons and who face severe obstacles, or outright refusal, when they attempt to relinquish their former nationalities.[19]

2.18 It is highly desirable that Australian citizens with unsought dual nationality should be free to participate in the highest levels of political life in the Australian democratic system. To deny them this right of citizenship on the basis of a determination by a foreign system of law, which for every other purpose has no application in the municipal law of Australia, would be most invidious. Professor Sawer's submission (No. 7) adverts to the problem of dual nationals and suggests that:

> . . . the disqualification should be modified where an Australian citizen also has another nationality forced upon him by the law of another country.

He then goes further and recommends:

> I would support the complete abolition of the disqualification, on the ground that nationality is to be regarded as at best for the electorate to consider, not for disqualification; it would then be necessary to consider ss. 34 and 16 of the Constitution.

2.19 We take the view that s. 44 (i) should be deleted. Simple abolition of s. 44 (i) without more would remove an important safeguard from the institution of Parliament which may not necessarily be compensated by electoral choice. It would not cover the situation of a member who after election was found to have an active allegiance to a foreign power, or to be exercising the rights and privileges of a citizen of a foreign power in circumstances which would inevitably compromise his position in Parliament. For example, a member may be in receipt of a pension, allowance, or *ex gratia* payment from a foreign government and, while the payment may be of an innocent nature, it could lead to the possibility of improper influence being exercised. Perhaps a more sinister area of influence could occur where a foreign government was in a position to deal favourably or unfavourably with other dual national members of the parliamentarian's family on their visiting the country of their non-Australian nationality. As a general principle we are of the opinion that a member of Parliament should not receive any rights, privileges or entitlements as a result of the possession of another nationality. Although we considered whether there should be any exceptions to this general rule, for example repatriation or pension payments, we concluded that it was important that members of Parliament should avoid being placed in a situation where even a suspicion of undue influence could arise. We are loath to create any opportunity for foreign governments to meddle in Australia's affairs, especially when it concerns the institution of Parliament. There is then, in our view, a need for some formal safeguards to cover at least part of the grounds originally intended to be covered by s. 44 (i).

2.20 The Committee considers that the safeguards in s. 44 (i), which are worth preserving without disqualifying dual nationals, can easily be embodied in a procedural provision. We believe that the most appropriate method is by means of a provision in the Commonwealth Electoral Act requiring any person who is seeking nomination to the Commonwealth Parliament to declare at the time of his nomination whether, to his knowledge, he holds a non- Australian nationality and, if he does, requiring him to make further declaration as to this other nationality along the lines recommended below. While we consider that the making of this declaration at the time of nomination should be a mandatory requirement, we think that it is unnecessary to go further and require that a breach of the declaration made pursuant to this provision should result in disqualification. We believe that the electorate will be placed in a position whereby it can make a proper judgment as to the commitment and loyalty of the candidate. Should facts emerge which are at variance with the undertakings given in the declaration, then the electorate would be able to express its view at the subsequent election should the member again be a candidate. We *recommend* that the terms of this provision be along the following lines:

73A. (1) A person shall declare at the time of nomination whether, to his knowledge, he holds a non-Australian nationality.

(2) If the declaration made pursuant to sub-section (1) is in the affirmative, he shall further state:

(a) that he has taken every step reasonably open to him to divest himself of the non-Australian nationality; and

(b) that for the duration of any service in the Commonwealth Parliament, he will not accept, or take conscious advantage of, any rights, privileges or entitlements conferred by his possession of the unsought nationality.

ENTITLEMENT TO VOTE

2.21 The final qualification in s. 69 of the Commonwealth Electoral Act is contained in paragraph (d) and uses identical language to s. 34 of the Constitution. It states that a member or candidate must be an elector entitled to vote at Federal elections, or be qualified to become such an elector. The requirements for entitlement to vote are contained in s. 39 of the Commonwealth Electoral Act in the following terms:

39.(1) Subject to the disqualification set out in this Part, all persons not under eighteen years of age, whether male or female, married or unmarried —

(a) who have lived in Australia for six months continuously, and

(b) who are British subjects,

shall be entitled to enrolment subject to the provisions of Part VII of this Act.

* * * * * * * * * *

39. (3) All persons whose names are on the roll for any Electoral Division shall, subject to this Act, be entitled to vote at elections of Members of the Senate for the State of which the Division forms part and at elections of Members of the House of Representatives for the Division, but no person shall be entitled to vote more than once at any Senate election or any House of Representatives election, or at more than one election for the Senate or for the House of Representatives held on the same day:

Provided that an elector shall not be entitled to vote as an elector of the Division in respect of which he is enrolled unless his real place of living was at some time within three months immediately preceding polling day within that Division. In this proviso the words 'real place of living' include the place of living to which a person temporarily living elsewhere has a fixed intention of returning for the purpose of continuing to live thereat.

(4) No person who is of unsound mind, and no person attainted of treason, or who has been convicted and is under sentence for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer, shall be entitled to have his name placed on or retained on any roll or to vote at any Senate election or House of Representatives election.

(5) A person who is—

(a) the holder of a temporary entry permit for the purposes of the *Migration Act* 1958: or

(b) a prohibited immigrant under that Act,

is not entitled to enrolment under Part VII.

2.22 The provisions in ss. 39 (1) and 39 (3) do not add any further requirements to the qualifications of members of Parliament already contained in s. 69 of the Commonwealth Electoral Act. For practical considerations, s. 39 (5) is unlikely to be of any real significance, and in any event all three subsections would be subsumed under the amendments to s. 69 recommended by us in paragraph 2.25. However, s. 39 (4) provides a new disqualification, viz. that a voter and consequently, by virtue of s. 69 (1) (d), a member, should be of sound mind. In addition, this provision contains two other requirements which conflict with recommendations made by us later in this Report.

2.23 The terms of s. 39 (4), concerning persons attainted of treason and persons convicted and under sentence, are almost identical to provisions disqualifying members of Parliament under s. 44 (ii) of the Constitution. We have recommended the removal of these disqualifications for reasons fully set out in Chapter 3, but the continuance of virtually the same disqualification in s. 39 (4) would render the Committee's recommendations impotent. One possible solution is to amend the relevant terms of s. 39 (4) in conformity with our recommended amendments to s. 44 (ii) of the Constitution. However, we are of the opinion that any amendments to s. 39 would be outside the terms of this reference: s. 39 is primarily concerned with the qualifications of persons entitled to be enrolled or to vote and only incidentally with members of Parliament. In addition, the reasons applicable for our amendments to s. 44 (ii) in relation to candidates and members of Parliament are not necessarily appliable to electors themselves. The other solution, and the one we prefer, is to delete s. 69 (1) (d) of the Commonwealth Electoral Act, thereby breaking the link between the voting provisions in s. 39 and the qualifying provisions.

2.24 We consider that this link between the qualification for members and voting rights, which was originally expressed in s. 34 of the Constitution and later adopted by s. 69 of the Commonwealth Electoral Act, can be broken and left to the ordinary electoral processes to resolve the problem.[20] While theoretically this would enable an Australian citizen to nominate and be elected without being on the electoral roll, we regard this possibility as so unlikely as not to warrant constitutional or parliamentary regulation. However, should such a situation arise, we are confident that the electorate can make a judgment of the particular circumstance of each case and take the appropriate action at the polling booth. Accordingly, we recommend the deletion of s. 69 (1) (d) of the Commonwealth Electoral Act.

2.25 The only other disqualification contained in s. 39 (4) which is not subsumed within recommended amendments to either s. 69 of the Commonwealth Electoral Act or s. 44 of the Constitution concerns persons of unsound mind. This disqualification only arises incidentally and was not included in either s. 34 of the Constitution, or s. 69 of the Commonwealth Electoral Act, which both deal directly with the qualification of members. We consider that it is most unlikely that a person of unsound mind would have the capacity to attract the support necessary for nomination and to prepare and

submit the forms required by s. 71 of the Commonwealth Electoral Act.[21] The result of our recommendation would be to remove this requirement.

2.26 Recommendations:

1. Section 34 of the Constitution should be deleted and a section to the following effect inserted in its stead:

> **34. A member of the House of Representatives must be at least eighteen years of age and must be an Australian citizen (paras. 2.5, 2.13).**

2. As an immediate measure the following amendments should be made to s. 69 of the *Commonwealth Electoral Act* 1918:

- **(i) section 69 (1) (b) should be amended by omitting the words 'a British subject' and substituting the words 'an Australian citizen' (para. 2.13).**
- **(ii) section 69 (1) (c) should be deleted (para. 2.8).**
- **(iii) section 69 (1) (d) should be deleted (para. 2.23).**

3. Section 44 (i) of the Constitution should be deleted (para. 2.19).

4. Following the deletion of s. 44 (i) of the Constitution, a new provision should be inserted in the *Commonwealth Electoral Act* 1918, along the following lines:—

> **73A (1) A person shall declare at the time of nomination whether, to his knowledge, he holds a non-Australian nationality.**
>
> **(2) If the declaration made pursuant to sub-section (1) is in the affirmative, he shall further state:**
>
> - **(a) that he has taken every step reasonably open to him to divest himself of the non-Australian nationality; and**
> - **(b) that for the duration of any service in the Commonwealth Parliament, he will not accept, or take conscious advantage of, any rights, privileges or entitlements conferred by his possession of the unsought nationality (para. 2.20).**

Notes and references

1. Representation of the People Act, which took effect with the publication of a new Electoral Register on 16 February 1970.
2. P. Norton, 'The Qualifying Age for Candidature in British Elections', *Public Law*, Spring 1980, p. 55 and p. 64.
3. The United States Constitution provides that a Senator must be at least 30 years old (Article 1, Section 3, Clause 3) and a Representative at least 25 years old (Article 1, Section 2, Clause 2); see the Commonwealth of Australia Bill 1891 which contained a similar provision with respect to senators: under cl. 15 the qualification of a senator included *inter alia* that 'he must be of the full age of thirty years': Convention Debates, 1891, at p. 946, and see debate on cl. 15 pp. 605-610. The amendment requiring senators to be twenty-five years of age was defeated at the Adelaide Convention in 1897 (p. 1191), and a clause providing that 'the qualifications of a senator shall be those of a member of the House of Representatives' was adopted (p. 1224).
4. Section 14 (1) of the *Australian Citizenship Act* 1948 provides:

   14 (1) The Minister may grant a certificate of Australian citizenship to a person who has made an application in accordance with section 13 and satisfies the Minister—

   . . .

   (c) that he has resided continuously in Australia or New Guinea, or partly in Australia and partly in New Guinea, throughout the period of one year immediately preceding the date of the grant of his certificate;

   (d) that, in addition to the residence required under paragraph (c), he has resided in Australia or New Guinea, or partly in Australia and partly in New Guinea, or has had service under an Australian government, or partly such residence and partly such service, for periods amounting in the aggregate to not less than two years during the eight years immediately preceding that date;

5. Citizens of the following countries currently have British subject-status pursuant to the Australian Citizenship Act and Regulations: Australia, Commonwealth of the Bahamas, People's Republic of Bangladesh, Barbados, Republic of Botswana, Canada, Republic of Cyprus, Fiji, The Gambia, Republic of Ghana, Grenada, Guyana, Republic of India, Independent State of Papua New Guinea, Jamaica, Republic of Kenya, Kiribati, Kingdom of Lesotho, Republic of Malawi, Malaysia, Malta, Mauritius, Republic of Nauru, New Zealand, Federal Republic of Nigeria, Saint Lucia, St. Vincent, Republic of Seychelles, Sierra Leone, Republic of Singapore, Solomon Islands, Republic of Sri Lanka, Kingdom of Swaziland, United Republic of Tanzania, The Commonwealth of Dominica, Kingdom of Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom and Colonies, Independent State of Western Samoa, Republic of Zambia, Zimbabwe.
6. The combined population of the Commonwealth nations, whose citizens have British subject-status pursuant to s. 7 of the Australian Citizenship Act, is approximately 1000 million.
7. *Australian Citizenship Act* 1948, s. 17.
8. ibid., s. 18.
9. ibid., s. 19.
10. ibid., s. 21.
11. R. D. Lumb and K. W. Ryan, *The Constitution of the Commonwealth of Australia, Annotated*, 2nd edn, Butterworths, Sydney, 1977 pp. 62-63.
12. Lumb and Ryan suggest that the second part of s. 44 (i) covers cases where an Australian naturalized citizen 'voluntarily retains the privileges or rights attaching to his former citizenship'. p. 63.
13. Australia, *Dual Nationality: Report from the Joint Committee on Foreign Affairs and Defence*, Parl. Paper 255/1976, Canberra, 1977, p. 2.
14. Citizens of the following countries are classified as dual nationals unless or until they formally renounce such citizenship: Argentina, Belgium, Brazil, Canada, Cyprus, Egypt, France, Germany (East), Greece, Hungary, Ireland, Israel, Lebanon, New Zealand, Poland, Switzerland, United Kingdom, USSR, Yugoslavia. This list was obtained from the Department of Immigration and Ethnic Affairs which compiled information from a local survey made in October 1979, and who also indicated that the survey was not comprehensive, and that there may well be other countries which fall within this category.
15. Report, *Dual Nationality*, cited fn. 13, p. 8.
16. ibid., p. 3.
17. The only country which, to the Committee's knowledge, does not recognise renunciation of nationality, is Argentina.
18. The countries which fall within this category and which have actively discouraged renunciation include: France and Greece, which provide extremely complex and lengthy renunciation procedures; USSR and Warsaw Pact countries in which renunciation is subject to government approval; Yugoslavia, which imposes stringent conditions on renunciation and may reject an application even if the conditions are fulfilled. Other countries which may well fall within this category but are omitted because of a lack of current information include: Iran, Iraq, Saudi Arabia, Syria, Turkey.
19. Report, *Dual Nationality*, cited fn. 13, p. 3.
20. This link has already been broken in other countries: in Britain the qualifying age is still 21 years although the voting age is 18 years. In the United States there is no constitutional qualification to the effect that a candidate to or member of, Congress be an elector or be entitled to vote.
21. 71. A nomination may be in Form C or Form D in the Schedule applicable to the case and shall—
    (a) name the candidate, his place of residence and occupation; and
    (b) be signed by not less than six persons entitled to vote at the election for which the candidate is nominated.

CHAPTER 3

Criminal Offences (s. 44 (ii))

INTRODUCTION

3.1 Section 44 (ii) of the Constitution provides:

> Any person who—
>
> (ii) Is attainted of treason or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer:
>
> shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives.

3.2 The authors of the Commonwealth of Australia Constitution Bill, while adopting the language of the equivalent provision in the British North America Act, made express provision in the early drafts for the disqualification on the grounds of treason or criminal conviction to be removed in certain circumstances.[1] Although the wording was subsequently modified, this general approach was confirmed in the committee stage and a proposal to make the disqualification permanent was negatived.[2] The clause was subsequently amended to substitute the language now contained in s.44 (ii) for the words 'felony or any infamous crime',[3] but the disqualification remained temporary in the case of offences other than treason. The provision in its present form disqualifies any person who is 'attainted of treason' (as to which, see below) and convicted persons under sentence or subject to be sentenced, for a year or longer. In the case of convicted persons, therefore, the disqualification ceases to apply once they have served the sentence.

TREASON

3.3 This provision has the effect of disqualifying from membership or candidature persons 'attainted of treason'. The word 'attainted' is somewhat obscure, having its roots far back in English legal history. A person was said to be attainted when he was under, or subject to, attainder. Attainder was that extinction of civil rights and capacities which formerly took place under English law when judgment of death or outlawry was recorded against a person convicted of treason or felony. The two principal consequences were the forfeiture and escheat of the lands of the criminal and the corruption of his blood, by which was meant that he became incapable of holding or inheriting land, or of transmitting a title by descent to any other person. These consequences of attainder were mitigated by various statutes and finally the British Forfeiture Act 1870 wholly abolished attainder, corruption of blood, forfeiture, and escheat for treason or felony, preserving them, however, in the case of outlawry. Of historical note is Coke's statement that a man attainted of treason was not eligible for election because the writ which was addressed to the sheriff called for the return of 'fit and proper' persons 'which they cannot be said to be when they are attainted of treason.'[4] However this term does not appear to have had a precise legal application in Britain by the year 1900, and has even less application in Australia today —a point which was raised by Professor Geoffrey Sawer in his submission to the Committee.[5] In its present-day context the words 'attainted of treason' imply someone blackened or stained with treason (from the Latin root 'attinctus'), but not necessarily convicted of treason. However Professor

Sawer suggests that 'a court might interpret it as meaning now simply "convicted of treason" '[6] and Lumb and Ryan[7] by implication adopt this view.

3.4 An issue which arises for consideration in relation to this part of section 44 (ii) is whether it is necessary or desirable to retain the offence of treason as a specific ground of disqualification or whether it can be subsumed under a more general class of serious offences. Professor Sawer, commenting on the obscurity of this provision, remarks that 'the following provisions of the sub-section would in any event cover the case.'[8] This may not be strictly true as the present wording of section 44 (ii) provides for a permanent disqualification in the case of a person attainted of treason while, in the case of other offences, the disqualification is only for the period during which the person is under sentence or subject to be sentenced.

3.5 We have, nevertheless, considered the desirability of abolishing the special ground of disqualification based on treason, and rejected such a course. The express inclusion in the Constitution of treason as a permanent ground of disqualification is a clear indication that the authors of the Constitution regarded it as the most serious crime which would preclude a person from membership of Parliament. The nature of treason and the abhorrence which it, not unnaturally, arouses are such as to justify its retention as a ground of permanent disqualification. It is, after all, the most serious offence which a citizen can commit against his fellow countrymen, striking at the very roots of the nation's security. As such, it is fitting that it should permanently bar a convicted person from national parliamentary office.

3.6 Nevertheless, the present constitutional formula, 'attainted of treason', is obscure. Given our view that treason should be retained as a ground of disqualification, it is desirable that the nature of this ground should be spelt out more clearly. The first step in achieving greater clarity is the replacement of 'attainted' by 'convicted'. Whether a person has been *convicted* of treason is a matter of fact, readily ascertainable by reference to court records. Once this fact is established, the disqualification arises. (The matter of a pardon will be discussed below.)

3.7 Treason is a statutory offence[9] defined under Commonwealth legislation in s. 24 of the *Crimes Act* 1914. The material part of s. 24 provides as follows:

> 24. (1) A person who—
> (a) kills the Sovereign, does the Sovereign any bodily harm tending to the death or destruction of the Sovereign or maims, wounds, imprisons or restrains the Sovereign;
> (b) kills the eldest son and heir apparent, or the Queen Consort, of the Sovereign;
> (c) levies war, or does any act preparatory to levying war, against the Commonwealth;
> (d) assists by any means whatever, with intent to assist, an enemy—
> (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
> (ii) specified by proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth;
> (e) instigates a foreigner to make an armed invasion of the Commonwealth or any Territory not forming part of the Commonwealth; or
> (f) forms an intention to do any act referred to in a preceding paragraph of this sub-section and manifests that intention by an overt act,
>
> shall be guilty of an indictable offence, called treason, and liable to the punishment of death.

By virtue of ss. 4 and 5 of the *Death Penalty Abolition Act* 1973 the penalty of imprisonment for life has been substituted for the punishment of death. Section 24 is a modification of the grounds of treason set down in a series of English statutes dating from 1351.[10]

3.8 It is possible, therefore, to determine whether a person has been convicted of treason as defined by the Commonwealth Parliament in s. 24 of the Crimes Act. This is

the basis on which the disqualification should rest, thereby keeping this particular ground of disqualification within the control of the Commonwealth Parliament, the appropriate body to exercise such control.[11]

3.9 Even though in this way the scope of the offence of treason will be kept within parliamentary control, we recognise that, with changing circumstances and the effluxion of time, it is possible that perceptions of deeds which earlier led to a conviction for treason may alter. This may result in the grant of a pardon for the offence. The effect of such a pardon will be to clear the person pardoned from all infamy and from all consequences of the offence for which it is granted. In addition he is cleared from all statutory or other disqualifications following upon conviction.[12] Expressed another way, the recipient of the pardon is given 'a new credit and capacity'.[13] Accordingly, it seems he would enjoy renewed capacity to seek election to the Parliament. It is fitting, therefore, that allowance should be made in s. 44 (ii) for the grant of a pardon to remove what would otherwise be a permanent disqualification, namely a conviction for treason.

3.10 We note in passing that the 1891 draft of the equivalent provision to s. 44 provided that the grounds of disqualification contained therein would have effect 'until the disability is removed by a grant of a discharge, or the expiration of the sentence, or a pardon, or release, or otherwise.'[14] This form of words was substantially modified in a later draft and its intent was, to a large extent, encompassed within the wording of the second aspect of s. 44 (ii). Nevertheless we think that it is appropriate, in relation to the offence of treason, to restore the reference to the possibility of a pardon, thereby regaining, in a sense, the spirit of the earlier draft. Our consideration of this aspect of s. 44 (ii) has led us to the view that a substantial re-wording is necessary and we recommend accordingly.

3.11 Recommendation: Section 44 (ii) of the Constitution should be amended by repealing the words 'is attainted of treason' and substituting the following words: 'has been convicted under the law of the Commonwealth, and not subsequently pardoned, of the offence of treason.'

OFFENCES PUNISHABLE BY IMPRISONMENT FOR ONE YEAR OR LONGER

3.12 The second aspect of s. 44 (ii) disqualifies any person who '. . . has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer'. This provision was less specific in earlier drafts of the Constitution in that the disqualification arose if a person was convicted of '. . . felony or of any infamous crime'. This wording appears in successive drafts of the Constitution from 1891 until 1898. However, the following words of the clause made it clear that the disqualification for such a conviction was not to be permanent by providing that it should last '. . . until the disability is removed by a grant of a discharge, or the expiration of the sentence, or a pardon or release, or otherwise.'[15]

3.13 At the Sydney session of the Convention of 1897 Edmund Barton referred to an amendment proposed by Sir Samuel Griffith. This proposal was to substitute for the words 'felony or any infamous crime' the following:[16]

> Any offence of such a nature that by the law of the State of which he is a representative, the person convicted of it is liable to undergo deprivation of liberty for a term of three years.

This proposal was apparently considered by the Drafting Committee after the 1897 session,[17] and in Melbourne in 1898 a much more specific provision, adopting the thrust of the Griffith proposal, emerged. This provision was, in fact, the same as the current s. 44 (ii) except that the period of imprisonment referred to was three years, not one as now.[18] During the short debate on this amendment the only question of principle which arose was whether a criminal conviction should operate permanently to disqualify a person from election to Parliament or only serve to disqualify him for the duration of his sentence.[19] Generally, however, there was little support for permanent disqualification on this ground and an amendment which would have had this effect was soundly defeated.[20]

3.14 Clearly, the purpose of the second part of s. 44 (ii) is to prevent persons convicted of offences of a certain degree of seriousness (indicated by their carrying a minimum penalty of a year's imprisonment) from either standing for Parliament or continuing to sit in Parliament during the period of their sentence. This provision is based on the view that someone who has been found guilty of a serious offence is not a fit and proper person to seek or hold parliamentary office while he is under sentence.

3.15 While we are in no doubt that this purpose remains valid, we are by no means certain that s. 44 (ii) is still the most effective way to achieve it. Professor Sawer in his submission[21] suggests the need to investigate whether existing or potential sentencing systems might create difficulty in deciding whether a particular offence is punishable for a year or longer. Indeed society's approach to the treatment of offenders has changed so much since the end of the nineteenth century, when this provision was included in the Constitution, as to throw its efficacy into doubt. Since that time society's methods of treating criminal offenders have become more complex; we have seen the development of the new field of criminology where the emphasis is on a criminal justice system which seeks to rehabilitate offenders as useful members of society rather than mete out harsh penalties in retribution for wrongs inflicted on society.

3.16 In its recent Interim Report, *Sentencing of Federal Offenders*,[22] the Australian Law Reform Commission discusses the fluctuating state of the debate on methods of punishing offenders, noting that the philosophy of rehabilitation appears to be 'undergoing a period of challenge or eclipse' while the philosophy of retribution 'is enjoying a renaissance under the "fresh guise" of the concept of "just desserts".'[23] After an extended discussion of the debate, the Commission, while acknowledging that there are many factors to be weighed up, concludes that imprisonment should be used only as a punishment of last resort. In the words of the Interim Report:

> Imprisonment should be used only in cases where it is necessary for the protection of society or where a lesser penalty would depreciate the seriousness with which society views a particular crime, or where lesser sanctions may have been applied in the past and ignored by the offender. Nevertheless, rational and humane sentencing reform should be guided by the principle that Commonwealth laws on punishment of convicted Federal offenders should adopt and encourage the use of the least punitive sanction necessary to achieve social protection. So far as is consistent with social protection, preference should be given to the use of non-custodial sentencing options and the use of such options should be facilitated by reform of Commonwealth law.[24]

We refer to these views because they serve to emphasise the inappropriateness of using as a yardstick for parliamentary disqualification the criterion of being under sentence or subject to be sentenced for any offence punishable by imprisonment. While as the Law Reform Commission itself acknowledges,[25] imprisonment as a form of punishment will be with us for the forseeable future, the trend of informed opinion is towards the greater

adoption of non-custodial sanctions. In this context, the entrenchment within the Constitution of a criterion based on nineteenth century methods of punishing serious offences is likely to become increasingly irrelevant.

3.17 An even more compelling criticism of this aspect of s. 44 (ii) as a basis for disqualification is the lack of consistency in attaching penal sanctions to offences. This is true both for terms of imprisonment and fines, and has been highlighted as regards Commonwealth offences by the Law Reform Commission. Thus, in the Interim Report on sentencing, the following conclusion is stated:

> The Commission's study of the range of penalties which provide periods of imprisonment for offences under Commonwealth Acts has revealed a lamentably confused morass of sanctions which lack any apparent consistency, rationale or planning.[26]

The Interim Report provides a number of examples of the inconsistency which prevails in the setting of maximum terms of imprisonment for similar offences.[27] One example, relating to the forging and uttering provisions in certain Commonwealth Acts,[28] will suffice to illustrate the reason for our concern. Under s. 47 of the *Reserve Bank Act* 1959 a penalty of 14 years' imprisonment is provided for persons who forge or utter Australian bank notes. Section 57 of the *Crimes Act* 1914, on the other hand, provides a term of imprisonment for 3 years for persons who utter any counterfeit coin knowing it to be counterfeit. Section 54 of the same Act provides a term of imprisonment of 10 years for persons who make, or begin to make, any counterfeit coin. Forging or uttering Treasury bills under s. 13 (1) of the *Treasury Bills Act* 1914, carries a penalty of 10 years' imprisonment. In relation to this example the Law Reform Commission remarks:

> It is difficult to see why the relativity provided for in the case of forging and uttering should evaporate entirely in the case of making coins and forging Treasury bills.[29]

3.18 Further incongruity arises in the case of some offences, which, although they are of a relatively minor nature, are punishable by long periods of imprisonment. Thus, for example, under s. 19 (2) of the *Antarctic Treaty (Environment Protection) Act* 1980 a person who, among other things, flies an aircraft in such a manner as to disturb a concentration[30] of birds or seals, or, while on foot, disturbs a concentration of birds or seals is liable to a fine of $2,000 or imprisonment for 12 months, or both. While accepting the policy behind this legislation, it is in our view quite extraordinary that a person convicted of an offence of such a character would thereby be disqualified from Parliament.

3.19 Another incongruity lies in the existence of serious offences which are punishable, upon conviction, only by the imposition of a fine without any provision for imprisonment. Such offences would not come within the terms of s. 44 (ii) and therefore would not operate to disqualify a convicted person from Parliament or candidature for Parliament. Thus, under s. 231 of the *Income Tax Assessment Act* 1936, any person who fraudulently avoids or attempts to avoid assessment or taxation is guilty of an offence for which the maximum penalty is $1,000 with a discretion in the Court to order the person to pay a sum up to twice the amount of tax that has been avoided or attempted to be avoided. Thus, under the law as it presently stands, a person convicted of a serious offence against the tax laws would not be thereby disqualified, although this is surely an area, if ever there was one, which demands probity from those seeking, or holding, parliamentary office.

3.20 Another area where pecuniary penalties are the only option available to deal with a convicted person is that of trade practices. Thus, under s. 76 of the *Trade Practices Act* 1974, a natural person who is convicted of a contravention of Part IV of the Act is liable to a maximum fine of $50,000. Part IV deals with such offences as contracts in restraint of trade, pricing covenants, secondary boycotts, monopolisation, exclusive

dealing, resale price maintenance, price discrimination and mergers. Under s. 79 a maximum penalty of $10,000 can be imposed on a natural person who contravenes the consumer protection provisions of the Act. Part V deals with consumer protection and includes provisions prohibiting practices such as false representations and false descriptions, and provisions creating implied undertakings as to quality or fitness. It is clear from the level of penalties imposed that Parliament regards these offences under the Trade Practices Act as serious. However, because they are not punishable upon conviction by a term of imprisonment, their commission would not render the offender liable to disqualification.

3.21 Further incongruities arise where there are differences in penalties for similar offences as between different jurisdictions. For example, in the A.C.T. sub-s. 5(2) of the *Poisons and Narcotics Drugs Ordinance* 1978 provides for a maximum penalty of 2 years' imprisonment, or a fine of $2,000, or both, for the possession of a quantity of cannabis in excess of 25 grams in mass. If the offence relates to a quantity of 25 grams or less, the penalty is a maximum fine of $100. In Queensland, on the other hand, s. 130 of the Health Act 1937-1980 prescribes a penalty of a fine of $2,000, imprisonment for 2 years with hard labour, or both, for possession in whatever quantity. Thus a serving member or a candidate who was convicted for possession of less that 25 grams of cannabis would be disqualified if convicted under the law of Queensland but not under the law of the A.C.T.

3.22 Even within the same jurisdiction there can be inconsistencies between penalties attaching to the same offence& This has been recently illustrated in a manner highly pertinent to the matter here under discussion when Senator Georges was convicted under the law of Queensland on two occasions, once in 1978 and again in 1979, for taking part in an unlawful procession and disobeying an order given by a member of the Police Force. Senator Georges was convicted under s. 36 of the Traffic Act 1949-1980, and reg. 124 made under that Act. Under those provisions, the maximum penalty is $200 or six months' imprisonment for an offence under the Act, or $100 or three months' imprisonment for an offence under the Regulations. If, however, he had been charged, as he might have been, and convicted under s. 61 of the Queensland Criminal Code for taking part in an unlawful assembly, he would have been disqualified from Parliament. This is because, under s. 62 of the Criminal Code, conviction for taking part in an unlawful assembly carries a penalty of imprisonment for one year, thereby bringing it squarely within s. 44 (ii).

3.23 This situation, and the sort of situation we have referred to in paragraph 3.21, are intolerable. Such inconsistencies in penalties attaching to similar offences, whether between the various Australian jurisdictions or within a particular jurisdiction, lead to uncertainty and injustice. Not only that, in the context of our discussion in this chapter, they place membership of the Commonwealth Parliament at the caprice of State Parliaments. The only appropriate body to determine the criteria for membership of the Commonwealth Parliament is that Parliament itself.

3.24 In a submission to the Committee, made before the publication of the Interim Report on sentencing but after the Law Reform Commission had done considerable research in this area, the Commission Chairman, Mr Justice Kirby, noted that the Commission's research demonstrated inconsistencies and lack of uniformity in the penalties provided under Commonwealth and A.C.T. law. His Honour remarked:

> If the Committee were to reach a similar view, it might consider that the provision disqualifying a person from being chosen or sitting in the Parliament by reason of being convicted of an offence punishable by imprisonment for one year or longer is unsafe or at best irrelevant.[31]

Indeed, on the basis both of the Commission's findings and of our own understanding of the situation, we have come to a similar view. It is notorious that, because of the increased number and complexity of offences which have been created by Parliaments, both Commonwealth and State, in recent times, many inconsistencies have been allowed to develop. The very fact that the Attorney-General has seen fit to give the Commission a reference on the punishment of Commonwealth offenders, as a matter of urgency,[32] is indicative of the gravity of the problem.

3.25 Modern developments in methods of sentencing, such as the suspended sentence and the conditional discharge, create anomalies and incongruities in the operation and effect of the second criterion of disqualification within s.44 (ii), thereby further emphasising its inappropriateness. Conditional discharge[33] means that the offender is released upon certain conditions, expressed in a bond, to which he must adhere for a specified time. If the offender abstains from re-offending during the period of his bond, that is the end of it. If he does not, he becomees liable to further sentence for the offence for which he was conditionally discharged and also to sentence for his new offence. Suspended sentence, although similar to conditional discharge, can nevertheless be distinguished from it. Whereas on conditional discharge no further sentence is imposed unless and until there is a breach of condition, under suspended sentence a sentence is imposed at the time of discharge which does not come into operation unless and until there is a breach of condition, when it comes into operation automatically.

3.26 Section 556A of the Crimes Act 1900 (NSW) provides an example of the option of conditional discharge.[34] It provides, in part, that where a court before which a person is charged thinks that the charge is proved but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed or to any other matter which the court thinks it proper to consider, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, either dismiss the charge, or discharge the offender conditionally on his entering into a recognizance to be of good behaviour and to appear for conviction and sentence when called on at any time during whatever period, not to exceed three years, as may be specified by the court. Section 558 of the NSW Crimes Act makes provision for a deferred sentence to be imposed in circumstances where the court before whom a person comes to be sentenced thinks fit. The court may order the offender's release upon a good behaviour bond for such period as it thinks fit. Until the period of the bond has elapsed, the offender, if he breaches the bond, is liable to be called up for sentence.

3.27 The incongruity of the second criterion of s. 44 (ii) which speaks of a person 'under sentence, or subject to be sentenced' should be apparent from this discussion. In cases where an order for a suspended sentence or conditional discharge is made for an offence which, upon conviction, carries a penalty of imprisonment for, say, a year, it is quite possible that an offender would have entered into a recognizance to be of good behaviour for a period extending beyond his sentence. Under s. 556A this period can be up to 3 years; under s. 558 there is no set period of time, being only such period 'as the Court thinks proper'. Yet the offender would still be liable to sentence at any time during the period of the recognizance, as provided by the terms of s. 556A (1) (b) or s. 558. Thus situations could arise where, even though the period of sentence to which the offender would have been liable if convicted has passed, because the period of recognizance has still not terminated he would still be liable for sentence or subject to be sentenced. Thus situated, he would, on a strict interpretation of s. 44 (ii), be disqualified

from being chosen as a member of Parliament, or, if already a member, from sitting. Such a state of affairs is, in our view, quite unsatisfactory and can only be regarded as going well beyond the purpose intended by the authors of s. 44 (ii).

3.28 These considerations have led us to conclude that the second aspect of s. 44 (ii) in its present form is quite unsatisfactory, and should either be amended or repealed. One obvious way of amending s. 44 (ii) would be to provide that the imposition of fines of a certain magnitude would lead to disqualification, thereby overcoming one of the problems we discussed earlier in the chapter. Such an amendment has several drawbacks. First, a similar lack of uniformity exists here as in the case of terms of imprisonment, as the Law Reform Commission points out in its Interim Report,[35] so that there is great difficulty in using a certain level of monetary penalty as an indication of the seriousness of offences. Secondly, even if the problem of inconsistency were overcome, it is quite inappropriate to entrench in the Constitution an amount of money to be used as a determinant of the right of people to stand for Parliament or, in the case of existing members, to continue to hold their seats. The difficulties of constitutional amendment mean that time and the effects of inflation could result in an alteration of the nature of the provision from one dealing with offences of a serious nature to one concerned with those of a quite trivial nature. This, of course, could lead to a situation where disqualification occurred as a result of a conviction for a minor offence.

3.29 Another method of amending s. 44 (ii) would be to provide that, upon conviction for offences of a certain level of seriousness, a sitting member of Parliament could be disqualified by decision of the House of which he is a member and forced to face the judgment of the electorate. This option is fraught with difficulties of definition, and these algne are sufficient to warrant its rejection. Examples are the question of the nature and seriousness of offences necessary to invoke an expulsion procedure; whether it would apply to offences tried summarily or only upon indictment; whether the expulsion procedure could in invoked only after all avenues of appeal had been exhausted, or at some earlier stage.

3.30 Undoubtedly both Houses of the Federal Parliament have the power to expel a member guilty of wrongful conduct.[36] The power of expulsion is one of the principal powers of the House of Commons and, as the Federal Parliament has not exercised its power under s. 49 of the Constitution to declare its powers, privileges and immunities, they are, by virtue of that section, those of the House of Commons at the establishment of the Commonwealth.[37] Thus an expulsion procedure could be implemented under Standing Orders to deal with disqualification for criminal offences.

3.31 The power of expulsion has only once been exercised —by the House of Representatives in 1920 when the Honourable Hugh Mahon, A.L.P. Member for Kalgoorlie, was expelled by resolution of the House. The motion, which was agreed to by a division on party lines, read as follows:

> That in the opinion of this House, the Honourable Member for Kalgoorlie, the Honourable Hugh Mahon, having, by seditious and disloyal utterances at a public meeting on Sunday last, been guilty of conduct unfitting him to remain a member of this House and inconsistent with the oath of allegiance which he has taken as a Member of this House, be expelled this House.

A further motion was moved, and agreed to, in the following form:

> That accordingly the seat of the Honourable Hugh Mahon, the Honourable Member for Kalgoorlie, be declared vacant by his expulsion from this House.[38]

The Mahon case, which was debated amid great acrimony, arose because of remarks attributed to Mr Mahon in a speech he made about the situation which existed in

Ireland in 1920. Mahon claimed in a letter to Prime Minister Hughes that the report of the speech was incomplete and that, read in its entirety, the speech was neither seditious nor disloyal, as claimed by the Prime Minister. The Leader of the Opposition moved an amendment to the effect that Parliament was not the proper tribunal to try a charge of sedition against a member arising out of the exercise of his right of free speech at a public assembly outside the Parliament. Rather, if there were grounds for a charge of sedition, it was a matter which should be tried in a court by a jury.

3.32 The vitriolic, highly-charged and emotional nature of the debate in the Mahon case, dealing as it did with extremely sensitive questions among the Australian people at that time, does little credit to the case for allowing Parliament itself to decide matters of disqualification. It should be remembered, however, that Parliament was there dealing with what was, in reality, an alleged political offence. The charge levelled against Mahon was of a highly political nature. We are concerned with matters which will already have been the subject of a court decision, thereby removing the danger of abuses of the legal process and denial of justice. Nevertheless, given that issues relating to a parliamentarian's personal conduct would be involved, there is still the possibility of a bitter debate with strong elements of personal attack and political point-scoring.

3.33 Arguably, it would be preferable to adopt a system whereby questions as to whether a member convicted of an offence would continue to sit would be referred to a parliamentary committee which would make a recommendation, for consideration by the whole House, as to whether the member's place should be declared vacant, thereby leaving the ultimate judgment to the electors. This procedure has the potential for a bipartisan approach in which the issues are examined objectively away from the politically charged atmosphere of a full-scale debate in one of the chambers.[39] We note in passing that the equivalent British legislation, the Forfeiture Act 1870, which disqualified persons convicted of treason and felony, has been repealed by the Criminal Law Act 1967 in so far as felonies are concerned. While no disqualification exists for criminal conviction (treason excepted), both Houses of the British Parliament have the right to expel such a person. Nevertheless, we do not find the parliamentary committee procedure attractive as a solution to the difficulties of this aspect of s. 44 (ii).

3.34 Professor Sawer suggests that there seems to be some merit in 'repealing the subsection, leaving such matters to the judgment of the electors in the first place and to the operation of section 38 thereafter.'[40]

Section 38 of the Constitution provides that:

> 38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

Section 20 makes similar provision in the case of absent senators. We see merit in the view put by Professor Sawer and have, upon consideration, reached the conclusion that the second aspect of s.44 (ii) is no longer satisfactory as a means of ensuring that persons convicted of serious offences do not either seek a place in Parliament or, if already a senator or member of the House of Representatives, retain their seat in Parliament. Instead, we, like Professor Sawer, regard this as something which can be left to the judgment of the electors where candidates are concerned and, in the case of sitting members, to the discretionary operation of s. 38 or s. 20. The operation of s. 38 would, of course, have the effect of causing a by-election for the House of Representatives, thereby putting the matter before the electors, presuming the member in question chose to stand again. The operation of s. 20 would give rise to a casual vacancy under s. 15 as far as the Senate is concerned.[41] We are aware that ss. 20 and 38 cannot assist in situations where the only penalty for an offence is a fine, so that a member convicted of a serious offence whose only penalty is a fine could still sit in the Parliament. However,

there is, in our view, no practical alternative but to leave the question of such a member's fitness for Parliament to the decision of the electors at the next election. Having said that, we are nevertheless confident that in serious cases the member concerned would be subject to strong pressures from within his own Party which could well lead to his resignation.

3.35 Finally, and keeping in mind the reservations we expressed above, there is as an ultimate, and extreme, resort the option of expulsion under s. 49. If a member of the House of Representatives is expelled, he has the option of seeking re-election at the by-election which must follow. The situation is more complex in the case of an expelled senator. It is conceivable, but not likely, that his name could be put forward for selection by the State Parliament under s. 15. In any event the expelled senator could nominate for the next election of the Senate. There are, therefore, processes whereby the electors can ultimately make their own judgment, even about members or senators who have been expelled.

3.36 In this context it is worth noting some examples which have occurred in the United States. Recently, on 2 October 1980, the United States House of Representatives took the unusual step of expelling a member (Rep. Michael Myers) who had been convicted of bribery in the FBI's 'Abscam' political corruption investigation.[42] He was defeated in the election held on 4 November 1980. Another member was also convicted in the 'Abscam' probe and subsequently defeated in the election.[43] Three other members, although on indictment awaiting trial on similar charges at the time, were also defeated in the election of 4 November.[44] By contrast, when the House of Representatives in 1967 voted to exclude Adam Clayton Powell from the 90th Congress for numerous offences, including involvement in court cases for income tax evasion and libel, he was re-elected overwhelmingly, even though he did not campaign.[45]

3.37 These examples serve to illustrate our belief that the electorate is the forum in which decisions about the suitability of a person for membership of the Parliament can best be made. Ultimately, it must be the electorate which makes decisions about the quality of representation which it demands in the national Parliament.

3.38 Recommendation: Section 44 (ii) of the Constitution should be amended by omitting the words 'or has been convicted and is under sentence or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer'.

3.39 If our recommendations with respect to the amendment of s. 44 (ii) are accepted, it will read as follows:

> Any person who has been convicted under the law of the Commonwealth, and not subsequently pardoned, of the offence of treason shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Notes and references

1. See J.A. La Nauze, *The Making of the Australian Constitution*, MUP, Melbourne, 1972, p. 53. See discussion later at paras 3.12-3.13.
2. Convention Debates, Sydney, 1891, pp. 665-659.
3. Convention Debates, Melbourne, 1898, p. 2445.
4. Quoted in Erskine May's *Parliamentary Practice*, 15th edn, London, 1950, p. 196.
5. Submission No. 8, p. 1.
6. ibid.
7. R.D. Lumb & K.W. Ryan, *The Constitution of the Commonwealth of Australia Annotated*, 2nd edn, Butterworths, Sydney, 1977, p. 63.
8. Submission No. 8, p. 1.

9. There appears to be no common law offence of treason: *Halsbury's Statutes of England*, 3rd edn, vol. 8, p. 13, note referring to *R* v *Sindercome* (1658) 5 State Tr. 842.
10. See *Halsbury's Laws of England*, 4th edn, vol. 11, para 811 ff.; *Halsbury's Statutes of England*, vol. 8, *passim*.
11. It is not clear whether treason provisions in the Queensland, Tasmania and Western Australia Criminal Codes are good law in light of the corresponding Crimes Act provision (See C. Howard, *Criminal Law*, 3rd edn, Law Book Co., Sydney, 1977 p. 423, footnote 69). In any event, we would restrict the ground to conviction for treason under Commonwealth law.
12. *Halsbury's Laws of England*, 4th edn, vol. 8, para 952.
13. per Morris C.J.: *R* v *Cosgrove* (1948) Tas. SR 99 at 106.
14. Convention Debates, Sydney, 1891, p. 655.
15. ibid.
16. Convention Debates, Sydney, 1897, p. 1020.
17. ibid, p. 1021.
18. Convention Debates, Melbourne, 1898, p. 1931.
19. Convention Debates, Sydney, 1891, pp. 655-659.
20. ibid, p. 659.
21. No. 8, p. 1.
22. ALRC Report No. 15, Commonwealth of Australia, 1980, para. 38 ff.
23. ibid, para. 41.
24. ibid, para. 67; and see further discussion at para 160.
25. ibid, para. 160.
26. ibid, para. 410.
27. cited footnote 22, paras 410-413.
28. ibid, para. 413.
29. ibid.
30. Section 19(4) defines 'concentration' as being, in relation to birds, an identifiable group of more than 20, and, in relation to seals, an identifiable group of more than 10.
31. Submission No. 15, p. 2.
32. ibid, p. 1.
33. The discussion on suspended sentence and conditional discharge is based on: 'Sentencing and Corrections', *First Report of the Criminal Law and Penal Methods Reform Committee of South Australia*, July 1973, chapter 4, pp. 135 ff.
34. 556A (1) Where any person is charged before any court with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed or to any other matter which the court thinks it proper to consider, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—
    (a) dismissing the charge; or
    (b) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

    (1A) A recognizance mentioned in subsection (1) shall be conditioned upon and subject to such terms and conditions as the court shall order.

    (2) Where an order is made under this section the order shall, for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner, and as to the payment of money upon or in connection with such restitution or delivery, and for the purpose of the exercise of any power conferred by section 437 (1) or section 554 (3), have the like effect as a conviction.

    (3) Where under subsection (1) a charge is dismissed or an offender is conditionally discharged, the person charged shall have the same rights as to appeal on the ground that he was not guilty of the offence charged as he would have had if convicted of the offence.
35. Cited footnote 22, paras 414-417.
36. J.R. Odgers, *Australian Senate Practice*, 5th edn, AGPS, Canberra, 1976, p. 261.
37. It should be noted that while the Privileges Committees of both Houses have investigated specific matters relating to the arrest and imprisonment of a Senator and member of the House of Representatives, they themselves have not gone on to make any specific recommendations which touch upon the question of how such arrests and imprisonment might affect the qualification or disqualification of members. See:

Imprisonment of a Senator, October 1979, Parl. Paper No. 273/1979; House of Representatives, Committee of Privileges, *Report Relating to the Commitment to Prison of Mr T. Uren, M.P.*, May 1971, Parl. Paper No. 67/1971.

38. Australia, House of Representatives, *Votes and Proceedings*, 1920-21, pp. 431-3.
39. It is useful here to refer to the Poulson affair in Britain. A Select Committee of the House of Commons was established to inquire into the conduct and activities of a number of members, including former Home Secretary Reginald Maudling, in connection with the business affairs of Mr J.G.L. Poulson to determine whether such conduct or activities amounted to a contempt of the House. Although Mr Maulding's conduct was criticised, he was not found to be in contempt. During debate on the Committee's report, amendments to expel Mr Maulding and another member were overwhelmingly defeated. A useful account is contained in *Keesing's Contemporary Archives*, October 14, 1977, pp. 28607-28610.
40. Submission No. 8, p. 1.
41. In the case of a casual vacancy in the Senate the electorate is the Parliament of the relevant State acting in accordance with s.15 of the Constitution as representatives of the voters of that State.
42. Myers is the first House member to be expelled since 1861. See the account in *Inside Congress*, Congressional Quarterly Inc., page 2894, October 4, 1980.
43. He is John W. Jenrette Jnr.: *Inside Congress*, page 3336, November 8, 1980.
44. Representatives Richard Kelly, John M. Murphy and Frank Thompson Jnr., ibid.
45. In a subsequent decision in 1969 the U.S. Supreme Court held that the House had acted improperly in excluding Powell. See a full account in *Congress and the Nation*, vol. II, Congressional Quarterly Service, Washington D.C., 1969, pp. 895-900.

CHAPTER 4

Bankruptcy and Insolvency (ss. 44 (iii) and 45 (ii))

CONSTITUTIONAL PROVISIONS

4.1 The operative provisions in this chapter are as follows:

> 44. Any person who—
> (iii) Is an undischarged bankrupt or insolvent:
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives
> 45. If a senator or member of the House of Representatives—
> (ii) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors:
> his place shall thereupon become vacant.

4.2 Sections 44 (iii) and 45 (ii) have attracted little attention during the last eighty years in common with the other provisions disqualifying members of Parliament. There has been virtually no commentary or analysis as to their meaning or likely interpretation in constitutional texts, nor have they been subject to judicial interpretation, with the exception of some incidental remarks in the Supreme Court of South Australia.[1] As far as we are aware, the only Parliamentary discussion of these provisions occurred in relation to an alleged breach of s. 45 (ii) by Mr Michael Baume MP.[2]

4.3 It can be argued that these provisions, and in particular s. 44 (iii), are far-reaching, if strictly interpreted according to their current meaning, and as a result this may cause considerable difficulty in determining whether a disqualification has definitely occurred. We will now consider the meaning and likely interpretation of these provisions and then broach the more substantive question of whether, as a matter of policy, such provisions should remain in the Constitution no matter what form they take.

(a) Meaning of s. 44 (iii)

4.4 The making of a formal bankruptcy order is a clear and definite event which can disqualify a candidate, sitting member or senator under s. 44 (iii). However, the use of the word 'insolvent' in s. 44 (iii) presents considerable difficulties of interpretation. Today, the word is more usually used to describe a condition of being unable to pay debts; used in this way it introduces a less clearly defined status as it does not imply any formal process of being declared insolvent. In bankruptcy proceedings the word 'insolvency' is used in two senses, first, to indicate that the realizable amount of the property of a person is less than the amount of a person's liabilities and, second, that the property of a person, although its realizable amount may exceed the amount of the liabilities, is in such a form as to prevent that person from paying his debts as and when they become due. This second usage was elucidated by Isaacs, J. in *Bank of Australasia* v. *Hall*.[3]

4.5 However, there has been no detailed discussion of 'insolvency' as it appears in s. 51 (xvii) of the Constitution, and in the Bankruptcy Act the insolvency of a person is expressed in terms of his inability to meet his debts as they become due out of his own moneys.[4] In *Sandell* v. *Porter*, Barwick CJ, interpreted this expression restrictively in relation to traders:

> . . . the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time —relative to the nature and amount of the debts

and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency . . . ought not to be drawn simply from evidence of a temporary lack of liquidity.[5]

While a restrictive interpretation is essential to ensure that traders may continue to trade with each other notwithstanding temporary liquidity problems, different interests are at stake in relation to non-business debtors. Generally credit is not extended to them, as it is to traders, to enable them to earn income. In effect, the definition of the concept of insolvency changes in accordance with a debtor's commercial status, or lack thereof, in the community.

4.6 Whether a person is able to pay his debts as they fall due is in each case a question of fact, and often there is no definite event which would automatically render a person insolvent. Insolvency can be inferred when debt recovery processes such as examination orders, instalment orders, garnishment orders, warrants and writs of execution have been instigated against an individual. However, the issue of a judgment recovery process cannot be taken as an infallible indication of the insolvency of the debtor at whom it is directed. He may have forgotten to pay, may dispute the debt, or may simply not wish to pay. In none of these cases can insolvency confidently be inferred. Despite these inherent difficulties, it could be argued that the word 'insolvent' is to be interpreted according to its current and ordinary meaning, and consequently any person who is unable to pay his debts, in either of the senses previously indicated, would be disqualified. The alternative approach that can be adopted is to hold that the word held a different meaning, either in its contemporaneous exposition, or in a technical legal sense, at the time of the enactment of the Constitution.

4.7 The approach of the courts used to be that each word in an Act retains the meaning that it had at the point of time when it was enacted. However, the operation of this rule has been virtually abandoned and the courts now generally interpret words in an Act in accordance with their current meaning, subject to certain limited exceptions.[6] It is possible that an exception may occur when construing ambiguous words in an old statute, where a word or phrase has acquired an extended or different meaning since enactment, which would clearly not have been intended by the legislature.[7] The courts are also frequently concerned with technical words and phrases, and when words have acquired a technical legal meaning, the courts will construe them on the basis that the legislature intended to use them with that meaning unless a contrary intention clearly appears from the context.[8]

4.8 The Convention Debates provide some assistance as to the proper construction to be given to the provision. Although none of the speeches explicitly define the word 'insolvent', it is apparent that the framers of the Constitution intended a different interpretation of the word than its current meaning. Perhaps the clearest exposition of the provision was made by Mr O'Connor:

So that directly a man became bankrupt or insolvent, and until his discharge, he is under one of the disabilities in sub-section (3), (4) and (5). As soon as he comes under these diabilities his place becomes vacant. That deals with cases of compulsory sequestration . . .[9]

The inference in this passage, that insolvency was synonomous with bankruptcy, also appears in the speeches of other members of the Convention who debated the clause.

4.9 Whether the courts would refer to the Convention Debates in attempting to ascertain the meaning of this word is, of course, another matter. There is strong authority denying the right of courts to consider what was said in parliamentary debates or at the Constitutional Conventions.[10] This approach is still followed by the courts as was pointed out by Barwick CJ in *Attorney-General for Australia (at the relation of McKinlay) and Others* v. *Commonwealth of Australia and Others:*

> But it is settled doctrine in Australia that the records of the discussions in the conventions and in the legislatures of the colonies will not be used as an aid to the construction of the Constitution.[11]

4.10 Perhaps the most notable exception to this rule occurred in the case of *In re Webster*.[12] As we mention in a later chapter, Barwick CJ specifically referred to the Convention Debates in reaching his conclusion as to the scope of s. 44 (v). While it is probable that this was merely an isolated instance and does not represent a change in the general rule, there is authority for the view that parliamentary debates, including the Convention Debates, may be referred to in order to determine the background to the enactment of legislation.[13] In the *McKinlay* case the Chief Justice states:

> In case of ambiguity or lack of certainty, resort can be had to the history of the colonies, particularly in the period of and immediately preceding the development of the terms of the Constitution.[14]

Gibbs J also referred to this aspect:

> In Australia it has been accepted that in construing the Constitution . . . regard may be had to the state of things existing when the statute was passed, and therefore to historical facts and to earlier legislation.[15]

4.11 These judicial statements lead us to the view that the courts would be likely to look at the meaning of the word 'insolvent' at the time of the enactment of the Constitution by reference to earlier legislation and usage.

4.12 The inference in the Convention Debates, that insolvency was synonomous with bankruptcy, can also be ascertained from the relevant colonial legislation. At the time of Federation three of the colonies, Victoria, Queensland and South Australia, had legislation described as Insolvency or Insolvent Acts.[16] A study of these statutes indicates that the term 'insolvency' appears to have been substituted for the earlier word 'bankruptcy', and that a person referred to as insolvent indicated that a formal order had been made against the individual concerned. It is probable that the framers of the Constitution, in their desire to comprehensively cover the situation of bankrupt members of Parliament, included the word 'insolvent' to be in accordance with the exact terminology of the relevant colonial legislation. If this interpretation is accepted, the word 'insolvent' could be classified as a noun and would be qualified by the adjective 'undischarged'. While it is not customary to speak of an 'undischarged insolvent', the Convention Debates as well as the colonial legislation are highly persuasive in confirming our view that this term was commonly used at the time of the enactment of the Constitution.

4.13 There are also practical reasons why s. 44 (iii) could be construed in a restrictive form to persons who have been declared bankrupt. Unless some formal step is required under the disqualifying provisions, great difficulties could occur in determining the date on which the disqualification occurred. This would be difficult in relation to eligibility for election, but even more so in relation to votes cast, or penalties incurred under s.46 of the Constitution, by a person whose financial position was not clear on any particular day.[17] Further, the wider interpretation of s. 44 (iii) might render s. 45 (ii) otiose, and obviously this result was neither intended, nor, we would argue, overlooked by the framers of the Constitution.

4.14 The only case to have judicially considered ss. 44 (iii) and 45 (ii) was the South Australian Supreme Court judgment in *Stott* v. *Parker*.[18] The Full Court was considering a petition of right for payment of salary by a member whose salary had been withheld by the Speaker, following the holding of a meeting of the creditors of the member, which agreed that the creditors would accept a composition in satisfaction of their

claims; the meeting also decided that the holding of the meeting did not constitute an act of bankruptcy. The Court considered s. 31 of the Constitution Act of South Australia, which provides that if any member of the House of Assembly becomes bankrupt or an insolvent debtor within the meaning of the laws in force in the State relating to bankrupts or insolvent debtors, his seat shall become vacant.

4.15 The majority (Napier and Richards JJ) found that the Court did not have jurisdiction to determine the question, but Napier J indicated that if jurisdiction existed, he would have been disposed to hold that the Commonwealth Bankruptcy Act is a law in force in the State relating to bankrupt or insolvent debtors, and that a debtor who takes the benefit of that law is an insolvent debtor within the meaning of s. 31 of the Constitution Act.

4.16 Cleland J held that the court did have jurisdiction, but considered that the member had not come within the disqualifying provision. He was not a 'bankrupt' and he was not an 'insolvent debtor', because even in ordinary language this means a debtor whose insolvency has in some way become definitely established. He comments on the earlier S.A. Insolvent Act 1860 and S.A. Insolvent Act 1868, pointing out that each distinguishes between insolvent debtors and debtors who make arrangements without insolvency. In illustrating that the statutory language corresponds to the popular idea of an 'insolvent debtor', he turns to ss. 44 (iii) and 45 (ii) of the Constitution. In his opinion the word 'bankrupt' is the equivalent of 'insolvent' because of the word 'undischarged'. He also notes that the creation of a further or new disability in s. 45 (ii) seems to be an implicit recognition in the Constitution that 'bankrupts' and 'insolvents' do not include persons who take the benefit etc. of any law relating to bankrupts or insolvents, otherwise this extended meaning would be otiose.

4.17 In considering the laws in force in South Australia, Cleland J noted that while the Commonwealth Act refers to 'bankrupts' viz. a person in respect of whose estate a sequestration order has been made, the earlier South Australian legislation refers to 'insolvents' as debtors who were made 'insolvent' (i.e. bankrupt) by proceedings in the Insolvency Court.[19] His argument reinforces the view that the word 'insolvent' was inserted by the framers of the Constitution as a semi-technical description used as a statutory synonym of the word 'bankrupt' and it is probable although not certain, that the High Court, sitting as a Court of Disputed Returns, would interpret this provision accordingly.

4.18 Because of the complexities of interpretation, and in the light of the persuasive practical reasons for limiting the operation of the provision, we are of the opinion that the words 'or insolvent' should be deleted from s. 44 (iii). However, we do not intend to make a recommendation at this stage as we come to the conclusion later in this chapter that the whole provision, and not just a part thereof, should be deleted from the Constitution.

(b) Meaning of s. 45 (ii)

4.19 The additional disqualification in s. 45 (ii) appears to have been inserted in an attempt to prevent members of Parliament avoiding bankruptcy or insolvency proceedings, with its inevitable disqualification, by entering into an arrangement with creditors. In the Convention Debates s. 44 (iii) was seen as dealing with cases of compulsory sequestration and s. 45 (ii) as extending to persons who voluntarily seek the assistance of the Bankruptcy Court. Mr O'Connor stated:

> There are cases in which a man may make an arrangement with some of his creditors without insolvency, and yet this arrangement comes under the direction of the court, which has

to give a certain legal effect to it. There are some cases in which a person may take the benefit of the insolvency laws by assignment or composition made under the direction of the court, and have a certain legal effect given to that arrangement by the court without actually becoming bankrupt or insolvent. It is to provide for cases of that kind that sub- section (2) was introduced.[20]

4.20 This provision was probably inserted to provide some consistency with s. 44 (iii). It would have been inconsistent to vacate the seat of a member against whom a sequestration order was made by a court, and not a member whose indebtedness would justify the making of such an order, but whose creditors allow him to enter into a substitutional form of statutory composition or arrangement. A literal reading of the provision however, appears to require an even higher standard than that imposed by s. 44 (iii). There are cases where a person who is not insolvent in that he has assets to cover all his liabilities[21] chooses not to sell assets but to enter into an arrangement with creditors; such a person is not bankrupt or insolvent but does take the benefit of a law relating to bankrupt or insolvent debtors.

4.21 However, a difficulty arises in the interpretation of s. 45 (ii), as it is not clear how widely the words 'takes the benefit' are capable of being interpreted. Given a broad interpretation, s. 45 (ii) would disqualify a member if he took any benefit under bankruptcy or insolvency legislation: such a benefit could be taken by a creditor or even a trustee in bankruptcy. Clearly the drafters of the Constitution could not have intended this result. Traditionally, bankruptcy laws were introduced to benefit the debtor at least as much as the creditor: among other things, bankruptcy legislation provides relief from debts which are impossible to defray, attempts to protect a debtor from undue harassment by creditors, and ensures a diligent and honest administration of his affairs.

4.22 It could be argued that the benefit in relation to bankruptcy is that of compulsion or involuntary agreement, in that one of the principal effects of a scheme under the Bankruptcy Act is to bind all creditors, even the dissenting ones who oppose the relevant scheme. But this is a benefit obtained by both a majority of creditors and by the trustee, and it seems unlikely that these words would be given this meaning. In our opinion, the most sensible interpretation of s. 45 (ii) is to regard it as limited to cases in which a member as a debtor takes the benefit by way of relief of his indebtedness of a law relating to bankrupt or insolvent debtors. This is obviously the meaning contemplated by the drafters of the Constitution, and there is no suggestion in the Convention Debates that the clause applied to any person who obtained an incidental benefit under any bankruptcy or insolvency legislation.

4.23 The question arises as to whether the courts would reach this conclusion. Under the literal rule of statutory interpretation, they are bound to apply the ordinary and natural meaning of words even if the result is inconvenient or improbable. Although in most contexts the application of this rule has been gradually watered down over the years, and statutory provisions have often been virtually ignored by the courts if they resulted in manifest absurdity, nonetheless the Committee is of the opinion that the words 'takes the benefit' give s. 45 (ii) an uncertain scope of operation. If the provision is to become effective, it should be amended to the relatively narrow and acceptable application suggested above.

4.24 Lumb and Ryan state that s. 45 (ii) covers the case where the member is not made bankrupt for his inability to pay his debts, but takes advantage of the alternative procedure to sequestration laid down in the Bankruptcy Act by entering into an arrangement with his creditors.[22] However, they do not discuss the anomalous situation which arises as a result of the respective ambits of ss. 44 (iii) and 45 (ii). The former permits a person who is currently involved in an arrangement with creditors to be

elected and sit as a member, but the latter makes the entering into of such an arrangement after election an event which vacates the member's seat. A number of other complexities also arise under the provision. For example, under s. 188 of the *Bankruptcy Act* 1966 the signing of an authority to enable a meeting of creditors to be called under Part X, constitutes an act of bankruptcy under s. 40 of the Act. It is unlikely that this would be sufficient to attract the status of a bankrupt under s. 44 (iii), but it would have to be considered in any litigation under s. 45 (ii). There is also a further question of whether deeds of arrangements under Part X of the Bankruptcy Act come within the ambit of s. 45 (ii). In our opinion, the words 'assignment' and 'composition' are not used technically, but in a broad sense, and when the phrase 'or otherwise' is read in conjunction with those words, it is intended to cover any type of arrangement in lieu of sequestration entered into between a debtor and his creditors under the Bankruptcy Act or similar legislation.[23]

4.25 The Baume case highlighted some of the difficulties in determining the scope of s. 45 (ii). Mr Baume MP had been a member of the collapsed stockbroking firm, Patrick Partners; he subsequently on 19 March 1976 entered into an agreement, formalised by deed, with the appointed trustee of the firm. The collapse of Patrick Partners had been raised on numerous occasions in Parliament and from time to time Mr Baume's involvement with the firm was brought up with suggestions of a possible breach of ss. 44 or 45. Eventually a motion was moved that the question of whether the place of the member had become vacant pursuant to s. 45 (ii) be referred for determination by the Court of Disputed Returns.[24]

4.26 The facts contained in the lengthy motion were not really in dispute although they were quite complex. The agreement between Mr Baume and the trustee recited that there was a dispute as to whether or not Mr Baume was indebted to the firm in respect of certain monies, and provided for Mr Baume to pay the sum of $106,082 in full settlement of all claims between the parties. The trustee covenanted not to bring any action against Mr Baume in respect of the trustee's claim, and to restrain any creditors from bringing any action or taking steps to enforce payments against him arising out of any joint indebtedness of the firm.

4.27 On the same day the eleven partners of the firm, excluding Mr Baume, executed Deeds of Arrangement under Part X of the Bankruptcy Act, each obtaining a moratorium for the currency of the deed and release at the end of it. Mr Baume was not a party to any of these deeds of arrangement, but they all contained covenants that the creditors would not commence or continue proceedings against Mr Baume during the currency of the deed, and on the expiration of that currency he received the benefit of a release.

4.28 The motion for referral to the Court of Disputed Returns was debated in the House of Representatives on 5 May 1977. The basis of the arguments in favour of referral was that the facts, prima facie, indicated that the agreement signed by Mr Baume constituted a deed of arrangement within the meaning of s. 45 (ii) or alternatively that he, additionally and separately, received the benefits of arrangements made under Part X of the Bankruptcy Act by the partners. The then Attorney-General, Mr Ellicott QC, rebutted these arguments and during the course of his speech tabled three legal opinions,[25] including a joint opinion by himself and the Solicitor-General. Each of the opinions concluded that the member's seat had not become vacant on the basis that Mr Baume's agreement did not constitute a deed authorized by any law of the kind mentioned in s. 45 (ii). Mr Ellicott stated:

> There is no basis on which it can be asserted to be a deed of arrangement. One might say that it was a deed executed contemporaneously with a deed of arrangement but not executed by him as a debtor under this Act as a deed of arrangement.[26]

4.29 Probably the more difficult issue was the fact that the deeds executed by the eleven partners undoubtedly conferred benefits upon Mr Baume, and those benefits were conferred by virtue of the Bankruptcy Act. However, each of the opinions concluded that these benefits were not the benefits to which s. 45 (ii) refers. It was argued that the provision applies only to cases in which a debtor/member takes the relevant benefit *as a party* to one of the transactions referred to. The word which supplies this meaning is 'takes', which stands in contradistinction to 'receives', denoting actual participation in a relevant transaction.

4.30 On the strength of the arguments in these opinions, the Government decided the issue was beyond doubt and that the matter should be decided by the House and not referred to the Court of Disputed Returns. Accordingly the motion for referral was put and negatived on party lines.

4.31 Although the rather complex facts in the Baume case brought attention to the uncertainties of the exact scope of s. 45 (ii), one fact was made quite clear in each of the opinions: the execution by a debtor/member of a deed of arrangement, deed of assignment or a composition under Part X of the Bankruptcy Act, would result in the automatic vacation of that member's seat.

APPROPRIATENESS OF DISQUALIFICATION UNDER ss. 44 (iii) AND 45 (ii)

4.32 The modern law of bankruptcy contrasts sharply with the law in past centuries when debtors could be imprisoned for non- payment of their debts, and never released from liability for them. Legislation in the 17th century provided for debtors guilty of improper conduct to be stood in the pillory; one ear was to be nailed to the pillory and then cut off when the debtor was released. The view was taken that bankruptcy was a crime and that a debtor was solely responsible for his debt. The attitude towards bankruptcy ameliorated after the 18th century, but even late in the 19th century there was still a strong presumption that bankruptcy involved moral turpitude.

4.33 Provisions for disqualification of bankrupt or insolvent persons are included in the Canadian Constitution and British legislation. Under the British Bankruptcy Act 1883, which disqualified an adjudged bankrupt from being elected to or sitting in either House of Parliament, the disqualification could be removed if the bankrupt obtained from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune, without any misconduct on his part.[27] The Convention Debates mirrored the prevailing attitudes towards indebtedness. Bankruptcy was not considered merely as a venial matter but, as Sir John Downer commented, 'one that involved great disgrace'.[28] In support of the provisions the Hon. Isaac Isaacs stated:

> Surely a person under a cloud for the time- being ought to stand aside until his conduct has been thoroughly cleared —in the interests of public morality he ought to keep a stain off the highest court of the country. Surely it is his duty to stand aside, and if so, it is for us to see that the law is made perfectly clear to, if necessary, compel him to do so.[29]

4.34 Several attempts were made during the Convention Debates to exclude the provision but were negatived on each occasion. At the Sydney session in 1897, a suggestion by the Legislative Assembly of New South Wales, to omit the disqualification of 'an undischarged bankrupt or insolvent, or a public defaulter' was supported by Mr

Carruthers.[30] He argued that none of the constitutions of the Australian colonies required such a person to remain out of public life during the whole period of his bankruptcy or insolvency. This was not the case, however, as at least one State Constitution (Victoria) provided that a bankrupt was incapable of being elected or of sitting in the State Parliament. Mr Curruthers was referring to the States (N.S.W., S.A. and Queensland) whose constitutions vacated a member's seat if he was adjudged bankrupt, but did not render him incapable of being chosen or sitting: such a person would forfeit his seat, but could immediately go before his constituents for re-election. Mr Carruthers alluded to a number of instances, without being specific, where parliamentarians including Premiers had to seek the protection of the Bankruptcy Court. Perhaps the most notable instances concerned Sir Henry Parkes who was declared bankrupt on three occasions—once as a member of the New South Wales Legislative Assembly, and on another occasion while he was the Premier. On both occasions, Parkes resigned his position in Parliament in accordance with the New South Wales Constitution, went to his constituents and was re-elected. Mr Carruthers argued that this would not be possible under the proposed Commonwealth constitutional provision as such members would have to wait until they were discharged from bankruptcy before they could be re-elected.

4.35 Mr Carruthers again moved for the omission of the provision at the Melbourne session for substantially the same reasons.[31] In negativing the amendment, the majority expressed the view that there was a very great probability of danger to the Commonwealth without such a provision and, that the interests and safety of the State were paramount even though in some cases hardship may be created.

4.36 At the Sydney session Mr Glynn moved that the first portion of the clause (i.e. s. 44) should be amended by the addition of the words 'until parliament otherwise provides'.[32] He referred to several of the disqualifications in s. 44 including the bankruptcy provision, and indicated that in his opinion they were only of a temporary nature to cover the gap until the Federal Parliament passed appropriate legislation. He argued that the Federal Parliament should have the power to legislate in this area of disqualification. There was some support for this amendment, but it was negatived by a majority of the Committee.

4.37 Modern economic and social conditions, including the remarkable growth of consumer credit since the Second World War, must be taken into account in considering the applicability or even necessity of s. 44 (iii). Finance companies have increasingly made available credit facilities to both businessmen and consumers, and the risks that go with this easily available credit pose difficulties for an ever growing number of people. Since 1945 there has been a significant growth in the total number of annual bankruptcies. It seems likely that part of this rise in bankruptcy rates can be related to the increase in business activity over the last three decades, as well as changes in business practices.

4.38 These changes in economic conditions have brought about a different community attitide towards debt. Nearly everyone accepts debt as an inevitable part of their daily lives, whether it includes housing or domestic loans or those of a business character. It is not surprising therefore, that there has been a significant change in attitudes towards bankruptcy and insolvency. This attitudinal change from the moral and criminal precepts of the insolvency laws of earlier centuries—which were so evident during the Convention Debates —is, we think, a sufficient reason in itself to reconsider the justification for ss. 44 (iii) and 45 (ii).

4.39 The Twelfth Annual Report of the Bankruptcy Act provides a further impetus to our argument, as it reveals a disturbing trend in the rise of the incidence of bankruptcies and arrangements under Part X of the Act. In 1978-79 there were 3,857 bankruptcies, which was the third consecutive year in which the number had risen. In the last three years since 1975-76, the incidence of bankruptcies rose 103 per cent—a very substantial increase. The total number of assignments, arrangements and compositions under Part X of the Act in favour of creditors during the year 1978-79 was 560, which represents an increase of 71 per cent on the numbers during the previous years.

4.40 The relevance of current social and economic conditions is also raised by Mr Justice Kirby, to whose submission (No. 15) was attached the Commission Report[33] and a further discussion paper on insolvency.[34] Mr Justice Kirby draws attention to the Commission's findings that 'perfectly honest and reliable people can get into debt difficulties by reason of circumstances over which they have little control'. The Commission Report refers in particular to individuals with instalment credit plans, who become ill for an extended period or otherwise become unemployed,[35] and to business debts, where a change in tariff policy, interest rates, or other operating costs may result in the unexpected financial collapse of a business venture.[36]

4.41 Mr Justice Kirby states that the aim of the law should not be to treat debt defaults as punishable offences, but to encourage and facilitate rehabilitation. Further, consistent with this approach, he states that the inclusion of bankruptcy and insolvency in the disqualifying provisions:

> . . . may require revision to bring it more into accord with current attitudes to indebtedness, particularly consumer indebtedness. It is one thing to disqualify a person from holding office who deliberately and without justification avoids the payment of his debts. It is quite another to disqualify a person because of his status as a bankrupt or insolvent. He may well, either under current bankruptcy laws or under the proposed revised laws on insolvency, be making every proper effort to reduce his indebtedness, consistent with his current means and circumstances.

This point is also taken up by Professor Sawer's submission (No. 7) in relation to s. 45 (ii). In his opinion the case for the additional disqualification, which applies only to sitting members or senators, is very weak as it is unlikely to involve any fraudulent or other morally reprehensible circumstances.

4.42 An argument that can be advanced for the retention of ss. 44 (iii) and 45 (ii) is that a candidate or a sitting member should be seen to be above moral reproach. While insolvency *per se* does not necessarily imply fraudulent or morally reprehensible behaviour, in the parliamentary sphere an insolvent candidate or member could be seen as being open to financial persuasion to adopt a particular policy, either locally within his electorate, or on a national issue. Again, greater pressures may exist on such a person to abuse the privileges of Parliament, financially or otherwise, or even to take fraudulent steps to cover up his indebtedness. However, the mere chance of such an imputation being raised upon a member's bankruptcy or arrangement with creditors is, we would argue, a tenuous supposition and not sufficient reason for the retention of these disqualifying provisions.

4.43 During the Convention Debates it was argued that the bankruptcy or insolvency of a member or candidate should be a matter for the electorate to consider. Mr Carruthers expressed the opinion that:

> The electors of the country have a right to make their choice, and if they chose to be represented by a man who is compelled by the necessities of his life to become bankrupt or insolvent, surely it is not our business to take away that choice from them.[37]

Other participants in the Convention Debates expressed similar views. Mr Reid considered that many men fell into financial difficulties not from dishonesty but from sheer misfortune, and that a man

> . . . should be able to submit himself to his constituency for their judgment, to be re-elected . . . If his conduct has been disgraceful, we can expect that the constituency will deal with him.[38]

Although several other members expressed their confidence in the electorate and their competency to adjudicate such matters, the majority thought otherwise. It was argued that steps could be taken to prevent the affairs of a bankrupt being brought under consideration before an election took place. Mr O'Connor stated:

> It is the easiest thing in the world to defer the examination of a bankrupt Member of Parliament until after his re-election. That is frequently done, . . . afterwards an inquiry discloses a condition of things which would have induced his constituents, had they known the real state of affairs, to refuse to re-elect him.[39]

Another argument advanced by Mr Wise for the inclusion of the provision concerned the fact that:

> . . . there have been frequent scandals from men becoming bankrupt, and making use of their bankruptcy as a ground for re-election, appealing to the sympathy of electors, . . . and asking them to return them, not on their merits, but because they are unfortunate.[40]

4.44 While these arguments, viewed in isolation, point out the possibility of abuse, we do not consider them to be significant. We are more influenced by the current attitudes towards bankrupt and insolvent persons; such persons are not, in our view, tainted as morally reprehensible or delinquent, nor are they prima facie unsuitable as a candidate or member of Parliament. The continuing expansion of credit facilities and the increasing uncertainties of economic conditions make these provisions inappropriate as a disqualification. We have no hesitation in leaving such a decision to the electors as we have already indicated as a basis for our recommendation in s. 44 (ii).

4.45 Recommendation: Sections 44 (iii) and 45 (ii) of the Constitution should be deleted.

Notes and references

1. *Stott* v. *Parker*, (1939) S.A.S.R. 98.
2. House of Representatives, *Hansard*, 7 April 1976, pp. 1416-17; 10 March 1977, pp. 131-132 and 164-165; 22 March 1977, pp. 461-62; 23 March 1977, pp. 483-87; 30 March 1977, pp. 719-721; 31 March 1977, pp. 877-78; 5 May 1977, pp. 1598-1610. See also three opinions tabled during the debate on 5 May 1977 (p. 1608) as to whether the member's seat had been vacated: a joint opinion by the then Attorney-General Mr R. Ellicott, QC and the Solicitor-General Mr M.H. Byers, QC and two opinions obtained by Mr Baume MP from Mr D. Bennett and Mr T.E.F. Hughes QC, former Attorney-General.
3. (1907) 4 CLR 1514.
4. *Bankruptcy Act* 1966, s. 122.
5. (1966) 115 CLR 666 at p. 670.
6. See D.C. Pearce, *Statutory Interpretation in Australia*, Butterworths, Sydney, 1974, pp. 27-31.
7. See *Lake Macquarie Shire Council* v. *Aberdare County Council* (1970) 123 CLR 327; see also Pearce, *Statutory Interpretation*, pp. 28-29.
8. See *Attorney-General for State of New South Wales* v. *The Brewery Employees' Union of New South Wales* (1908) 6 CLR at 531 per O'Connor J.
9. Convention Debates, Melbourne, 1898, p. 1944.
10. See *Municipal Council of Sydney* v. *Commonwealth* (1904) 1 CLR 208 at p. 213; *Tasmania* v. *Commonwealth* (1904) 1 CLR 329 at p. 333.
11. (1975) 7 ALR 593 at p. 600; see also Gibbs J at p. 624, who notes that one reason for this rule is 'because it cannot be certain that what any particular speaker said received the acquiescence of the majority of those present'.

12. (1975) 49 ALJR 205.
13. See P. Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular', (1961) 4 UQLJ 1; see also Pearce; *Statutory Interpretation*, pp. 45-47.
14. (1975) 7 ALR 593 at p. 600.
15. ibid., p. 624.
16. Insolvency Act 1890 (Vic.); *Insolvency Act* of 1874 (Qld); Insolvency Act, 1886 (S.A.).
17. Note that different consequences can flow from disqualification under s. 44 in contrast to s. 45.
18. (1939) SASR 98.
19. Until recently the *Bankruptcy Act* 1966 also appeared to confirm this view in relation to State legislation. Former s. 149(6), dealing with undischarged bankrupts under Commonwealth and State laws provided that 'bankrupt' included an insolvent and 'bankruptcy' included insolvency.
20. Convention Debates, Melbourne, 1898, pp. 1944-5.
21. Note differences between traders and non-business debtors. In the latter class, regard should not be had to the possibility of realizing assets which are usually regarded as necessary to a reasonably comfortable and dignified existence, nor to those which cannot be realized without significant loss and consequent disruption e.g. household goods, motor vehicle or home. If these are the only available assets over and above a non-business debtor's liabilities, he would be considered insolvent; see The Law Reform Commission, Report No.6, *Insolvency: The Regular Payment of Debts*, AGPS, Canberra, 1977, p. 77, para. 161.
22. R.D. Lumb and K.W. Ryan, *The Constitution of the Commonwealth of Australia, Annotated*, 2nd edn., Butterworths, Melbourne, 1977, p. 65.
23. This construction results from the application of a legal rule of interpretation known as *ejusdem generis* i.e. where general matters are referred to in conjunction with a number of specific matters of a particular kind, the general matters are limited to things of the same nature as those which have been specifically mentioned.
24. The notice of motion was given on 30 March 1977 and debated on 5 May 1977: House of Representatives, *Hansard*, 5 May 1977, pp. 719-721 and pp. 1598-1610.
25. Cited footnote 2.
26. House of Representatives, *Hansard*, 5 May 1977, p. 1606.
27. s.32(2)(b).
28. Convention Debates, Melbourne, 1898, at p. 1934.
29. Convention Debates, Sydney, 1897, p. 1019.
30. ibid., p. 1015.
31. Convention Debates, Melbourne, 1898, p. 1932.
32. Convention Debates, Sydney, 1897, p. 1012.
33. Australia, Law Reform Commission, Report No.6, *Insolvency: The Regular Payment of Debts*, AGPS, Canberra, 1977.
34. Australia, Law Reform Commission, Discussion Paper No.6, *Debt Recovery and Insolvency*, 1978.
35. ALRC6 paras. 128 ff. and ALRC Discussion Paper No.6 para. 2.
36. ALRC Discussion Paper No.6 para. 2.
37. Convention Debates, Melbourne, 1898, p. 1933.
38. ibid., p. 1934.
39. Convention Debates, Melbourne, 1898, p. 1939.
40. Convention Debates, Sydney, 1897, p. 1017.

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.

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.

CHAPTER 7

Pecuniary interests (ss. 44 (v) and 45 (iii))

CONSTITUTIONAL PROVISIONS

7.1 Perhaps the most well-known disqualifying constitutional provisions, and ones which have caused the most concern and disquiet among members of Parliament, are the pecuniary interests provisions in ss. 44 (v) and 45 (iii). Section 44 (v) provides that:

> Any person who—
>
> (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

In addition s. 45 (iii) provides that:

> If a senator or a member of the House of Representatives—
>
> (iii) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:
>
> his place shall thereupon become vacant.

(a) Background to s. 44 (v)

7.2 This provision has its origins in the House of Commons (Disqualification) Act 1782 and evolved as a response to the Crown's attempt to gain political support through a comprehensive system of patronage, in particular the Crown's allocation of lucrative contracts to members. The original rationale for disqualifying government contractors is to be found in the preamble of the Act which states its object as being 'For further securing the freedom and independence of Parliament'. A different view of this basic rationale, however, emerged during the Convention Debates in the 1890s and has tended to dominate the issue of members' pecuniary interests; that is, a concern with members using their position to their personal profit or advantage, or, what is at least as important, being in a situation where they appear to be so using their position.

7.3 At first sight, s. 44 (iv) seems extremely far-reaching, and capable—on a strictly literal interpretation—of disqualifying members for engaging in quite trivial or everyday transactions with government departments. Examples of the manifest absurdities that could arise include renting a telephone, subscribing to a Commonwealth loan, buying stamps and so on. Some commentators have argued that so many possible applications of the section are patently absurd that the courts would end up denying it any practical application at all. Others hold the view that s. 44 (v) is capable of relatively precise, narrow and acceptable application.[1] This latter view is more in accord with the reasonably well-defined body of case law developed around the Act of 1782 and the similar legislative provisions in Commonwealth jurisdictions, including the Australian States, and was the reasoning followed by Barwick CJ sitting as a Court of Disputed Returns when s. 44 (v) eventually came under judicial interpretation in the case of *In re Webster*.[2]

7.4 *The Webster Case.* In April 1975 a question as to the qualifications of Senator Webster was raised by the Chairman of the Joint Committee on Pecuniary Interests of Members of Parliament[3], as a result of evidence placed before the Committee by a Melbourne journalist during the course of the Committee's hearings. The Committee Chairman, Mr J. M. Riordan MP, informed the Senate by letter that a member of the Joint Committee itself, Senator James J. Webster, 'probably unwittingly, had broken Section 44 (v) of the Constitution by contracts with the Crown'. The Senate referred the matter to the Court of Disputed Returns pursuant to s. 204 of the *Commonwealth Electoral Act* 1918.[4] The claim was that Senator Webster, at the time of his re-election to Parliament in May 1974, and subsequently, had a pecuniary interest in certain agreements entered into with departments of the Australian Public Service. Evidence produced before the Chief Justice established that Senator Webster at the relevant time was one of nine shareholders in J.J. Webster Pty. Ltd., and was also Managing Director, Secretary and Manager of the Company. His only reward from the Company was a fixed salary and use of a company car. At various relevant times the Company publicly tendered for, and subsequently supplied, material to the Postmaster-General's Department, and the Department of Housing and Construction.

7.5 Senator Webster was held not to have contravened the Constitution. The Chief Justice's judgment was narrow in scope, and based very much on the particular facts before him. He had to determine several questions which are involved in any application of s. 44 (v): first, the requirement that there be a transaction 'with the Public Service of the Commonwealth'; second, the requirement that this transaction be an 'agreement'; and third, the requirement that the person have a 'direct or indirect pecuniary interest' in such agreement 'otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons'. Barwick CJ had no difficulty with the first issue, holding that transactions with the Postmaster-General's Department and with the Department of Housing and Construction were unquestionably with the Public Service of the Commonwealth. His judgment focused on the second issue, i.e. whether the transactions in question were the kind of 'agreement' covered by s. 44 (v). He approached this key question by looking first to the purpose for which the clause had been enacted. Although Barwick CJ revealed during the hearings that he had consulted the Convention Debates,[5] which in our view emphasise the misuse of influence by a member himself rather than the Crown, he felt able to hold that the sole purpose of the clause was that indicated on the face of the 1782 United Kingdom progenitor, i.e. one the protecting parliamentary independence and integrity. This in turn enabled him to apply a number of English decisions on the progenitors of s. 44 (v) and to hold that the Australian provision only applies to executory contracts[6] and those of a 'more permanent or continuing and lasting character'.[7] These requirements, in Barwick CJ's opinion, spring out of the purpose of s. 44 (v): for there to be any possibility in practice of the government exercising improper influence, the agreements must be of more than a casual or transient character. His Honour was then able to hold, by paying minute attention to each of the agreements and to their proper technical characterisation under the law of contract, that these agreements for the supply of timber and hardware were of a 'casual and transient' kind.

7.6 The Chief Justice then expressed an opinion—although it was no longer necessary to the case—as to whether Senator Webster could be said to have a direct or indirect pecuniary interest in any agreement to which the Company was a party. He referred to the general law, under which it is well established that a shareholder does not have any legal or equitable interests in the assets, including agreements, of a company (even if he owns almost all the shares), and suggested that the terms of s. 44 (v) do not amend the

general law. Consequently a shareholder *qua* shareholder 'does not by reason of that circumstance alone have a pecuniary interest in any agreement the company may have with the Public Service'. He conceded that 'due to particular circumstances' a shareholder may have such an interest, but concluded that no such circumstances existed in this case and he was 'doubtful' whether Senator Webster had in fact such an interest.[8]

7.7 The decision in the *Webster* case has been widely criticised, not only because Barwick CJ sat alone, despite the constitutional importance of the case,[9] but also because of the basis and manner of his reasoning and its consequences for the intendment and scope of the provisions. Gareth Evans (now a member of this Committee) in a postscript to the *Webster* case contained in an article in the Australian Law Journal, commented on the narrow scope of the judgment and highlighted the extremely technical differentia involved in construing the contracts. As to the Chief Justice's interpretation of the purpose of the clause he stated:

> His emphasis on the almost archaic 'Crown influence' purpose will, if carried through to other contexts, go some distance towards allaying the fears of Parliamentarians. Whether it will satisfy those citizens who see the section playing a role in preserving both the appearance and reality of Parliamentarians' integrity is, of course, another question.[10]

7.8 Barwick CJ's emphasis on the Crown influence purpose has been criticised on the basis that it is contrary to the intention of the drafters of s. 44 (v), which was expressed not only during the Convention Debates but in the wording of the provision itself. The most striking difference between the constitutional provision and its progenitors is the inclusion of the words 'pecuniary interest': a term which had only been used in local government-type legislation before 1900 for the purpose of removing from those who govern 'the manifest possibility of a conflict between interest and duty'.[11] The phrase was apparently inserted after the 1897 Sydney Convention where the thrust of the debate was towards the need to prevent members of the national Parliament from using their elected office for personal gain.[12] However, Barwick CJ discounted completely the possibility that an analogy could be drawn between the purpose sought to be achieved by disqualification provisions, under local government legislation, and s. 44 (v). He gave no reason for this conclusion, apart from simply asserting that members of Parliament are in a 'significantly different situation' to that of councillors.[13]

7.9 A case note on the *Webster* judgment by J. D. Hammond[14] questions the validity of the Court's conclusion that the sole purpose of s. 44 (v) is identical with that of the English Act. He compares the two provisions, including the successive drafts of s. 44 (v) and concludes that

> . . . the inclusion of the word 'pecuniary interest', coupled with the radical change in wording, indicated a deliberate attempt by the 1897 draftsmen to broaden the scope of the section beyond that contemplated by the English Act.[15]

Hammond argues that, although the High Court should not refer to the Convention Debates, it can consult successive draft bills,[16] in interpretating the intentions to be gathered from the language of the Constitution, and submits that the four drafts of s. 44 (v) support a conclusion different to that reached by the Court. In his opinion it is possible for the section to perform a two-fold purpose:

> First, it would still proscribe the sort of behaviour the English Act sought to affect. Secondly, it would go further, and require of Federal parliamentarians no lower standard of probity than was expected of their local government brethren.[17]

7.10 Barwick CJ's interpretation of the purpose of s. 44 (v) has also been questioned in an article by P. Hanks. He states:

> I am not sure that it is as obvious as the Chief Justice maintained that the purpose of s. 44 (v) is confined to protecting the integrity of Parliament. That may have been the concern of the parliament which passed the Act of 1782 but it may be that the draftsmen of s. 44 (v) were also seeking 'to protect the public against fraudulent conduct of members of the House'.[18]

Hanks comments that the emphasis on pecuniary interests 'is peculiar to s. 44 (v), in that none of the earlier British or Australian colonial legislation contains such a qualification'. He then concludes:

> It is permissible, and not altogether unrealistic, to infer that the drafting amendments to s. 44 (v) (emphasising the notion of 'pecuniary interest') was made as a response to the Sydney delegates' preoccupation with the corrupt use of office rather than with the suborning of parliamentarians by the Crown.[19]

7.11 Another point of criticism offered by Hanks was that:

> An interpretation which confines s. 44 (v) to long-term agreements for the supply of commodities to the Crown, but which omits a series of short-term agreements of a similar nature from the group of s. 44 (v) seems an imperfect way of securing the independence and integrity of Parliament.[20]

Evans was also critical of the manner in which Barwick CJ was able to characterise the contracts as casual and transient 'despite their magnitude and apparently ongoing nature'.[21] He noted that Barwick CJ came to this interpretation:

> . . . by paying minute attention to the proper technical characterisation, under the law of contract, of the agreements involved. Some of the 'accepted tenders' proved upon close scrutiny to be mere offers to treat, or for some other reasons were not agreements at all. And those agreements that were agreements were not agreements of a 'standing or continuing character': rather these were offers for the supply of goods, up to a certain maximum quality and at a certain price, which (although appearing to be accepted in general terms when each tender was accepted) were not in truth accepted by the Department until specific orders for the goods were given. Each tender resulted, then, not in an ongoing contract, but a series of individual agreements each of which was indistinguishable in principle from an 'over-the-counter transaction'. As the Chief Justice himself conceded during the course of his judgment, 'It is indeed ... a matter for real regret that the composition of a House of the Parliament should depend on such highly technical differentia'.[22]

7.12 Barwick CJ's opinion on the third issue, that is, whether Senator Webster by virtue of his shareholding could be said to have a direct or indirect pecuniary interest in any agreement to which the company was a party, has also attracted adverse comment. The Chief Justice's views, which are noted in more detail in paragraph 7.6, were to the effect that Senator Webster did not have any such interest. Hanks's opinion on this aspect of Barwick CJ's judgment is explicit:

> I find that argument and conclusion difficult to accept. It seems to me that the draftsman of s. 44 (v) went to some pains to ensure that people did not evade the prohibition or disqualification in that paragraph by making their dealings with the Crown behind a corporate veil. First there is the reference to 'direct or indirect pecuniary interest'. Secondly, there is the exempting clause which excuses (perhaps quite illogically, but nevertheless unequivocally) from the disqualifications of s. 44 (v) persons who are members of incorporated companies with more than twenty-five members.[23]

7.13 Two recent reports have also expressed criticism of the now restricted scope of s. 44 (v) since Barwick CJ's judgment in the *Webster* case: the Joint Committee on Pecuniary Interests of Members of Parliament[24] and the Committee of Inquiry Concerning Public Duty and Private Interest. The Joint Committee, in the course of its report, observed that 'the apparent prevention of conflict of interest situations to be derived from s. 44 (v) may prove to be illusory'[25] and, after considering the *Webster* case, concluded that s. 44 (v) 'could not be considered as a safeguard against conflict of

interest and duty'.[26] The Joint Committee, which tabled its Report on 30 September 1975, did not recommend any change to the disqualification provisions in s. 44 or the vacating provisions in s. 45, but recommended the establishment of a register of the pecuniary interests of members of Parliament. This recommendation was not accepted by the present Government as putting forward adequate solutions. A Committee of Inquiry was formed on 15 February 1978 under the chairmanship of the Hon. Sir Nigel Bowen, a former Commonwealth Attorney-General and now Chief Judge of the Federal Court.[27] The report of the Bowen Committee was tabled on 22 November 1979.

7.14 The Bowen Report agreed with the Joint Committee statement that the constitutional provisions did not 'give the necessary assurance that decisions affecting the public will be taken in the public interest'.[28] They further stated that 'the decision in the *Webster* case, coupled with the associated change to the law concerning common informers, leaves s. 44 (v) of the Constitution relating to government contracts with very little substance'.[29] They conclude that

> . . . these Constitutional provisions [ss. 44 (iv), (v), and 45 (iii)] are inadequate to cope with the many conflict of interest situations which arise in the federal government. Although it will be difficult to amend them, the Committee recommends that ss. 44 (iv), (v), and 45 (iii) of the Constitution be reviewed.[30]

7.15 While the *Webster* decision has substantially limited the scope of s. 44 (v) by confining it to the 'Crown influence' purpose, a result not entirely unexpected,[31] we do not agree with the opinions expressed in both Reports, and by other commentators, that this has left s. 44 (v) virtually denuded of substance. On the contrary, we are of the opinion that the provision still has a wide area of potential application and it will have significant importance in other commercial transactions not exempted by the essentially narrow and specific exceptions applied to the transactions in the *Webster* case. This is a matter that we view with some considerable concern, a concern that has been frequently expressed in the past by members of Parliament uncertain as to the possible application of s. 44 (v) in a whole variety of transactions between themselves and the Crown. Many of these agreements lie within the area of goods, services and other benefits provided by the Commonwealth on the same terms and conditions as they are made available to the public generally, and which are essentially of a private or personal service character. Transactions in this category which are still nonetheless ostensibly within the ambit of s. 44 (v) include:

- Government insurance;
- acquisition of property interests from the Crown—leasing residential premises or small plots of land;
- compensation settlements including payments for property compulsorily acquired;
- loans made to the Commonwealth, and by the Commonwealth.

7.16 On a strictly literal interpretation, the provision could also apply to transactions with some essentially non-public service intermediary as well as transactions directly with the Public Service. Further, if the phrase 'Public Service of the Commonwealth' is regarded as being coterminous with 'Crown in the right of the Commonwealth', transactions with a variety of non-departmental servants, agents and instrumentalities might conceivably come within the operation of s. 44 (v). The question arises as to whether almost every agreement, other than the classes excepted by the Chief Justice, would disqualify a member of Parliament or whether there are some other implied limitations.

7.17 Despite this wide area of potential application, we would not agree, as other commentators have suggested, that the courts would end up denying the provision any practical application at all. The 1782 Act and its descendants have not always been distinguished into impotence whenever sought to be used: there are several examples of

successful application both in Parliaments and in the courts. A number of resignations have been induced not only by the English Act in the House of Commons[32] but also by similar provisions in other Commonwealth jurisdictions, including the Australian States.[33] A recent Australian example is the case of the Tasmanian MLC, Mr John Orchard, who was forced to resign from the Tasmanian Legislative Council in 1968, because he was performing printing work for the State Government through a printing company in which he and his wife were the sole proprietors.[34]. Other successful court cases have included *Bird* v. *Samuel*[35] (Britain), *Hackett* v. *Perry*[36] (Canada) as well as a number of cases involving analogous local government legislation. With the exception of *Samuel's* Case, which involved large sums earned by Sir Stuart Samuel, MP, as a partner in a firm purchasing silver for the Secretary of State for India, all of the amounts in issue have been relatively small indicating that what is at stake is not so much the reality of any influence but rather the principle that everything possible ought to be done to avoid any chance or appearance of it.

7.18 While the Chief Justice's judgment in the *Webster* case offers little clarification on these issues, parliamentarians can perhaps gain some solace from the decision, as it indicates that the High Court is prepared to view the provision restrictively. Despite the difference in the statutory language between s. 44 (v) and its progenitors, His Honour felt able to apply English cases which tended to construe these earlier provisions in a restrictive manner, ensuring a relatively narrow and acceptable application. This raises the possibility that the High Court may consider many of these decisions as persuasive which would in turn, we suggest, give some efficacy to s. 44 (v). Whichever way the court approaches this question in the future, it seems apparent that they will continue to seek out ways of confining the operation of s. 44 (v) to the cases to which it was really intended to apply, namely, those where the character of the agreement is such as to raise prima facie questions in the public mind about the exercise of improper influence on the part of either the Government or the contractor.

(b) Background to s. 45 (iii)

7.19 Section 45 (iii) provides:

> 45. If a senator or member of the House of Representatives—
>
> (iii) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:
>
> his place shall thereupon become vacant.

This provision does not appear to have any legislative origins in other jurisdictions and seems to have been adopted purely as a result of Australian political conditions at the time of the Convention Debates. It has not been subject to judicial scrutiny, and consequently its full effect is a matter of conjecture. The first limb of the clause was moved by Mr Carruthers at the Adelaide Convention in 1897 with the specific intention of preventing barristers in Parliament from accepting Crown work.[37] Other speakers to the motion took a broader view and envisaged the provision as encompassing medical practitioners, engineers and other professional men. The second limb of the clause was introduced on the motion of Mr Reid at Melbourne in 1898 who argued that:

> If this provision had been in the Constitution of the United States there would have been an opportunity of stopping a number of abuses in connection with legislative measures.[38]

Mr Reid's intention was to prohibit members of Parliament from accepting payment for advocating or putting Bills through the Parliament.

7.20 The primary application of the first limb of s. 45 (iii)—concerning fees or honoraria for services rendered to the Commonwealth—appears to be directly within that area of *professional* services which Mr Carruthers wished to prohibit. 'Fee' and 'honorarium' are terms which would appear to have their ordinary dictionary meanings, the former being a sum of money payable under any contract or arrangement, the latter implying a voluntary payment, that is, one made without any formal contractual obligations to make it. They would appear to cover not only the brief fees of a barrister advising or appearing for the Crown, but also retainers, a point noted by the Bowen Report which suggests that the 'existence of this provision has prevented the development of the consultancy arrangements which so concerned the British House of Commons and contributed to the decision to introduce a register of Members' interests'.[39]

7.21 Vexed questions have arisen in this area, both in Parliament[40] and elsewhere, as to inadvertent payments by the Commonwealth to members, with a corresponding contravention of the Constitution. What is the position of members who are pharmaceutical chemists or medical practitioners and who may receive payments from the Commonwealth under the National Health Act; or members who have received payments from the Australian Broadcasting Commission after being interviewed on radio or on television; or solicitor-members who have accepted matters referred by a State or Territory Legal Aid Commission? While it is possible that such payments would, on a strictly literal interpretion of s. 45 (iii), constitute a breach of the provision, Evans suggested that:

> The courts may be expected to approach quite sympathetically these problems involving members engaging in a small way in professional activities of manifest benefit to the community. If all other more specific escape routes fail, the judges may be tempted to discern some more fundamental, underlying, exemption principle, perhaps along the following lines, namely, whether the payment in question was such as could conceivably raise prime facie questions in the public mind as to the possibility of improper influence being exercised by either the goverment, on the one hand, or the member-payee, on the other. Each case would turn on its facts, but the application of some such principle would seem likely to exclude most cases involving members who act as doctors, chemists or legal aid lawyers.[41]

7.22 Although there is still some uncertainty as to the full extent of the meaning of the words of the first limb of s. 45 (iii) in the absence of judicial authority, there are payments which are seen as more clearly inapplicable. These include allowances received by a member for out-of-pocket expenses incurred in performing services for the Commonwealth—these not being 'fees' for the purposes of the section—and fees of various kinds paid to a member for his services, including sitting on parliamentary committees, but not Government boards and committees (the word 'Commonwealth' arguably being confined in this section to the Executive Government). The clause does not seem to extend to such things as gifts[42] and sponsored travel, which the Bowen Report suggests 'might be more serious than payment of fees and honoraria'.[43]

7.23 There is no real difficulty in ascertaining the application of the second limb of s. 45 (iii): direct bribery of a member for services rendered in the Parliament—voting a particular way, raising a particular matter at Question Time, lobbying a particular minister, advocating Bills—are clearly caught by the provision. The Convention Debates indicated that there was concern over the possibility of bribery of members and Mr Barton referred to a number of instances of expulson from the British House of Commons on this ground.[44] Erskine May notes that the British Parliament did not confine itself to the repression of direct pecuniary corruption. 'To guard against indirect influence, it has further restrained the acceptance of fees by its members for professional services connected with any proceeding or measure in Parliament.'[45] As to the

interpretation of various phrases in the section: 'any person' would include corporations; 'any State' is probably confined to States of the Federation as distinct from foreign countries; and 'services rendered' would probably not be confined to past services but also include those rendered in the future.[46] Whether the expressions 'fee' and 'honorarium' would include various prerequisites offered to members, for example, trips overseas, is unlikely, as the terms imply a direct cash advantage.[47]

THE NEED FOR CLARIFICATION

7.24 The provisions in ss. 44 (v) and 45 (iii) can be viewed as establishing a primitive code to deal with conflict of interest problems and which, given a not too restrictive reading, could avoid a considerable number of situations of potential conflict. Given the availability of the constitutional provisions, the question arises as to why they have not more often been relied upon. Although the most likely explanation is that there has never been any information readily available on which to found such proceedings, at least part of the explanation is doubt about the meaning and scope of the provisions. The decision in the *Webster* case merely reinforces our view that the whole question of members' pecuniary interests remains in need of systematic clarification by a formal constitutional amendment, and if this should prove fruitless, at least, by the laying down of parliamentary guidelines.

7.25 Assuming for present purposes that constitutional change is possible, several options are open for consideration:

(1) Deleting ss. 44 (v) and 45 (iii), leaving any such matters for judgment within the Parliament or, ultimately, to the electorate.

(2) Replacing the present provisions with amendments to the Standing Orders of both Houses of Parliament. This may already be possible under s. 50 (ii) of the Constitution but could be put beyond doubt by the addition of a third subsection to s. 50 along the following lines:

> 50 (iii) Nature of interests pecuniary or otherwise which shall not be held by a senator or member of the House of Representatives.

(3) Replacing the present provisions by legislation empowered under s. 49 of the Constitution, i.e. by express declaration of the privileges of the Senate and of the House of Representatives.

(4) Replacing the present provisions with detailed constitutional provisions defining all the areas sought to be covered.

(5) Recasting the constitutional provisions in terms of a broad principle and enabling Parliament to prescribe detailed provisions.

(6) Replacing the present provisions by a general head of power enabling Parliament to prescribe detailed provisions as it sees fit.

7.26 Option (1), proposing simple deletion of the constitutional provisions is not without merit: similar proposals have been made in other jurisdictions with provisions closely related to s. 44 (v). In the United Kingdom a 1956 Select Committee of the House of Commons[48] recommended the repeal of the section in the House of Commons Disqualification Act 1931, which disqualified government contractors. The prevailing view was that the provisions were no longer necessary as there had been little or no abuse in this area for over one hundred years. In considering the alternatives to repeal, they noted the uncertainty of the scope of the existing provision, and pointed out the extreme difficulty of drafting satisfactory provisions to cover all the possible contractual arrangements in which a member may, theoretically, become subject to the

influence of the government. The question of the appearance of conflict was not, however, a major issue, and the Select Committee's recommendation received legislative approval the following year.[49]

7.27 Despite the historical ties between the English provision and s. 44 (v) and the applicability of the various arguments raised by the United Kingdom Select Committee, we are not convinced that such provisions are no longer necessary. The lack of known abuses and the virtually dormant status of the constitutional provisions does not, to our mind, necessarily indicate that there has never in fact been any conflict of interest of the kind in question. Further, obvious policy reasons predicate the retention of these provisions. Members of Parliament should avoid actual or potential conflicts of interest, and avoid being placed, or even being seen to be placed, in situations where a suspicion of undue influence can arise. As public confidence and trust in politicians is not especially high, the maintenance of respect for the institution of Parliament demands not only total integrity, but the appearance of total integrity. In such a climate we feel the deletion of these provisions would be unacceptable to an already suspicious electorate. These suspicions would be increased when the alternative modes of redress are considered—namely, public pressure being brought against the member to resign, or expulsion from the Parliament for misconduct. This latter power—exercisable by the United Kingdom House of Commons and ipso facto applicable to the Commonwealth Parliament under s. 49 of the Constitution—is unlikely to be used except in the most grave circumstances because of its inherent political ramifications. While public pressure can be a useful instrument of political and social persuasion, we are not convinced as to its appropriateness, effectiveness, or even deterrence, in this area of undue influence.

7.28 Options (2) to (5) also suffer from various defects. As regards option (2), we have serious doubts as to whether amendments to Standing Orders could be implemented in an unrestricted and effective manner. For example, House of Representatives Standing Order 196, which prohibits members from voting on certain types of questions in which they have a pecuniary interest, has been severely limited in its operation in part because of the interpretation placed on it by successive Speakers. The adoption of such Standing Orders may also place either the Speaker or the President in an invidious position if a question of disqualification arises, and could easily result in an explosive political issue fuelled perhaps by allegations as to the partiality of the Presiding Officers. Option (3) is a feasible alternative, but the removal of overt constitutional provisions dealing with pecuniary interests may be unacceptable to the electorate. As to option (4), we consider that the inclusion of detailed provisions within the Constitution would be inappropriate: not only is there the difficulty of satisfactorily covering all the possible variations, but a concomitant risk that such provisions rapidly become out of date or irrelevant. Option (5) also presents drafting problems in that there is difficulty in phrasing such a general principle in wide enough terms to cover all the diverse situations which may arise now or in the future.[50] We also wished to avoid the possibility that any legislation enacted under such a principle would have to be tested in the High Court before its constitutional validity was ensured.

7.29 Option (6), that of substituting the present provisions with a general head of power, is the one we favour: it avoids the shortcomings noted in the other options, enables Parliament to legislate witout restriction over the whole area of conflict of interests so as to make the matter non-justiciable and ensure contemporaneity with the prevailing social and economic conditions.

7.30 Before attempting to formulate a general enabling power, we think that it would be helpful to delineate, at least in a general way, the areas of 'conflict of interests' and

'undue influence' sought to be covered. In our opinion, the purpose sought to be achieved by the progenitor of s. 44 (v) —that of securing the freedom and independence of the Parliament from the Crown and its influence —is still applicable despite the significant changes in political and social circumstances since the eighteenth century. Although this rationale is obviously less important today, we can still conceive of circumstances when the Executive may wish to influence a member of Parliament. For example, a recalcitrant backbencher's vote may be critical to the government in its legislative program, especially if the government holds only a slim majority in either House. If such a member was involved in commercial enterprises, a lucrative government contract could readily be seen as inducing or influencing such a member's role. This argument applies with equal force to services rendered within the Parliament in circumstances presently excluded by s. 45 (iii). Familiar examples are Crown briefs delivered to barrister members, or direct bribery in connection with legislative measures. While on the one hand we wish to include these more pernicious forms of government influence, we are equally concerned, on the other hand, to exclude those innocent or trivial transactions with, or payments from, the government. Further, we would wish to put beyond doubt all the allowances, fees, fares and so on made available to members of Parliament in that capacity.

7.31 An area of considerable significance, and one presently excluded from the scope of s. 44 (v), is that of members using their position to their personal profit or advantage. These benefits need not be strictly financial in character, but clearly are ones from which a member of Parliament should not gain advantage, and which would certainly not be available to him as a member of the public, or as an ordinary member of his profession. The Convention Debates indicate that there was considerable concern about parliamentarians who engaged in fraudulent conduct against the public. The Hon. Isaac Isaacs, in moving an amendment to the second draft of s. 44 (v), stated that 'the object of the clause is to prevent individuals making a personal profit out of their public positions'.[51] This concern applied not only to the actual occurrence of profit but, as Sir John Downer remarks, to its possibility: 'I think it inexpedient to allow members of Parliament to have any contractual relations which might suggest to one that their position might be impure'.[52] We are in full agreement with these sentiments. For example, indirect profits and advantages gained through holdings in a corporation in which the member had a 'substantial interest', and which has entered into contracts with the Public Service, should be proscribed by any intended provision. The size of a member's interest in the issued capital of a company is clearly a far more relevant criterion than the present constitutional one, namely, the number of fellow shareholders.

7.32 Another factor in our deliberations is that the interests we wish to prohibit are primarily of a pecuniary character. Although the non-pecuniary interests of a parliamentarian can conflict with his public duty, experience from other countries indicates that they may be too nubulous for legal definition.[53] The term 'pecuniary interests' has been tentatively defined by the Joint Committee on Pecuniary Interests as 'any direct or indirect financial concern, stake or right in, or title to, any real or personal property or anything entailing an actual or potential benefit'. This definition is consistent with the case law in this area, which has generally construed the term in a very wide fashion, but which we consider is inappropriate in the parliamentary sphere and perhaps should be limited to situations where there is some identifiable and measurable advantage flowing from the contract or benefit in question.

7.33 A further issue that requires examination concerns the concept inherent within ss.44 and 45, that of avoidance of conflict of interests. This concept is based on the assumption that it is preferable to avoid the occurrence of a conflict rather than rectify

a potentially scandalous situation. Arguments have been raised against the extent of, or even the use of, constitutional provisions in solving conflict of interests problems. The Joint Committee on Pecuniary Interests states:

> This principle [avoidance] is commendable in limited situations, but to attempt to solve all potential conflicts of interest problems by means of avoidance would require Senators and Members to divest themselves of all pecuniary interests. Evidence was given that this would be incompatible with the representative responsibilities of a Member of the Parliament, who has been elected, at least in part, because he has personal interests which coincide with those of many of his constituents. It may be regarded as an over- reactions in an area where some compromise must be found between protecting the privacy of individual Members of Parliament and protecting the interest of the public in ensuring that decisions are not being made for improper motives.[54]

A more negative stance has been taken in the Bowen Report:

> The constitutional or statutory provisions which provide for automatic vacation of an office by reason of a disqualification are, in the Committee's opinion, unsuitable for conflict of interest situations because they fail to allow for the varying degrees of seriousness of the conflict or the intent of the officeholder.[55]

7.34 We do not concur with these statements. In our opinion there is a pressing need for adequate constitutional provisions disqualifying members of Parliament involved in situations where their pecuniary interests manifestly conflict with their public duties. Avoidance of these conflicts at the outset is far preferable to formulating rules to extricate members from potentially embarrassing or scandalous situations as they become known. The deterrent effect, inherent in avoidance provisions, would reduce the incidence of pecuniary conflicts and go some way towards raising public confidence in members of Parliament. In addition, legislation based on the enabling provision would provide a certain threshold, indicating whether the conflict was serious enough to warrant disqualification. The argument that avoidance provisions would require members of Parliament to divest themselves of all their pecuniary interests is clearly not applicable. These provisions merely attempt to prevent situations which would inevitably give rise to the appearance or actuality of improper influence. Under the proposed constitutional amendment, Parliament would be able to draft legislation with a relatively precise, narrow and acceptable application. We envisage that both candidates and members would then be capable of identifying those pecuniary interests which should be divested to avoid the disqualifying provisions.

7.35 Members of Parliament have been held by the law to occupy positions of public trust[56] and as such have public duties, although it is impossible to state precisely what those duties are. A submissionby P.D. Finn to the Joint Committee on Pecuniary Interests examines this issue and notes that the only attempt at a judicial definition of those duties 'and that only a partial one'[57] was made by Isaac Isaacs in the High Court in *Horne* v. *Barber*:

> When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duties. One of the duties is that of watching, on behalf of the general community, the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament—censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses. The effective discharge of that duty is necessarily left to the member's conscience and the judgment of his electors, but the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudically to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration.[58]

Thus, Finn notes that a member's duties cover those activities associated with his respective Chamber and, equally, would seem to cover all his dealings with the Executive. But beyond this, he notes that 'it is impossible to state when he ceases to be a public officer and becomes a private individual.'[59]

7.36 The question of what constitutes a public duty becomes relevant as we attempt to articulate, at least in a general way, the terms of the constitutional head of power and any legislation enacted thereunder. As a broad statement of principle, we consider that a member of Parliament should not have any interest, pecuniary or otherwise, which conflicts, or might reasonably be thought to conflict, with his public duty, or to improperly influence his conduct in the discharge of his responsibilities as a member of Parliament. More specifically, we envisage this principle as applying to cases where the character of an agreement with, or payment or benefit to, a member of Parliament is such as to raise prima facie questions in the public mind as to the possibility of improper influence being exercised by either the government, on the one hand, or the member, on the other. We wish to phrase the constitutional enabling power as widely as possible so as not to limit Parliament's ability to legislate as it seens fit on any facet of the area indicated above in the general principle.

7.37 Recommendation: Sections 44 (v) and 45 (iii) of the Constitution should be deleted and a provision to the following effect inserted in their stead:

45A. The Parliament may make laws with respect to:

(a) the interests, direct or indirect, pecuniary or otherwise, which shall not be held by a senator or member of the House of Representatives;

(b) the circumstances which constitute the exercise of improper influence by or in relation to a senator or member of the House of Representatives and the action which shall be taken with respect to such an exercise; and

(c) the procedures by which any matters arising under such laws may be resolved.

7.38 It is to be hoped that legislation enacted under these proposed constitutional provisions will be an effective safeguard of the public interest and that it will also ensure a sensible and dispassionate determination of the issues so as not to jeopardise public confidence.

GUIDELINES FOR PROPOSED LEGISLATION

7.39 As a matter of convenience, this legislation could be divided into two separate parts, although these parts overlap to some extent. On the one hand, there would be those sections limiting the scope of the original rationale, namely, government contractors and professionals involved in situations in which they could be unduly influenced by the Executive. On the other hand, there would be those sections defining the scope of the modern rationale, which is the desire to avoid the appearance or actuality of improper influence being exercised by members of Parliament. With one exception, we do not intend to spell out the form of such legislation, as the full extend and meaning of the constitutional provision which we recommend obviously needs detailed examination and parliamentary debate before there can be any real consensus. We intend, however, to specify those areas which require consideration, and indicate generally the conduct which, in our opinion, is clearly within, or outside, the provision.

7.40 *Government contractors.* The exception referred to above concerns the area of government contractors, which has been subject to both legislative and judicial scrutiny and which we feel can be codified in a restrictive fashion. We recommend a list of exceptions, for incorporation within legisaltion, empowered under the constitutional

provision, excluding those trivial transactions with the government which, in our opinion, do not raise questions as to the possibility of improper influence being exercised by either the government or the member. Evan's article discusses this question and concludes that there are two main sources of precedent in formulating a list of these exceptions: the 'understood' common law limitations of s. 44 (v) and the exception clauses in the various State Constitutions with provisions analogous to s. 44 (v). Evans drafted a basic list of categories of exception compounded from the above sources, which were subsequently adopted by the Joint Committee on Pecuniary Interests as follows:[60]

(a) Agreements performed, goods supplied or services rendered of which the person in question had no knowledge, and of which he could not reasonably have been expected to know.
(b) Agreements with the Public Service to which the person in question is, or was, not a direct party.
(c) Agreements not originally made directly with the person in question, but the benefit of which he takes by way of assignment, devise or similar means, and of which he divests himself within a reasonable time.
(d) Agreements for the provision by the Crown of goods, services or other benefits on the same terms and conditions as they are made available to the public generally.
(e) Loans made to the Crown.
(f) Compensation settlements, including payments for property compulsorily acquired.
(g) Agreements performed or services rendered of a casual and transient kind where the value of the transaction or the amount of the fee involved is relatively small.

Two other provisions which were not adopted by the Joint Committee, but which we feel should be included are:

(h) Agreements entered into by corporations in which the member has a less than substantial interest, where substantial interest is designated as control of not less than (one fifth) of the voting rights in the company.
(i) Agreements fully executed by the person in question at the relevant time.

7.41 *Fees, honorariums and benefits.* Persons accepting any fees or honorariums for services rendered to the Commonwealth are presently excluded under the first limb of s. 45(iii). The provision was intended to protect further the independence of Parliament and was directed at professionals, although it has a much wider application. Legislation under the proposed constitutional amendment could easily proscribe payments of this kind. Although we disapprove in principle of the paying or giving of any financial benefit to a member for services rendered to the Commonwealth, there are some obvious expections. Allowances received by a member for out-of-pocket expenses, fees for various kinds paid to a member for his services, including sitting on Parliamentary committees, should be specifically excluded from the operation of any such legislation. Similarly, the position of members who are lawyers, medical practitioners, pharmaceutical chemists and so on and who receive payments from the Commonwealth, should be clarified under the proposed legislation. Those members engaging in only a small way in professional activities should not have to face a parliamentary or judicial inquiry. However, when the payment received is substantial, there should be procedures to refer the matter to the Court of Disputed Returns for a decision on the particular facts.

7.42 *Gifts, hospitality and sponsored travel.* Pecuniary interests in this category would not come within the ambit of s. 45 (iii), unless there was a direct cash advantage and a close nexus established between the benefit offered and the alleged service rendered. These benefits raise different issues from the other types of pecuniary interests. On the one hand, the giving and receiving of favours is common, and total prohibition is neither practicable nor desirable. On the other hand, there is an obvious concern with

appearances, and the possibility that undue influence could be suspected. A difficult question arises as to the determination of when such a benefit becomes improper. As the Bowen Report notes, these benefits 'may be provided to create a general climate of goodwill on the part of the beneficiary. The 'debt' might not be called in for years or ever.'[61] We make no recommendation as to whether these benefits should be regulated by an arbitrary threshold or otherwise —this is something Parliament should decide. However, a member's seat should be vacated under the proposed legislation, if he receives benefits which manifestly raise questions about the exercise of undue influence.

7.43 *Bribery.* The second limb of s. 45 (iii) prohibits direct bribery of a member for services rendered in the Parliament —examples include lobbying ministers or voting a particular way. Corruption and bribery of members are clear examples of the exercise of undue influence. Although there are no Commonwealth statutory provisions relating to bribery of members of Parliament, other than s. 211 of the *Commonwealth Electoral Act* 1918, there are precedents for establishing that members of Parliament are public officers for purposes of the common law offences of misbehaviour or breach of trust in public office. Consequently, a member who uses his influence as a public officer in the Parliament, or with the Executive, may commit a criminal offence.[62]

7.44 The foregoing headings are by no means an exhaustive list of areas of improper influence. A number of situations spring to mind: there is the possibility of a member secretly using his public office to protect and/or advance a property interest of his own; or the misuse by a member of Parliament of official information for pecuniary gain. While such activities are likely to remain hidden, and may be difficult to prove, they are clearly within the suggested conflict of interests principle. The moderating factor in each of these circumstances depends on the definition by the Parliament of what constitutes 'improper' influence. The case of bribery is clearcut, but the matter is not so clearly delineated in other cases, for example, medical practitioners receiving substantial payments from the Commonwealth under the National Health Act. We see this legislation as filtering out those ordinary or trivial financial transactions by a member which are unlikely to raise serious questions of impropriety, while the more serious cases are referred by the Parliament to the Court of Disputed Returns. These, then, are some of the matters which should be considered in any legislation under the proposed constitutional power and we recommend accordingly.

7.45 Recommendation: Upon acceptance by referendum of a constitutional amendment along the lines recommended in paragraph 7.38, the Parliament should, pursuant to that constitutional amendment, enact legislation which encompasses within its terms the sorts of considerations with regard to conflict of interests and improper influence discussed in this chapter.

Notes and references

1. See Gareth Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution', (1975) 49 ALJ 464: a detailed analysis of ss. 44(v) and 45(iii).
2. (1975) 49 ALJR 205.
3. The Joint Committee established late in 1974 was appointed 'to inquire into and report on arrangements to be made relative to the declaration of the interests of the Members of Parliament and the regisration thereof'. The Report of the Committee was tabled on 30 September 1975.
4. The terms of reference were as follows:
   'That the following questions respecting the qualifications of Senator James Joseph Webster be referred to the Court of Disputed Returns—
   (a) whether Senator Webster was incapable of being chosen or sitting as a senator; and
   (b) whether Senator Webster has become incapable of sitting as a senator.'
5. 'One ought not to do it, but I did it; I went and looked at original debates' per Barwick CJ: *Transcript of Proceedings*, Sydney, 2 June 1975, p. 95.

6. Contracts under which at the relevant time something remains to be done by the contractor in performance of the contract: the English cases deciding this point are *Royse* v. *Birley* (1869) L.R. 4 C.P. 296 and *Tranton* v. *Astor* (1917) 33 TLR 383. In *Royse* v. *Birley*, the member of Parliament in question, a partner in a rubber goods firm, had sold a small quantity of rubber chamber pots for use in a lunatic asylum, in ignorance that he was dealing with a government institution. He kept his seat.
7. *Tranton* v. *Astor*, ibid., at p. 387, per Low J.
8. *In re Webster*, cited fn. 2, p. 212.
9. When the matter came on for hearing, Barwick CJ refused an application that the matter be referred to the Full Court, even though at one stage during the preliminary hearing he had thought that it 'would be better (to have) more than one view about it': *Transcript of proceedings*, Sydney, 19 May 1975, pp. 6-7. It is to be noted that there is no appeal from the Court of Disputed Returns, however constituted.
10. Evans, cited fn. 1, at p. 476 fn. 86.
11. Local Government Act 1890 (Vic) No. 1112, s. 173.
12. Convention Debates, Sydney, 1897, pp. 1022 ff. Note, however, the different view taken by Barwick CJ ' . . . [the] provision was neither initially devised nor inserted in the Constitution in order to protect the public against fraudulent conduct of members of the House, carried out perhaps behind the shield of a corporation of small membership': (1975) 6 ALR 65 at p. 70.
13. (1975) 6 ALR 65 at pp. 70, 72.
14. J.D. Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the Webster Case', 3 *Monash Law Review* p. 91.
15. ibid., p. 99.
16. *Tasmania* v. *The Commonwealth and State of Victoria* (1904) 1 CLR 329, per Barton J at p. 351.
17. ibid., p. 100.
18. P.J. Hanks, 'Parliamentarians and the Electorate' in *Labor and the Constitution* 1972-1975, Gareth Evans ed., Heinemann, Melbourne, 1977, p. 196-7.
19. ibid., p. 197.
20. ibid., p. 196.
21. Evans, cited fn. 1, p. 476.
22. ibid., p. 576-7.
23. Hanks, cited fn. 18, p. 198.
24. Australia, Parliament, *Declaration of Interests: Report of the Joint Committee on Pecuniary Interests of Members of Parliament* (J.M. Riordan, Chairman), AGPS, Canberra, 1975.
25. Australia, *Public Duty and Private Interest: Report of the Committee of Inquiry* (Hon. Sir Nigel Bowen, Chairman), AGPS, Canberra, 1979.
26. ibid., p. 7.
27. ibid., p. 8.
28. ibid., p. 58, para. 7.6.
29. ibid., p. 59, para. 7.11.
30. ibid., p. 59, para. 7.14.
31. See Evans, cited fn. 1, p. 467 where he noted, writing before judgment in the *Webster* case was handed down, 'there are considerable difficulties, however, in the way of admitting evidence of the founders' intent as a guide to the construction of the Constitutional provisions and it may well be that if the matter now went to court, the original, and perhaps now less relevant, rationale is the one that would have to be argued'.
32. See Erskine May's *Parliamentary Practice* (10th edn 1893) at p. 605.
33. See article in the *Journal of the Society of Clerks-at-Table in Empire Parliaments*, vol. 17, 1948, at pp. 289-316.
34. See Senate, *Hansard*, 22 April 1975, at p. 1200.
35. (1914) 30 TLR 323.
36. (1887) 14 SCR 265 (Sup. Ct. Can.)
37. Note that in the *Webster* case the Chief Justice's view was that 'in the climate of the 18th century the likelihood of influence upon a government contractor was high. Accordingly the mere existence of a supply contract justified the disqualification. But in modern business and departmental conditions the possibility of influence by the Crown is not so apparent, whilst it need not be certain, at least it must be conceivable . . . ' 49 ALJR 209.
37. Convention Debates, Adelaide, 1897, at p. 737.
38. Convention Debates, Melbourne, 1898, at p. 1945.
39. Bowen, *Report*, cited fn. 27, p. 59, para. 7.13.
40. See Senate, *Hansard*, 22 April 1975, p. 1215 (Senator Greenwood).
41. Evans, cited fn. 1, p. 470.

42. A parliamentary precedent for excluding gifts from the provision is the 25,000 pounds gift to Prime Minister Hughes raised by subscription and expressed as a tribute to his wartime leadership. See House of Representatives, *Hansard*, 1921, vol. 95 at pp. 770 ff.
43. Bowen, *Report*, cited fn. 27, p. 59, para. 7.13. See also Evans' evidence to the Bowen Inquiry, *Transcript of Proceedings*, 20 September 1978.
44. Convention Debates, Melbourne, 1898, p. 1946.
45. Erskine May's *Parliamentary Practice*, 10th edn p. 81: a resolution of the House of Commons on 22 June 1858 stated 'It is contrary to the usage . . . of this House that any of its members should bring forward, promote or advocate . . . any proceedings or measure in . . . consideration of any pecuniary fee or reward.'
46. See the opinion of the General Council to the Attorney- General who argues, persuasively, that future services must be included, because 'otherwise it would be easy to evade s.45(iii) by accepting a fee before rendering the services in question': Senate, *Hansard*, 4 April 1974, at p. 683. The Solicitor-General held a similar view: see note in 48 ALJ 221 at 223.
47. Evans, suggested that for this point to be even arguable 'the nexus between the benefit offered and the service rendered would have to be extremely close', cited fn. 1, p. 470.
48. Britain, House of Commons, Report of the Select Committee, HC 349 (1955-56).
49. House of Commons (Disqualification) Act 1957 (UK).
50. See the Report of the British House of Commons Select Committee of 1956, cited fn. 48, which pointed out the extreme difficulty of drafting satisfactory provisions to cover all the possible contractual arrangements in which a member may theoretically become subject to the influence of the government.
51. Convention Debates, Sydney, 1897, p. 1023.
52. ibid., p. 1025.
53. See the British Royal Commission on Standards of Conduct in Public Life 1974-1976 (Lord Salmon, Chairman), *Report*, Cmnd. 6254, HMSO, London, 1976, pp. 40, 64; see also Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, Harvard University Press, Cambridge, Mass., 1960, p. 17.
54. Riordan, *Report*, cited fn. 24, p. 9.
55. Bowen, *Report*, cited fn. 27, p. 22.
56. *R* v. *Boston* (1923) 33 CLR 386.
57. Riordan, *Transcripts of Evidence*, vol 2, p. 1344 at p. 1351.
58. (1920) 27 CLR 494 at p. 500.
59. Riordan, *Transcripts of Evidence*, vol 2, p. 1352.
60. Riordan, *Report*, cited fn. 24, p. 14.61. Bowen, *Report*, cited fn. 27, p. 14.
62. *R* v. *Boston* (1923) 33 CLR 386. See also *R* v. *White* (1875) 13 SCR (NSW) (L.) 322. Note the common law offence relating to breach of trust in public office is discussed by P.D. Finn in his submission to the Joint Committee on Pecuniary Interests, *Transcripts of Evidence*, vol. 2, pp. 1346-1361. See also Bowen, *Report*, pp. 125-127.

CHAPTER 8

Procedural questions (ss. 15, 33, 46, 47)

INTRODUCTION

8.1 Although we have briefly touched on the consequences of a breach of ss. 44 and 45 of the Constitution we have not closely examined the differences between these provisions, nor the ways in which the various constitutional issues may arise for authoritative determination. The Constitution provides two mechanisms by which members and senators may be challenged for an alleged breach of ss. 44 and 45. They are ss. 46 and 47 which provide as follows:

> 46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.
>
> 47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

If a determination is made under either of the above provisions that a member or senator has contravened either ss. 44 or 45, the question arises as to whether the place of the member or senator becomes vacant in such a way as to bring into operation the casual vacancy provisions in ss. 15 and 33, or whether an election is required under ss. 7 and 32 of the Constitution. The relevant parts of the casual vacancy provision are as follows:

> 15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.
>
> 33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

DISTINCTION BETWEEN A BREACH OF s. 44 AND OF s. 45

8.2 Section 44 enumerates the different kinds of status which, so long as they continue, render a person incapable of being chosen or of sitting as a senator or a member. If a person is in fact chosen, perhaps in ignorance or disregard of the disqualifications within s. 44, he is nevertheless 'not chosen within the meaning of the Constitution, and accordingly is not a senator or a member.'[1] As the election is void ab initio, one cannot speak of a senator or member vacating his seat and consequently the vacancy provisions

in ss. 15 and 33 of the Constitution are inapplicable, and an election is required pursuant to either s. 7 (Senate) or s. 32 (House of Representatives) of the Constitution. Quick and Garran, commenting on this point, state:

> The proper course for the House, upon proof of disqualification, is either (1) to declare the candidate next on the poll duly elected, or (2) to declare that the seat is vacant—not that 'his place is vacant'—and require another election.[2]

However, if such a person takes his seat, he may be liable to a penalty for every day on which he sits. We discuss this issue later under the common informer provisions.

8.3 Section 45 deals only with senators or members who are qualified at the time of their appointment or election, but who at some time thereafter become disqualified. This section enumerates different acts or events which vacate a senator's or a member's seat: in s.45 (1) the disqualifying event is the acquisition of any of the kinds of disqualifying status listed in s. 44, and s.45 (ii) and (iii) add two further categories of disqualifying acts which do not involve a continuing status. The consequence of a contravention of s. 45 is automatic and is effected by the section itself as soon as the s. 44 disability or s. 45 disqualification arises. Under the provision, 'his place shall become vacant' and there is now a vacancy—a casual vacancy within s. 15 when the State legislature acts, or a casual vacancy within s. 33 when the Speaker acts.

COMMON INFORMERS

8.4 As we noted at the beginning of this chapter, s. 46 of the Constitution provides one of the mechanisms by which members and senators could be brought to account for an alleged breach of ss. 44 or 45. The provision enabled any person to sue a member who was disqualified under the Constitution and provided that such a member would be liable to a penalty of one hundred pounds for every day on which he sat. Consequently the total penalty incurred under s. 46 could have been enormous[3] if an infringement only became apparent years after it had occurred. Despite these obvious financial attractions, s. 46 was never once relied upon. As Evans noted:

> The reasons for this are perhaps not hard to find. Common informers are not, for one reason or another, very highly regarded by the courts, who tend to place as many procedural and evidentiary barriers in the way of the informer's success as they can reasonably devise, and to construe the substantive law even more strictly in favour of the defendant member than they might otherwise be tempted to do.[4]

8.5 In April 1975 at the height of the Webster affair, the Parliament 'provided otherwise' pursuant to ss. 46 and 51(xxxvi) of the Constitution and passed the *Common Informers (Parliamentary Disqualifications) Act* 1975.[5] The Act abolishes suits brought directly under s. 46[6] and provides instead for a suit to be brought in the High Court of Australia by any person for the recovery of a penalty of $200 in respect of a past breach, and for the recovery of a further penalty of $200 for every subsequent day on which the member sits while dsqualified after service of the originating process.[7] In addition, the Act limits informer suits to recent allegations,[8] ensures that no member can be penalized more than once in respect of any given period of sitting,[9] and vests exclusive jurisdication in these matters with the High Court.[10]

8.6 A question arises as to whether common informer provisions, however cast, serve any useful purpose. Evans commented:

> The attraction in principle of such provision is, of course, that any member of the public who feels that Parliament is being unduly protective of one of its own members can force the issue and have the matter canvassed in a totally impartial forum. The trouble in practice,

however, as was suggested above, is that those individuals who might be most likely to bring suit for proper, public interest, motives are those who will be most dissuaded by the 'greedy informer' label still attaching to such suits. With the passage of the 1975 Act, the ironic result seems likely to follow that the amounts recoverable will now be too low to attract the genuinely greedy, but still high enough to embarrass the potential suitor who does not want to be thought greedy at all. For one reason or another, it seems to be the experience of all those jurisdictions retaining common informer provisions here that they work capriciously, fitfully or not at all.[11]

8.7 There are a number of differing views on this question. Professor Campbell suggests that suits for penalties under s. 46 be abolished entirely.[12] The Western Australian Law Reform Committee in considering the equivalent Western Australian constitutional provision suggests that it be recast providing simply for an action for a declaration at the suit of any person, as to whether or not a member of Parliament is disqualified.[13] They further suggest that 'to discourage needless harrassment, the applicant could be required to give security for costs.'[14]

DECLARATION UNDER s. 47

8.8 Section 47 of the Constitution provided the other means of challenging the qualifications of a member of Parliament before a court of law. In 1907, in the absence of any legislation on the subject, the High Court refused to determine whether a senator had been validly appointed under s. 15 of the Constitution because this was, among other things, a question respecting a vacancy within the meaning of s. 47 and therefore a matter for the Senate itself to decide.[15] Arising out of that case, the Australian Parliament passed an Act pursuant to s. 47 enabling such questions to be referred to the High Court of Australia sitting as a Court of Disputed Returns: this Act was the *Disputed Elections and Qualifications Act* 1907. The present provision for referring such questions to the High Court sitting as a Court of Disputed Returns is s. 203 of the *Commonwealth Electoral Act* 1918, which is enacted pursuant to s. 47 and s. 51 (xxxvi) of the Constitution. This provision faithfully mirrors the language of s. 47 as follows:

> 203. Any question respecting the qualifications of a senator or of a member of the House of Representatives or respecting a vacancy in either House of the Parliament may be referred by resolution to the Court of Disputed Returns by the House in which the question arises and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.

8.9 An important question for consideration arises here as to whether the enactment of s. 203 has had the effect of ousting the jurisdiction of both Houses of Parliament given to them by s. 47 of the Constitution. If s. 203 does not have that effect, both Houses retain the jurisdiction to determine questions of vacancies themselves, instead of referring them to the Court for its determination. In 1974, it was argued by the then Attorney-General, Senator Murphy, that the enactment of s. 203 had exhausted any power which either House of Parliament might have had to determine any question respecting a member's qualifications or a vacancy, just as s. 183 of that Act had removed the Houses' power to determine any question of a disputed election.[16] That argument, which was supported by a 1952 opinion of Garfield Barwick QC, was rejected by the Senate on party lines.

8.10 The Senate's rejection of this argument has been supported in a number of articles since that time[17] and we also are of the same opinion. First, Parliament has not, in enacting s. 203, declared unequivocally that the House shall not determine questions

respecting qualifications and vacancies, whereas, in regard to s. 183 of the Act, the Parliament distinctly provided that the Court of Disputed Returns alone shall have jurisdiction. Secondly, the provision states that the Houses of Parliament 'may' refer certain questions to the Court. The operative word is 'may' and the relevant House clearly retains a discretion as to whether to refer such questions. As Professor Campbell notes:

> The effect of section 203 is simply to create a concurrent jurisdiction in the Court, a jurisdiction arising on reference by the House of Parliament concerned. It may be that if either of the Houses refers a question to the Court, and the Court determines the question so referred the referring House thereupon lacks jurisdiction to determine the question anew. But when a question of the type specified in section 47 arises, the House in which that question arises may proceed to decide that question itself.[18]

8.11 Despite the strength of the arguments in support of this interpretation of s. 203, we are of the opinion that the issue should be put beyond doubt. We recommend that s. 203 be amended to ensure that both Houses of Parliament retain a clear jurisdictional discretion under s. 47 of the Constitution to determine any question respecting qualifications, vacancies or disputed elections of senators and members.

8.12 Recommendation: Section 203 of the Commonwealth Electoral Act 1918 should be amended along the following lines:

> **203. Any question respecting the qualifications of a senator or of a member of the House of Representatives or respecting a vacancy in either House of the Parliament may be determined by the House in which the question arises or may be referred by resolution of the House to the Court of Disputed Returns and the Court shall thereupon have exclusive jurisdiction to hear and determine the question.**

8.13 The debate concerning the alleged vacancy of Senator Gair's seat raises a number of other issues which require consideration. The Senate's interpretation of the Constitution and of s. 203 of the Commonwealth Electoral Act is not binding on any court of law. As Professor Campbell notes:

> Neither House of Parliament can, by mere assertion of authority, give itself jurisdiction which as a matter of law it does not possess. The existence of their jurisdiction under the Constitution or under enactments of the Commonwealth Parliament is ultimately a matter to be determined in the courts of law.[19]

Thus, if either House of Parliament asserted jurisdiction to determine a question respecting a vacancy and adjudged that a seat had become vacant, such a determination could be challenged in the Court.

8.14 However, it is by no means certain whether the Court, in reviewing such a determination, would inquire beyond the jurisdictional issue. Professor Campbell canvasses the issue and states:

> But I think it unlikely that a Court, having found that the House adjudging a vacancy to have occurred was acting within jurisdiction, would presume to rule on whether the House had made erroneous findings of fact or had misapplied the constitutional provisions defining qualifications, disqualifications or the circumstances in which seats become vacant.[20]

In support of this argument, Professor Campbell notes, among other things, that no court has been invested by statute with jurisdiction to entertain appeals against decisions made by the Houses of Parliament under s. 47 of the Constitution, and that it would require a distinct statutory provision to give a court such jurisdiction.

8.15 The other question which arises for consideration concerns the possible conflict of procedures which could occur between a determination made under s. 47 and a suit instituted pursuant to the *Common Informers (Parliamentary Disqualification) Act*

1975. Thus, if either House of Parliament exercised its jurisdiction under s. 47 and determined that a member's qualification or seat was not in jeopardy, the determination could be challenged indirectly in a suit for penalties. It has been suggested that a prior determination by the House would render the matter *res judicata*, i.e. the matter cannot be raised again. Lumb and Ryan, writing before the passage of the Act in their Constitution of Australia Annotated, state:

> if the matter is being dealt with by the House or has been referred to a Court of Disputed Returns, the common informer's suit would be excluded.[21]

We do not agree with this assertion, however, as the legislation enacted pursuant to these provisions provides for two entirely different procedures, each of them independent from the other. Furthermore, there is judicial comment in the English case of *Bradlaugh* v. *Gossett* which suggests that the court trying the suit for penalties would not be bound by the House's adjudication.[22] Although the matter has not yet come up for judicial decision, we have little doubt that a court would decide the matter independently of what might have been previously decided by the relevant House of Parliament.

8.16 Obvious difficulties arise if the Court determining a suit for penalties reaches a different conclusion to that of the House. If the Court held that a member was incapable of sitting and voting in the House or that his seat was vacant, contrary to a determination by the House, the member would be in an invidious position: he could be liable for a penalty of $200 for every day he continued to sit and vote. If he was not prepared to run the risk of further penalties by sitting and voting, he would deprive his electors of representation.

8.17 In such circumstances it is probable that the relevant House would not see fit to issue a writ for the election of a new member, or to take the necessary action prescribed by s. 15 for filling a casual vacancy in the Senate. Professor Campbell suggests that in such circumstances it is possible that legislation would be sought to extinguish the penalty, present and future. She states:

> Care would need to be taken in the formulation of such legislation. An enactment which on its face contradicted the court's judgment that the member was incapable of sitting as a member would be open to constitutional challenge on the gound that it represented a usurpation of the judicial power of the Commonwealth. On the other hand, sections 46 and 51(36) authorise the Parliament to remove or alter the penalties for sitting whilst disqualified. An act which merely removed the liability to penalties, generally or in relation to a particular person, would probably be held *intra vires*.[23]

8.18 While on the one hand the present difficulties associated with the informer provisions lead us to the conclusion that they should be abolished, on the other hand we believe these provisions do provide a necessary alternative mechanism by which the qualifications of members can be tested. Despite the fact that they have not yet been availed of, we recommend, on balance, that such provisions remain, but only in the form of an action for a declaration, while penalties, which serve no useful purpose, should be abolished.

8.19 Recommendation: The *Common Informers (Parliamentary Disqualifications) Act* 1975 should be amended, deleting the penalty provisions, and providing simply for an action for a declaration to be brought in the High Court of Australia at the suit of any person, as to whether or not a senator or member of the House of Representatives is disqualified.

Alan Missen
Chairman

The Senate
Canberra
May 1981

Notes and references

1. Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, at p. 491.
2. ibid., p. 491. See also, *Vardon* v. *O'Loghlin* (1907) 5 CLR 201. Vardon appeared to have been elected as a South Australian senator. His election was challenged in *Blundell* v. *Vardon* (1907) 4 CLR 1463 and the Court declared the election 'absolutely void' because of defective ballot papers. The South Australian legislature took the view that the Court's judgment created a 'casual vacancy' under s. 15 of the Constitution and in accordance with this provision chose O'Loghlin as Senator for South Australia. Vardon challenged the State legislature's action in *Vardon* v. *O'Loghlin*. The Court declared that s. 15 was inapplicable as there had never been a valid and effective election: because Vardon had not become a senator there was no casual vacancy. An election under s. 7 of the Constitution was required to fill the vacancy and the people consequently elected Vardon.
3. See the comments made by Senator Withers on the effect of s.46: 'Some of our longer serving colleagues could be up for $250,000 or a similar penalty': Senate, *Hansard* 22 April 1975, p. 1237.
4. Gareth Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution, (1975) 49 ALJ 462 at p. 472.
5. The legislation passed through all stages in both Houses in one evening and came into effect the following day.
6. *Common Informers (Parliamentary Disqualifications) Act* 1975, s. 4.
7. ibid, s. 3(1).
8. ibid., s. 3(2): A suit under this section shall not relate to any sitting of a person as a senator or as a member of the House of Representatives at a time earlier than 12 months before the day on which the suit is instituted.
9. ibid., s. 3(3).
10. ibid., s. 5.
11. Evans, cited fn. 4, at p. 473.
12. Australia, Royal Commission on Australian Government Administration: *Appendix, Volume One*, Parl. Paper 186/1976, p. 191 at p. 209.
13. Western Australia, Report of the Law Reform Committee, *Disqualification for Membership of Parliament: Offices of Profit Under the Crown and Government Contracts* (Project No. 14), 1971.
14. ibid., para. 38.
15. *R* v. *Governor of South Australia* (1907) 4 CLR 1497.
16. Senate, *Hansard*, 4 April 1974, p. 681 ff.
17. See Campbell's paper in Coombs, *Appendix, Volume One*, cited fn. 12, pp. 205-6; Evans, cited fn. 4, p. 471; P.H. Lane, *The Australian Federal System*, 2nd edn, The Law Book Company Limited, Sydney, 1979 at p. 50; P. Hanks, *Australian Constitutional Law*, 2nd edn, Butterworths, Sydney, 1980, at pp. 25-6; P. Hanks, 'Parliamentarians and the Electorate'; in G. Evans (ed.), *Labor and the Constitution*, Heinemann, Melbourne, 1977 pp. 193-4; G. Sawer, *Federation Under Strain*, MUP, Melbourne 1977, pp. 35-6.
18. ibid., p. 205.
19. Coombs, *Appendix, Volume One*, cited fn. 12, pp. 206-7.
20. ibid., p. 209.
21. In the 1st edition (1974), at p. 61. This statement was not repeated in the 2nd edition 1977.
22. (1884) 12 QBD 271 at 281-2.
23. Coombs, *Appendix, Volume One*, cited fn. 12, p. 209.

APPENDIX 1

Individuals and organisations who made written submissions to the Committee

	Submission No.
Attorney-General's Department	18
Baume, Senator Peter	6
Croasdale, James R., Yetna —Nanson, W.A.	1
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APPENDIX 2

Letter from Attorney-General to Senator Evans regarding employment of Senator-elect as 'Legislative Assistant'.

ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

21 November 1980

Dear Senator,

I refer to your inquiry as to whether a person who was elected as a State Senator at the recent Senate election and is desirous of accepting employment on the electorate staff of an Opposition member of the Parliament as a "Legislative Assistant" for a period expiring not later than 30 June next would, if he accepted such employment, be disqualified from taking his place or sitting as a senator from 1 July next year.

Your inquiry raises an important point both of principle and practice as to whether an Attorney-General should advise an individual member or a member-elect on such a matter. Former Attorneys-General have refrained from accepting such a role and my Department has generally adopted a similar approach.

There have been sound reasons of prudence for this course. The disqualification and vacancy provisions in sections 44 and 45 of the Constitution are mandatory, and can only be altered by referendum. The decision of questions that arise still lies primarily, I believe, with the House concerned under section 47 of the Constitution, which may, however, refer the matter to the High Court sitting as the Court of Disputed Returns (Electoral Act, s.203). Moreover, any person can still sue in the High Court as a common informer for a penalty for sitting when disqualified, although the amount of penalty is now limited by the Common Informers (Parliamentary Disqualifications) Act 1975. No opinion by an Attorney-General or his Department can therefore be regarded as conclusive and binding on the matter.

I take a different approach to my predecessors to the extent of believing that where the Attorney-General can properly assist in the difficult questions that arise in this area, it is appropriate for him to do so, rather than leave persons completely bereft of any official guidance. Anything said, however, must be subject to the caveats referred to above, and the member or member-elect concerned should ultimately make his own decision, in the light of his own legal advice, on whether he is willing to take a course that may lead to questions of disqualification being raised.

Turning to the particular matter you have raised, a question obviously arises whether the disqualification provisions in section 44 of the Constitution are applicable in the interregnum between a senator-elect being chosen - which would be complete at least by the return of the election writ to the State Governor concerned - and his sitting after taking his place on the following 1 July.

This question arises because the language of section 44 is addressed to a person's status at the time of being chosen or sitting as a member or senator, and because the places in the Senate at present filled by State senators rejected at the recent elections will not become vacant until the occupants' terms expire on 30 June next, and the terms of the persons elected to fill the vacancies which will then occur will not begin until 1 July next. Consequently a person who is not at present a senator, but who has recently been elected a senator, will not become a senator until 1 July 1981. In the meantime he is a senator-elect, to use the usual description. He is not yet sitting, or entitled under the Constitution to sit as a senator; he has no senatorial place.

The circumstances may be contrasted with the circumstances on the occasion of the filling of a casual vacancy in the Senate under section 15 of the Constitution and the election of a member of the House of Representatives, where there is no interval of time between the choosing of the senator or member and the commencement of his term of service.

So far as I have been able to ascertain, however, the question whether section 44 of the Constitution is applicable to a senator-elect has never been the subject of debate in the Senate (though it was raised in the House of Representatives on 7 March 1962, Vol. H.of R. 34, pp.585-6), nor does there appear to be any established practice on the matter, the one way or the other. The particular issue that arises in the present case concerns paragraph (iv) of section 44 of the Constitution so far as it relates to holding "an office of profit under the Crown", where the mischief intended to be dealt with would be at least as acute in the case of a senator-elect - in fact probably more so - than at the earlier stage of being elected as a senator, to which the disqualification provisions are clearly applicable. On the other hand, the case for regarding section 44 as applying to senators-elect might seem less compelling where the alleged ground of disqualification was, for example, a temporary insolvency that was terminated before the senator-elect was due to take his place as a senator.

In In Re Webster (1975) 132 C.L.R. 270, Barwick C.J. said that as there were penal consequences of a breach of section 44(v) the paragraph should receive a strict construction. Elsewhere in the same judgment he said that the purpose of the presence of section 44(v) in the Constitution must be borne in mind. These two comments seem equally applicable in relation to the other paragraphs of section 44, including section 44(iv), but, if they are applied, they seem to point in opposing directions. A strict construction of section 44 as a penal

provision would indicate that it is not to be regarded as applicable to senators-elect. A strong regard on the other hand to the mischiefs that section 44 was intended to deal with would, I think, justify the implication that appears to be necessary to make section 44 applicable to senators-elect. The notion of disqualification provisions applying during the election processes and during the time of service as a senator, but being interrupted by an interregnum while the elected person awaits the time when he takes up his place, can only be regarded, I believe, as highly anomolous.

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

On this view, it would therefore be necessary to consider whether or not the position of Legislative Assistant in question would constitute an office of profit under the Crown within the meaning of section 44(iv) of the Constitution. In this instance also, the decided cases do not appear to give satisfactory guidance. If the test that appears to be adopted by Barwick C.J. in In Re Webster (supra) in relation to section 44(v) is applied, namely whether the situation is one under which the Crown could conceivably influence the holder of the position in question, I think the answer must be "no". On the other hand, the fact of the matter is that these positions are at present serviced by using the Public Service Act. The persons concerned are appointed as temporary employees under that Act even though, so I gather, their selection is completely a matter for the member of Parliament concerned, and they are expected to obey the directions of the member concerned. There can be no doubt that an engagement under the Public Service Act, even though not involving the holding of an "office" in the formal sense of that term, has been widely regarded as being one of the obvious cases of the holding of an office of profit under the Crown. Section 47C and 82B of the Public Service Act 1922 (as amended) clearly proceed on the assumption that persons engaged under the Public Service Act, whether officers or temporary employees, will resign to become candidates at an election.

I do not think that I can take the matter much further than this. There is no direct judicial authority on section 44(iv). I would only say that a conclusion that a position on an Opposition member's electorate staff constitutes an office of profit under the Crown would be highly technical in character, but the area is one in which, in the absence of clear judicial guidance, it may not be safe to ignore that possibility.

Yours sincerely,

(PETER DURACK)

Senator G.J. Evans,
Parliament House,
CANBERRA. A.C.T. 2600