Members of Parliament:
law and ethics

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PROSPECT
2000
This book is dedicated to

V.G.C. & L.M.C.
In a democracy, political institutions depend ultimately on public confidence in their efficiency and integrity. Confidence in these institutions is not maintained solely by the ballot box. The discipline of the party system, control over the selection of candidates and the ephemeral nature of electoral issues and promises place a limit on the effective accountability of political institutions to the general public.

The efficiency and integrity of political institutions are functions of the qualifications and character of those in whom political power is reposed and of the manner in which that power is exercised. The public expects that certain standards will be maintained and, provided those standards are maintained, accepts and peacefully submits to the exercise of political power. The maintenance of proper standards underpins the peace, order and good government of society. This book is about the maintenance of those standards. It is also about the means of protecting democratic debate inside and outside the Parliament.

The standards of political conduct are defined and buttressed by a number of institutional mechanisms which themselves command public support, albeit their content is not fully known to the public nor fully appreciated by those who are expected to observe the relevant standards. Constitutions, laws, conventions, guidelines and practices all have an effect — sometimes coercive, sometimes persuasive, sometimes by providing a touchstone of desirable propriety. These are the subject of Professor Carney's treatise.

The author has covered the standards applicable to practically every aspect of public conduct on the part of those vested with political authority. But the value of this treatise lies not so much in its breadth as in its depth and insights. Parliamentary history and contemporary practice, constitutional imperatives and Speakers' rulings, statute and the common law, promulgated guidelines, committee reports and the lessons of notorious affairs are examined and expounded to show the way in which political power should be exercised on behalf of the community which entrusts that power to their political representatives.

The book is not a mere anthology of ethical desiderata. This is a practical handbook for those engaged in politics and for their advisers and an authoritative textbook for
lawyers and public administrators. It is at once a work of scholarship and a lucid roadmap of political propriety. When an issue has not hitherto been clarified by law or practice, the author says so. When existing law or practice is arguably defective, the author proposes reform.

The book contains a long overdue exposition of the relationship between, on the one hand, constitutional imperatives, the general law (including the relevant principles of tort and equity) and the law and custom of parliament, and, on the other, the ethics, practices and problems of parliamentary and political life. The division of this book into three Parts — Qualifications and disqualifications, Parliamentary privilege and freedom of speech, and Standards of conduct — helpfully focuses on elements of a general subject few parts of which can be considered in isolation.

Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament and the Practice Books of the Australian Senate and House of Representatives do not provide the same depth of analysis covering the field of law and ethics affecting members of Parliament. Yet there are some issues — including the difficult topic of art 9 of the Bill of Rights 1689 and disclosure of Parliamentary proceedings in court — which require not only an examination of diverse authorities but the skill of precise legal analysis.

By the publication of this book, Professor Carney has made a considerable contribution to public law and public administration in Australia. The scholarship with which for a time he assisted me in the judicial branch of government is now directed to a wider audience and to the service of parliaments of the Commonwealth — the institutions which are at the heart of our democracy.

Gerard Brennan
Chambers, Sydney NSW
2 June 2000
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While libraries are overflowing with political biographies and works on political philosophy and politics, little has been written on the principles which guide members of parliament in the performance of their representative responsibilities. This work hopefully provides some guidance in the three areas it explores: qualifications and disqualifications; parliamentary privilege; and standards of conduct. Linking these three areas is the primary duty of members to act in the public interest rather than in their own personal interest. While the focus is particularly on the position of members of all Australian parliaments and legislatures, the principles examined are relevant to all Westminster parliaments throughout the Commonwealth.

While no attempt is made to give an exhaustive account of all the legal and ethical obligations of members, this work endeavours to deal with many of their principal obligations. Particular emphasis is given to their legal obligations, which permeate all three parts of the book. The division into those three parts might perplex some who would correctly assert that all three address the standards of conduct of members, rather than just Part III. Nevertheless, each remains a distinct topic despite their inter-relationship in terms of standards of conduct.

This work is intended primarily as a detailed reference work, particularly in relation to Part I on qualifications and disqualifications and Part II on parliamentary privilege. These are both technical topics which cannot be adequately explained by a generalised work — such a work would fail to provide the guidance needed to give accurate advice in particular cases. Part III, on the other hand, focuses more on the ethical obligations of members, especially in relation to the disclosure of interests and codes of conduct. It is therefore a more generalised discussion.

It is hoped that this work becomes a useful reference work for members of parliament, lawyers, parliamentary officers and staff, political scientists, political journalists, and others who are involved in or are interested observers of the parliamentary process.

The origins of this work began in 1988 when I was asked by the Legal Division of the Commonwealth Secretariat in London to undertake a comparative study of the various regimes developed within the Commonwealth concerned with conflict of...
interest and members of parliament. That study, completed in 1989, was subsequently published by the Commonwealth Secretariat as *Conflict of Interest: A Commonwealth Study of Members of Parliament*. I returned to Australia eager to examine the position in Australia in more depth. Since the publication of my Commonwealth study, there has been increased public focus on the accountability of all who exercise governmental power. Consequently, codes of conduct and registers of interests have become a common feature of the political landscape. How effective they are is unclear in the absence of empirical research, but their proliferation within Australia and overseas sends a message to their respective constituencies that members understand the need for accountability and transparency in the performance of their parliamentary functions.

So many people have provided me with assistance of various kinds for which I am very grateful. Several are specifically acknowledged here despite my fear of omitting others who should be mentioned. Particular thanks must go to Emeritus Professor Enid Campbell, Associate Professor Noel Preston, and Emeritus Professor Colin Hughes who reviewed parts of the manuscript. I especially thank Mr Neil Laurie, Deputy Clerk of the Legislative Assembly of Queensland, for reviewing the whole manuscript. My sincere thanks must also go to the Hon Justice Paul Finn for including me for a time in his *Integrity in Government Project*.

I have also been grateful for the assistance provided by various officers of all Australian parliaments, in particular, Laurie Marquet (WA), Peter Alcock (Tas), Gareth Griffith (NSW), Velia Mignacca (NSW) and Paul Venosta (Vic) who answered my many queries and provided copies of many relevant publications. Special thanks must also be given to Mr Paul Dacey of the Australian Electoral Commission who arranged for Part I to be reviewed by all the Electoral Commissions and Offices in Australia. Their comments were indispensable. Thanks must also be extended to Professor Malcolm Cope, Dean of the QUT Law School for the provision of research facilities at QUT in 1999 and to Geoff Barlow at the Bond Law Library for his unfailing assistance.

Finally, I am very grateful for the encouragement, patience and tolerance shown by my family and friends, as well as by my colleagues at Bond University Law School, in particular, Professor Laurence Boulle.

This was an ambitious project to cover the position of members of the Commonwealth and all six State Parliaments, as well as of the Legislative Assemblies of the Australian Capital Territory and the Northern Territory. I seek the reader's indulgence for any inaccuracies in particular respects. With that qualification, the position is stated as at 1 May 2000.

_Gerard Carney_
Bond University Law School
June 2000
Chapter 1

Introduction

This work considers the principal features of the legal and ethical status of members of parliament. While the primary focus is on the members of all Australian legislatures, reference is made to the members of the United Kingdom House of Commons, the mother of Westminster parliaments, from which many of the relevant principles were adopted. Hence, this analysis of the position in Australia reflects to a substantial degree the position found in many Westminster parliaments of the British Commonwealth.

The legal and ethical status of members has been divided into three parts:

- Part I deals with the grounds of qualification and disqualification;
- Part II deals with parliamentary privilege; and
- Part III deals with standards of conduct.

The role of a member of parliament is predominantly to represent the interests of his or her electorate. The nature of that role is therefore dependent on the nature of the franchise, the electoral system and the parliamentary system. Obviously, as those systems evolved to form a democratic representative system of government with a universal adult franchise, the role of a member responded to that constitutional development. Equally significant was the evolution of responsible government, whereby those who form the ministry must have the support of the members of the lower house of parliament. This means that members of parliament possess two principal functions: to represent the interests of their constituents in the parliament; and to review the activities of the government. In addition, the members of the lower house decide who forms government.

Although the phrase ‘member of parliament’ refers in the United Kingdom only to a member of the House of Commons and not to a member of the House of Lords, it is a description which is elsewhere used to describe a member of either house of parliament. In referring to the ‘parliament’ the description is somewhat misleading, since it is membership of a ‘House’ rather than parliament as a whole which determines the role and status of members. Parliamentary privileges are enjoyed by each House, including the power to discipline its own members.
The Houses of Parliament through their respective members perform a range of important functions. They:
(1) enact legislation;
(2) approve appropriation or supply for the government;
(3) review government policy and action (the accountability role);
(4) review proposed legislation;
(5) investigate matters which appear to require investigation or reform by investigatory committees; and
(6) provide a forum by which matters of public interest may be raised before the government and the general public.

The functions of members of parliament include all of the above, of which the last four provide the greatest opportunity for individual participation. Other important functions of an extra-parliamentary kind performed by members include:
(1) providing advice to constituents and other persons; and
(2) making representations on their behalf to government (often through a Minister) or to other organisations.

What pervades these functions and the parliamentary process itself is the political party system which has effectively deprived members other than independents of their freedom to perform those functions as they see fit. Party discipline has substantially subsumed the independence of members for the sake of stability of voting blocks in the parliament. Potentially, this places members in an invidious position, with conflicting loyalties to their party, their constituents, the government or the opposition, and to the nation. How are these conflicts to be resolved? To start with, the universally accepted primary obligation of members is to act in the public interest and never in their own personal interest. This at least highlights the public trust vested in members to act in the public interest and not profit from that role. So far the focus has been on avoiding pecuniary benefits, since these are usually easily identified as unethical, if not illegal. As for non-pecuniary benefits, such as the promotion of a relative or oneself, these are not so easily detected and may at times involve delicate questions as to whether or not they are acceptable as part of the political process of compromise and bargaining.¹

Members, however, face other potential conflicts which do not necessarily involve a personal interest, such as when their own conscience conflicts with party policy. Although on rare occasions members are given a ‘conscience vote’ on issues on which the party has no policy, they are normally expected to follow the party line in the House. This means that conflicts of this nature are tackled by the individual member within the parliamentary party room rather than in the House. To follow the party line is not necessarily unethical provided this is done after due consideration of the competing interests at stake.

It is in this environment of the parliamentary system dominated by the discipline

Chapter 1: introduction

of political parties that this book examines the principal features of the legal and ethical status of members of parliament. There are several themes which weave their way through all three Parts outlined earlier. All of them derive from the fundamental obligation of members to act in the public interest. While the ‘public interest’ defies definition, it clearly involves the balancing of competing interests to promote the common good. The pressures involved in this political process are captured by Dr Noel Preston:

[Parliamentarians and unelected public officials] assume responsibility in a significant way, for protecting the rights and interests of the public. Much of the work of public officers — elected or appointed — involves choices amongst values; indeed, it is this characteristic of their role in a liberal democracy that often makes their decisions contestable, debatable and requiring public justification. Elected and unelected officials have to make choices in an environment where they have limited resources and options, choices which will benefit some and disadvantage others. The political environment is a highly competitive and adversarial one, which by necessity is fuelled by the quest for power. Before becoming an elected official, deals of dubious kinds may be done to win pre-selections. Politicians are constantly faced with the demands of interest groups, factions, institutions, powerful individuals as well as ordinary constituents.2

Maureen Mancuso has drawn the distinction between a ‘conflict of interest’, which arises when a member’s personal interests conflict with official duty, and a ‘conflict of interests’, which describes those competing interests which are resolved by the parliamentary process — these are ‘inherent to Parliament, for without disagreement on important issues, no deliberative assembly would be needed’.3

The pre-eminent theme in this book is concerned with the former situation: that is, the avoidance of a conflict of interest between a member’s official responsibilities and his or her personal interests. An early statutory mechanism to assist members to comply with this obligation was the disqualification from parliament of government contractors and holders of an office of profit under the Crown. In addition, members were required by early resolutions of the UK House of Commons to declare their personal interests in parliamentary proceedings.

In recent times, those mechanisms, along with the grounds of disqualification referred to, have been acknowledged as inadequate. Hence, registers of interest and codes of conduct have been adopted in the hope that they will improve the apparent low level of public confidence in the parliamentary and political process. These mechanisms are considered in Part III, while suggestions are made in Part I for updating and clarifying the grounds of disqualification. The objective of these

mechanisms is to assist members to act and be perceived as acting in the public interest. In a democracy which recognises the sovereignty of the people, public confidence is essential for the maintenance of any government institution. Members must therefore avoid both actual and apparent conflicts of interest. However, it is unfair to judge the success of these mechanisms by reference to any improvement (if any) in the level of public confidence in politicians. Where that level lies is the product of a range of factors, including the performance of the political parties and the level of public understanding of the parliamentary process. Nonetheless, members are expected to maintain high standards of conduct in the performance of their official duties. Although public expectations of members may have increased in the latter part of the 20th century, the importance of capable members to exercise legislative power has been recognised since the time of Blackstone:

So that it is a matter most essential to the liberties of this Kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge. 4

Another common theme is the difficulty in judging whether there has been a breach of the public trust vested in a member. The range of potential misconduct extends along a spectrum from merely unethical conduct at one end to criminal conduct at the other. The grounds of disqualification considered in Part I clearly raise the issue of whether they are all sufficiently serious to warrant the drastic consequence of disqualification. Comparison with cases which merely incur suspension of a member for failing to comply with accepted standards of conduct suggests certain grounds are not warranted. It is important to ensure that the sanction imposed is an appropriate and proportionate response.

A further theme concerns the relationship between parliament (or its Houses) and the courts; that is, the capacity of the courts to exercise the power of judicial review over the activities of parliament and of its members. Here, the focus is on the predominant parliamentary privilege, freedom of speech under art 9 of the Bill of Rights 1689. Part II of the book examines this aspect by exploring the justification for freedom of speech.

In the end, the central objective of all the legal and ethical obligations of members is to ensure that their House, and hence Parliament as a whole, is able to translate the people's will into law and to select and call to account the executive branch. How parliament is made accountable for performing that role is answered by Dr John Uhr:

Three overlapping answers emerge: the blunt instrument of electoral accountability; the double-edged sword of parliamentary privilege; and the new and untested weapon of a parliamentary code of ethics. 5

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Chapter 1: introduction

Each of these matters is covered in this book. Part I examines how the election of members is enhanced by the prescription of grounds of disqualification; Part II deals with parliamentary privilege; and Part III explores the range of criminal and civil standards which protect the public trust vested in members. It should be noted that this book does not cover the additional responsibilities of those members who are ministers. While all of the principles applicable to members apply to those who have accepted ministerial office, ministers are subject to more onerous obligations, particularly in relation to the avoidance of conflicts of interest.
Part I
Qualifications & Disqualifications
Chapter 2

Qualifications and disqualifications

Introduction

Part 1 endeavours to offer a comprehensive analysis of the qualifications and grounds of disqualification of members of Parliament in Australia at the Commonwealth, State and Territory level. While the position is generally similar in respect of membership of all these parliaments, differences do exist. Moreover, determining the precise operation of certain grounds of disqualification is by no means an easy task. This is of concern given the effect disqualification has on the member, the member's electorate and the parliament itself. Nor is ambiguity the only problem. Certain grounds, at least in their current form, are now outdated, based on notions from the 19th century which are no longer current. Accordingly, this Part attempts first to clarify the qualifications and grounds of disqualification and secondly, to assess their efficacy and fairness. Legislative reform is required, especially in relation to the Commonwealth Parliament. Yet for this to be achieved, constitutional amendments are necessary. Hopefully this Part contributes in some way to the achievement of that goal.

The relevant Commonwealth, State and Territory legislation distinguish between qualifications and disqualifications for election to parliament. This distinction derives from their different objectives and period of operation. The prescribed qualifications are designed to ensure that candidates possess the basic capacity to perform parliamentary duties. Their capacity need only be judged at the time of nomination or election. On the other hand, the grounds of disqualification are concerned with the integrity of members. These are usually of continuing operation for the period one is a member of parliament.

Today the qualifications for election are relatively straightforward and

1 Any reference to 'Territories' refers only to the Northern Territory and the Australian Capital Territory.

uncontroversial. However, the same cannot be said of the various grounds of disqualification. Most if not all of the grounds of disqualification originally evolved in the United Kingdom in relation to members of the House of Commons. These grounds were adopted by the Australian parliaments during the 19th century in much the same way that the privileges of the House of Commons were inherited or adopted.

While the practice of the House of Commons has usually been closely monitored by the Australian parliaments, divergence between their respective grounds of disqualification has arisen as changes in the United Kingdom have not been followed. One explanation for this is that until recently few cases of disqualification have been raised publicly. It is likely that over the years a number of members have in fact been disqualified in Australia but ignorance of the grounds of disqualification and, to a lesser extent, political expediency have saved them from challenge. Today though, the likelihood of a challenge to a member is greater given the more litigious nature of Australian society, increased public concern with government integrity and the increasing prevalence of minor parties and independents standing for election. Evidence of this last mentioned factor can be seen in the successful challenge to the Senate election of Ms Heather Hill, the only candidate from Pauline Hanson's One Nation Party elected to the Commonwealth Parliament at the 1998 federal election. Consequently, these grounds of disqualification can no longer be ignored.

It is apparent from a quick survey of this Part that there are relatively few judicial decisions either in Australia or the United Kingdom in this area of law. Nor is there much by way of academic analysis or criticism. However, there have been various parliamentary reports since Federation examining the Commonwealth and State grounds of disqualification which are of invaluable assistance. Pre-eminent of these is the Report of the Senate Standing Committee on Constitutional and Legal Affairs in 1981, *The Constitutional Qualifications of Members of Parliament* (the 1981 Senate Report). The most recent Commonwealth report is that from the House of Representatives' Legal and Constitutional Affairs Committee in July 1997 entitled *Aspects of Section 44 of the Australian Constitution — Subsections 44(i) and (iv)* (the 1997 House of Representatives Report). A list of other relevant Commonwealth, State and overseas reports is provided in Appendix 1.

It needs to be noted that the Legal, Constitutional and Administrative Review Committee (LCARC) of the Queensland Parliament has proposed the consolidation of the various statutes which in effect constitute the Queensland Constitution. The Committee has proposed a consolidation into two statutes, the *Constitution of Queensland Act* and the *Parliament of Queensland Act*. Accordingly, whenever reference is made to the current statutory provisions there follows a reference to the corresponding clause of the relevant draft Bill proposed by LCARC in its *Consolidation of the Queensland Constitution: Final Report* (Report No 13, April 1999).

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Qualifications of members

The purpose of prescribing specific qualifications to stand for election to parliament is to ensure that a candidate possesses the basic capacity to perform the functions of a member of parliament.\(^4\) The common qualifications are to be of adult age, an Australian citizen and entitled or qualified to vote at that election. Today, these provoke little controversy. Yet until the beginning of this century, both the qualifications to vote and to stand for election were rigorously debated.

In colonial Australia, the property qualification\(^5\) and the denial of the franchise to women\(^6\) and Aborigines and Torres Strait Islanders\(^7\) were the most prominent issues.\(^8\) Significantly, at the Commonwealth level only the last of these issues was hotly debated. The introduction of a uniform franchise by the Franchise Act 1902 (Cth) conferred on all adult Australians other than Aborigines the right to vote at Commonwealth elections and the right to stand for election to the Commonwealth Parliament.\(^9\) Similarly, the restricted franchise in most States soon gave way to universal adult suffrage other than for Aborigines. Until the conferral of an unconditional right to vote in federal elections in 1962, Aborigines\(^10\) only possessed a Commonwealth franchise if they were entitled to be enrolled for their State election or as a member or former member of the Commonwealth defence force.\(^11\)

Only in Queensland and Western Australia were they denied the franchise, although

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\(^4\) Blackstone's Commentaries on the Laws of England, Vol 4 (11th ed) Dublin, p 162 explained that minors were not qualified to be elected to ensure members were not 'incapable, or else improper' to manage the authority of parliament.

\(^5\) By Federation, the franchise for the lower House in each State depended on residence, although Queensland, Tasmania and Western Australia allowed plural votes for property owners. On the UK position, see Thornton v Pearce (1819) 1 B&B 25 and Act 21 & 22 Vict c 26 (1858).

\(^6\) The franchise was denied to women except in South Australia and Western Australia. It was also denied in the UK: see for example Beresford-Hope v Lady Sandhurst (1889) 23 QBD 79 until granted by Parliament (Qualifications of Women) Act 1918 (8 & 9 Geo V c 47).

\(^7\) At Federation, Aborigines were denied the vote in Queensland (s 6 Elections Act 1885) and in Western Australia (s 12 and 21 Constitution Act Amendment Act 1893 — unless they held the freehold qualification).

\(^8\) See Quick and Garran, The Annotated Constitution of the Australian Commonwealth, Angus and Robertson Sydney, 1903 pp 469-470 for the qualifications for voters in the States in 1901.


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in the other States either they were not sufficiently advised of their right to vote or the obligation to vote was not enforced.\(^\text{12}\)

**Commonwealth**

While the Constitution prescribed the initial qualifications for election to the Commonwealth Parliament, ss 34 empowered the Parliament thereafter to determine the qualifications for election to the House of Representatives. By ss 16 these qualifications must also apply for election to the Senate. No similar power is given to the Parliament to alter the grounds of disqualification in ss 43, 44 and 45, for which constitutional amendment is necessary.

The current qualifications for election to both Houses are prescribed by ss 162 and 163 of the *Commonwealth Electoral Act 1918* (Cth). Those sections require candidates for election to either House to be at the date of their nomination:

- at least 18 years of age;
- an Australian citizen; and
- entitled to vote at a House of Representatives election or qualified to become such an elector.\(^\text{13}\)

The voting age was reduced in 1973\(^\text{14}\) from 21 to 18 years, while the requirement of Australian citizenship was introduced\(^\text{15}\) in 1984. Prior to the 1984 amendments, the *Commonwealth Electoral Act 1918* (Cth) permitted all British subjects to vote and to nominate for a federal election. However, since 1984, British subjects who do not have Australian citizenship are only entitled to vote in federal elections if they were enrolled to vote federally before 26 January 1984.\(^\text{16}\) Although it may have been assumed by some that those with dual British and Australian citizenship were entitled to nominate for a federal election, the High Court held in *Sue v Hill*\(^\text{17}\) in 1999 that they were disqualified under s 44(i) for owing allegiance to a ‘foreign

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13 The difference between these two situations is that the former is listed on the Roll for a Subdivision, whereas the latter is not actually listed but having lived in a Subdivision for one month is entitled to be listed on the Roll for that Subdivision: s 99 *Commonwealth Electoral Act 1918*.


16 See now s 93 (previously s 39) *Commonwealth Electoral Act 1918* (Cth). Failure to satisfy the requirement of being an Australian citizen avoids the need to resort to s 44(i): *In re Wood* (1988) 167 CLR 145.

power'. It was unnecessary for the Court to decide precisely when the United
Kingdom assumed this 'foreign' status, since it was sufficient in that case to decide
that it had occurred at least since the enactment of the Australia Acts in 1986.

Significantly, there is no specific constitutional requirement to maintain
Australian citizenship once elected. But as Australian citizenship is only likely to be
lost where a member acquires foreign citizenship, this acquisition will in any event
incur disqualification under s 44(i). Nevertheless, as a matter of principle, the 1997
House of Representatives Report recommended that the Constitution be amended to
require members and candidates to be Australian citizens and to remain so.18

As to the last of the above mentioned requirements (that an elector be entitled to vote
or qualified to become an elector), the qualifications of electors are prescribed pursuant
to ss 8 and 30 of the Constitution by s 93 of the Commonwealth Electoral Act 1918 (Cth).
Section 93 effectively adds to the qualifications for nomination for election to
Parliament the avoidance of the following grounds which disqualify electors:

- holding a temporary entry permit or being an unlawful non-citizen under the
  Migration Act 1958 (Cth) (subs (7));
- being incapable of understanding the nature and significance of voting by reason
  of an unsound mind (subs (8)(a));
- serving a sentence of five years or longer for an offence under Commonwealth,
  State or Territory law (subs (8)(b)) or
- convicted of treason or treachery and not pardoned (subs (8)(c)).

Section 99(1) adds a residential requirement of living for one month in the
Subdivision in order to be listed on the Electoral Roll for that Subdivision. However,
s 99(4) exempts both senators and members of the House of Representatives from living
in the Subdivision which they represent.

It should be noted that in McGinty v Western Australia19 obiter comments by
Brennan CJ,20 Gaudron21 and Gummow JJ22 indicate that universal adult suffrage is
guaranteed by the requirement in ss 7 and 24 of the Constitution that members be
'directly chosen by the people'. This would also render invalid any property
qualification if one were to be introduced.23

Other restrictions on Parliament's power in s 34 of the Constitution to prescribe
the qualifications of members may arise from the grounds of disqualification in
ss 43, 44 and 45 of the Constitution. In other words, no prescribed qualification
could negate any constitutionally prescribed ground of disqualification if that were

18 See rec 2 at xiii.
19 (1996) 186 CLR 140.
20 At 166-167.
21 At 221-222. See also Toohey J at 201.
22 At 286-287. Rejected by Dawson J at 183; contrast McHugh J at 244.
23 Contrast with Professor Lane's suggestion that the High Court in Fabre v Ley (1973) 127 CLR 665
indicated that a property qualification could be introduced through s 34: P H Lane (ed), Lane's
possible), nor could s 34 be used to impose on sitting members new ‘qualifications’, since they would in substance constitute new grounds of disqualification.

A further restriction on the power in s 34 to prescribe the qualifications of members arises from the very nature of a ‘qualification’. Any prescription would need to be confined to candidates and not apply to sitting members. If that is the only indicia of a qualification, it allows any ground to be prescribed subject to the Constitution. Accordingly, s 164 of the Commonwealth Electoral Act 1918 (Cth), which purports to preclude members of State and Territory Parliaments from nominating for election to the Commonwealth Parliament, is not open to challenge.24

State and Territory

Similar qualifications to those outlined above for members of the Commonwealth Parliament are prescribed25 for members of the State and Territory parliaments: 18 years of age; an Australian citizen; entitled to be enrolled to vote in the State or Territory election26 or actually enrolled to vote;27 and a residential requirement. In all States and both Territories, the qualifications for election to Parliament incorporate, in effect, the qualifications for voting.

One significant difference from the Commonwealth position is that British subjects (or in Tasmania, aliens) enrolled to vote immediately before 26 January 1984 are qualified to be nominated or elected to all State Parliaments except Queensland28 and South Australia.29 Both of these States as well as the two Territories have followed the Commonwealth in confining to Australian citizens the right to be elected to State Parliament. The right given to British subjects to nominate for election in certain States impacts on the foreign allegiance disqualification — a matter considered below.

As with the Commonwealth qualifications, the qualifications for election to the State Parliaments of NSW, Queensland, South Australia and Tasmania, as well as in the Northern Territory and the ACT, are determined at the time of nomination. The position is not so clear in Victoria and Western Australia, where the qualifications for

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24 Contrast with the Senate Standing Committee on Constitutional and Legal Affairs, The Constitutional Qualifications of Members of Parliament (the 1981 Senate Report) at para 5.55 which queried the validity of the predecessor to s 164.

25 Sections 20(1), 33(1), 79(1) and 81B(1) Parliamentary Electorates and Elections Act 1912 (NSW); ss 44(2) and 48(2) Constitution Act 1975 (Vic); s 83(1)(a) Electoral Act 1992 (Qld), proposed in cl 64(1) LCARC’s draft Parliament of Queensland Bill; ss 29(1) and 52 Electoral Act 1985 (SA); ss 7 and 20 Constitution Acts Amendment Act 1899 (WA), s 17 Electoral Act 1907 (WA); ss 14, 20, 28, 29 and 33 Constitution Act 1934 (Tas); s 20 Northern Territory (Self-Government) Act 1978 (Cth); s 103 Electoral Act 1992 (ACT).

26 Vic, Tas, WA, NT and ACT.

27 NSW, Qld, SA, Tas and WA.

28 Sections 79(1) and 20(1)(b)(i) Parliamentary Electorates and Elections Act 1912 (NSW); ss 44(1) and 48(1)(a) Constitution Act 1975 (Vic); ss 28(1) and 29(1) Constitution Act 1934 (Tas); ss 7 and 20 Constitution Acts Amendment Act 1899 (WA); s 17(1)(a) Electoral Act 1907.

29 Sections 17(1)(ab), 31(1)(ab) and 46 Constitution Act 1934 (SA), require sitting members and candidates to be and remain Australian citizens.
prescribed as ‘qualified to be elected’. This may require the qualifications to be determined on the date of the poll or, more likely, on the declaration of the poll.

Grounds of disqualification

The primary focus of the grounds of disqualification is on the integrity of members of parliament to ensure that they perform their parliamentary functions in the interests of their constituents and, overall, in the public interest. This in turn supports public confidence in the parliamentary process and hence in the institution of parliament itself. Ultimately, the purpose of these grounds of disqualification is the protection of the independence and integrity of parliament.

In assessing the efficacy and relevance of the current grounds of disqualification, it is necessary to take account of the consequence of disqualification; namely, that a candidate or member loses the right to be a member of parliament. These grounds might well be designed to enhance or protect the integrity of members, but disqualification from parliament should not be a disproportionate penalty. The democratic right to represent one’s constituents needs to be weighed into the balance in assessing the justification and proportionality of each of the grounds of disqualification. Given their evolution in earlier times, it should not be surprising if a quite different assessment of these grounds arises today.

The principal grounds of disqualification can be categorised into two groups. First, there are those which developed as the original mechanisms for avoidance of a conflict of interest, in particular, a conflict between the interests of parliament and those of the executive. Such grounds include the holding of a public office under the Crown, being a party to or interested in a government contract, and holding an allegiance of some nature to a foreign power. Each of these situations clearly compromises the independence of members. The second category of grounds concerns the personal integrity of members, namely, criminal conviction and bankruptcy. Apart from assessing the fairness of the actual prescriptions of these grounds, the policies underlying these two categories require careful consideration. Do they warrant the catastrophic consequence of disqualification or is there a more proportionate alternative? Can conflicts of interest be dealt with in other ways? Is the electoral process better equipped to judge personal integrity?

Of further concern is the extraordinary difficulty in formulating grounds of disqualification with sufficient particularity to catch those situations which may warrant disqualification and release those which do not. This was recognised by the Bowen Committee:

Generally prohibitions, when expressed in absolute terms, are inconveniently rigid. Because of this, they tend to receive excessively narrow interpretations

30 Section 44(1) Constitution Act 1975 (Vic); ss 7 and 20 Constitution Acts Amendment Act 1899 (WA).
which often nullify their effectiveness. Automatic disqualification from office may be too severe a sanction for an innocent oversight or a misreading of obscure law. Antiquated provisions relating to offices of profit and government contractors are notoriously pits into which the most upright may stumble.\textsuperscript{32}

Apart from this drafting difficulty, there remains the fundamental issue of whether so draconian a measure as the loss of the right to represent one's constituents is justified in order to avoid a conflict of interest or ensure a certain degree of personal integrity. This would appear to be the case only when the conflict of interest and the deficiency in personal integrity is so serious as to threaten the functioning of parliament itself. Obviously these assessments need to be undertaken in the light of contemporary standards, not those of the past. Professor Finn (as he then was) suggested this threshold test:

\begin{quote}
Absolute disqualification from office on account of a personal interest should be regarded as an extreme measure only to be taken where the integrity of decision making processes cannot adequately be secured by other means.\textsuperscript{33}
\end{quote}

It will become apparent as the grounds of disqualification are outlined that certain grounds fail to meet this standard, while others present a farrago of rules which ensnare innocent situations.

The drafters of the Commonwealth Constitution were content to leave to the Parliament the prescription of the qualifications of members pursuant to ss 16 and 34. But they allowed no similar indulgence in relation to the grounds of disqualification prescribed by ss 43, 44 and 45 (reproduced in Appendix 2). These grounds may only be altered through a s 128 referendum. Moreover, it is implicit from ss 43, 44 and 45 that no other grounds of disqualification can be prescribed.\textsuperscript{34} This indicates the importance which the drafters attached to the maintenance of the integrity of members of Parliament. Nonetheless, they were acutely conscious of the fact that they were drafting a constitution and that it was inappropriate for them to legislate on matters which were the responsibility of the new federal Parliament. Accordingly, Edmund Barton summed up the delicate role in drafting the grounds of disqualification in these terms:

\begin{quote}
It is one thing not to put limitations on the ordinary freedom of the citizens of the Commonwealth. It is another thing to provide against the defilement of parliament.\textsuperscript{35}
\end{quote}

\textsuperscript{32} Report of the Committee of Inquiry established by the Prime Minister, \textit{Public duty and private interest} Canberra 1979, at para 5.14.


\textsuperscript{34} Although this position may be undermined by new grounds of qualification under ss 16 and 34, they at least cannot be applied to sitting members.

\textsuperscript{35} Official Record of the Debates of the Australasian Federal Convention (Second Session), Sydney, 1897, at 1012-1013.
Given the balance which the drafters endeavoured to achieve nearly a century ago in the drafting of ss 43, 44 and 45, it is appropriate that there be a re-assessment of those grounds and of the proportionality of the sanction of disqualification.

Commonwealth

Sections 43, 44 and 45 of the Constitution prescribe the grounds for disqualification of both members and senators. Section 43 prevents a member of one House of the Commonwealth Parliament from being elected to the other House. Each of the grounds in s 44 renders elected candidates and members ‘incapable of being chosen or of sitting’ in Parliament. That section, however, does not actually vacate the seat of a member who incurs a ground of disqualification after taking his or her seat. It is s 45(i) which vacates the member’s seat in these circumstances. Section 45 also prescribes two further grounds of disqualification which apply only to members: (ii) taking the benefit of a bankruptcy law; and (iii) accepting a fee for services rendered to the Commonwealth or in the Parliament. As soon as one of these grounds of disqualification is satisfied under s 45, the member’s seat becomes vacant automatically.

Essentially, the specific grounds of disqualification prescribed by ss 43, 44 and 45 for members of the Commonwealth Parliament are as follows:

- membership of the other House or of another Parliament;
- foreign allegiance;
- criminal conviction;
- bankruptcy;
- office of profit under the Crown;
- government contractor; and
- receipt of fees and honoraria.

States

The State Constitutions prescribe similar grounds of disqualification for their members of parliament. In some States, mental incapacity is a further ground. Determining the precise scope of some of these grounds is often difficult. This is due in part to the adoption or adaptation of legislative models from other jurisdictions with subsequent ad hoc amendments to meet particular difficulties.

A further problem encountered with the State Constitutions is that candidates for election and members are not necessarily treated in the same way. Certain disqualifications only operate after a member is elected. This contrasts with the...
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approach taken by the Commonwealth Constitution which, apart from paras (ii) and (iii) of s 45, applies the same disqualifications to candidates and members.

 Territories

Grounds of disqualification similar to those prescribed for the Commonwealth Parliament operate in the Northern Territory for both candidates and members. In the ACT, ss 103 and 104 of the Electoral Act 1992 (ACT) do not distinguish between candidates and sitting members, preferring to adopt the terminology that a 'person is eligible to be an MLA' or 'is not eligible to be nominated for election as an MLA'. While this is not as clear as it might be, the same grounds of disqualification apply to candidates and sitting members.

Since the grounds of disqualification are similar at the Commonwealth, State and Territory level, each of the grounds will be examined, first in respect of the Commonwealth, then in respect of the States and both Territories. Before examining these grounds of disqualification, an important preliminary issue needs to be addressed: from what point in time is each ground determined?

When is disqualification determined?

 Commonwealth

In the case of a sitting member, disqualification occurs at the point in time when each ground of disqualification arises. In most cases this can be determined with certainty. For candidates, the grounds of disqualification under ss 43 and 44 are to be adjudged at the time 'of being chosen'. To what point in time does this refer?

This issue arose in Sykes v Cleary, where Mr Philip Cleary was, at the time of his nomination for the House of Representatives seat of Wills, a Victorian state school teacher on unpaid leave. The High Court, with Deane J dissenting, decided that 'being chosen' referred to the process of being chosen — of which nomination is an essential

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Constitution Act 1934 (SA), which renders the election void of 'any person by this Act disabled from or declared to be incapable of voting or sitting in Parliament'. However, ss 17 and 31, which prescribe general grounds of disqualification for sitting members, merely provide that their seat becomes vacant — they do not expressly state they are unable to vote or sit. Further, it is difficult to apply for example the foreign citizenship ground of disqualification in that way. Statutory clarification of the precise grounds of disqualification for candidates is clearly required.

41 Section 21(1) Northern Territory (Self-Government) Act 1978 (Cth).
42 Section 21(2).
43 Section 104(a) Electoral Act 1992 (ACT).
44 This, however, was not the case under ss 44(iv) and 45(i) with the appointment of Senator Gair as Ambassador to Eire; see chapter 3.
45 (1992) 176 CLR 77.
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part — rather than simply the act of being chosen. Accordingly, disqualification had to be determined at the date of nomination when the process of ‘being chosen’ began.

The Court reinforced its textual reasoning with several policy and practical grounds against disqualification being judged later at the declaration of the poll: first, the undesirability of allowing public servants the option to resign their public office after polling day but before the announcement of the poll; secondly, the uncertainty this might inject into the election process; and thirdly, since s 43 prevents a member of one House from ‘being chosen’ as a member of the other House, this provision could not be interpreted to allow a member to remain a member of a House until he or she is declared the elected member of the other House.

Accordingly, Cleary was held to be disqualified at the time of his nomination for holding an ‘office of profit under the Crown’ within s 44(iv). His resignation as a teacher prior to the declaration of the poll was insufficient to avoid disqualification.

Deane J dissented on this issue, holding that disqualification is determined on the date of the declaration of the poll: “incapable of being chosen” in s 44 should be construed as meaning not capable of becoming the chosen member by being declared elected at the termination of the election process. While acknowledging that the language of the section accommodates either the process of the election or the termination of that process with the declaration of the poll, his Honour preferred the latter interpretation for several reasons. First, it was appropriate for the section to be strictly interpreted by determining disqualification at the final step in the election process since it deprived citizens of their democratic right to participate in political life on grounds which are unalterable except through s 128. Secondly, the objective of s 44 to avoid conflicts of interests would not be frustrated by determining disqualification at the declaration of the poll. Finally, it would remove the disadvantage which public servants suffer if they have to resign from

46 (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 99-101. Also agreeing with the joint judgment: Brennan J at 108; Dawson J at 130; and Gaudron J at 132.
47 A different view was reached in the 1981 Senate Report at para 5.21: ‘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.’ The report rejected the prevailing legal view that the relevant date was the date of nomination.
48 (1992) 176 CLR 77 per Mason CJ, Toohey and McHugh JJ at 100.
49 A similar provision in India — s 7 of the Representation of the People Act 1951 ‘shall be disqualified for being chosen’ — has been interpreted to extend from nomination to announcement of the election result: Chatturbhuj Vithaldas Jassani v Moreshwar Parassram AIR 1954 S C 236; Satyanathan v Subramaniam AIR 1965 S C 459.
50 (1992) 176 CLR 77 at 120.
51 At 120.
52 At 121.
53 At 122.
their offices before being nominated for election.54

By way of comment on these two different interpretations, the phrase 'being chosen' is ambiguous, so that resort to the purpose of ss 43 and 44 is necessary. The principal purpose of most of the prescribed grounds55 is clearly the avoidance of conflict of interest on the part of those who seek election to the Parliament and those who sit there. Hence, the issue is: which of the two interpretations better achieves this purpose? Although Deane J discounted any risk to the independence of members or of executive influence until the member held both positions,56 there is the possibility that candidates may abuse their position or appear to do so after nomination and before their election. Furthermore, the avoidance of any appearance of a conflict of interest during an election campaign serves to enhance the reputation of members and preserve respect for the Parliament. For these reasons the interpretation given by the majority in Sykes v Cleary is the preferable one.

Since a process of nomination also occurs for election to the Senate, ss 43 and 44 presumably apply to that date of nomination as well.57 In each case, the precise time of determination, it is submitted, is the time when the nomination form is delivered to the Divisional Returning Officer for the Division concerned or to the Australian Electoral Officer.58 Nominations close at 12 noon on the final date for nominations.59 While a similar process of nomination occurs in relation to by-elections to fill casual vacancies in the House of Representatives,60 this is not the case when filling casual Senate vacancies pursuant to s 15 of the Constitution.

Casual Senate vacancy

Under s 15 of the Commonwealth Constitution, the 'Houses of Parliament of the State ... sitting and voting together ... shall choose a person' to hold the place or, if the Parliament is not in session when notified of the vacancy, the Governor on the advice of the Executive Council 'may appoint a person' until the State Parliament chooses. The person chosen or appointed must be a member of the same political party as the former senator but is deemed not to have been chosen or appointed if not a member of that party before taking his or her seat in the Senate. Section 15 also requires the name of the person chosen or appointed to be certified by the State Governor to the Governor-General.

The grounds of disqualification in ss 43 and 44 clearly apply at the time when the replacement senator is actually chosen by the State Parliament, that is, when the resolution is passed at the joint sitting of both Houses. Whether they apply at an earlier stage appears to depend, in the light of Sykes v Cleary, on whether there is an

54 At 122-123.
55 That is, s 43 and s 44(f), (v) and (v).
56 (1992) 176 CLR 77 at 122.
57 Section 162 Commonwealth Electoral Act 1918.
58 Section 167.
59 Sections 170 and 175.
60 Pursuant to s 33 of the Constitution.
identifiable process of choosing a replacement senator. In all States, the most likely time to apply the grounds of disqualification is when the replacement senator is actually nominated in whatever form prescribed.\textsuperscript{61} For instance, in Queensland, SO 331 requires from any person whose name is submitted to the Legislative Assembly to fill a vacancy a declaration of qualification and a consent to be nominated and to act if chosen. The appropriate time for any disqualification to be judged would be either when the declaration is made or when it is submitted to the Assembly.

On the other hand, where a vacancy is filled by appointment by the State Governor, it would seem that the grounds of disqualification under ss 43 and 44 apply at the time the appointee first sits in the Senate. This arises because of the distinction in s 15 between \textit{choosing} and \textit{appointing} a replacement which appears to be reflected in the distinct incapacities of being \textit{chosen} and of \textit{sitting} in ss 43 and 44.

\textbf{Review of \textit{Sykes v Cleary}}

A particular difficulty imposed on candidates by the \textit{Sykes v Cleary} interpretation is that they may be required to relinquish certain benefits before nominating — and if their attempt to be elected is unsuccessful, resumption of those benefits may be impossible. This is not the case with all the grounds of disqualification, but it may pose a dilemma for candidates who possess foreign citizenship or allegiance within s 44(i), hold an office of profit under the Crown within s 44(iv), or enjoy the benefit of a government contract within s 44(v).

The ideal is only to require the relinquishment of those benefits if elected. Of particular concern has been the burden on Commonwealth and State public servants who must resign their offices of profit under the Crown in order to nominate for a federal seat. Recommendations have been made to remove this burden, for example, by allowing public officers to stand for election but to provide for the automatic termination of their office if elected.\textsuperscript{62} The current practice is to ensure reappointment to their former or equivalent positions if their election is unsuccessful. These recommendations are considered in detail in relation to s 44(iv).\textsuperscript{63}

Similar approaches are less feasible with the other two grounds (foreign allegiance and government contractor). Obviously they involve more complicated circumstances which may not be so easily resolved between polling day and the declaration of the poll. The most that is feasible is to alter, by way of a s 128 referendum, the relevant date from the date of nomination to that of the declaration of the poll. This allows further time for a candidate to avoid the grounds of disqualification.

\textsuperscript{61} The appointment of Mr Patrick Field by the Queensland Parliament in 1975 to fill the casual Senate vacancy caused by the resignation of Senator Gair was challenged on the basis that he was at the time of his selection by the Parliament still a member of the Queensland Public Service: see P J Hanks, ‘Parliamentarians and the Electorate’ in G Evans (ed) \textit{Labor and the Constitution 1972-1975} Heinemann Melbourne 1977, pp 198-199. That challenge presumably lapsed with the double dissolution of Parliament on 11 November 1975.

\textsuperscript{62} 1981 Senate Report at para 5.23.

\textsuperscript{63} See chapter 3.
Disqualification after nomination

While *Sykes v Cleary* determined that the grounds of disqualification in s 44 are applied as from the date of nomination, it is not entirely clear for what period they operate to render the candidate ‘incapable of being chosen’. In other words, if a ground of disqualification in s 44 arises after nomination, up to what point in time will this prevent the candidate being elected? The process of choosing may be completed on any of three events: on election day, on declaration of the poll, or on return of the writ. Support for the declaration of the poll as the relevant date is found in the joint judgment of Mason CJ, Toohey and McHugh JJ in *Sykes v Cleary*, which expressed the view that the member is ‘chosen’ on election day by the casting of the votes and that the declaration of the poll is the formal announcement of that choice. Hence, if a ground arises prior to the declaration of the poll, the candidate is just as disqualified as if it existed at nomination.

If a ground arises after the declaration of the poll (assuming this is the end of the process of choosing) and before taking the seat in the House, s 44 prevents the successful candidate from ‘sitting’. Whether this is only a temporary disqualification for so long as the ground continues to persist is unclear. It may be that if a disqualification arises after being chosen and is removed before being sworn in, there is no obstacle to taking the seat. This view is argued in detail in Chapter 3 in relation to the position of senators-elect holding an office of profit under the Crown.

Certainly, if a ground of disqualification arises only after taking the seat, s 45 and not s 44 applies to render that seat vacant. This is on the basis that a successful candidate only becomes a member by taking his or her seat in the House immediately after subscribing an oath or affirmation of allegiance pursuant to s 42 of the Constitution.

States

As with members of the Commonwealth Parliament, no difficulty usually arises in relation to the time at which the grounds of disqualification apply to sitting members of State Parliaments. But, in the absence of authority, some uncertainty exists as to when those grounds apply to candidates. The phrase used in four State Constitutions which prescribe grounds of disqualification for candidates is ‘incapable of being elected’. This phrase compares with ‘incapable of being chosen’ in ss 43 and 44 of the Commonwealth Constitution. As these two phrases appear indistinguishable, the interpretation given in *Sykes v Cleary* to the Commonwealth phrase is likely to apply at the State level. In other words, the grounds of disqualification are determined at the date of nomination as the commencement of the process of choosing or electing the member. This interpretation is supported by

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64 (1992) 176 CLR 77 at 99.
65 See s 13(1) *Constitution Act 1902* (NSW); s 6 *Constitution Act 1867* (Qld), s 5 *Officials in Parliament Act 1896* (Qld) (contrast with s 83(1) and (2) *Electoral Act 1992* (Qld) which clearly determines disqualification at the date of nomination); ss 32(3) and 33(1) *Constitution Act 1934* (Tas); s 44 *Constitution Act 1934* (SA) ‘[not] capable of being elected’.
Chapter 2: qualifications and disqualifications

the same textual and practical considerations given in *Sykes v Cleary*.

In the other two States, Victoria adopts the expression 'shall not be qualified to be elected', 66 while in Western Australia, s 35 of the *Constitution Acts Amendment Act 1899* (WA) declares the 'election shall be void' of a person who is not qualified or is disqualified. These expressions suggest that it is the date of the poll or even the declaration of the poll which is the critical date.

The clearest provision is that proposed for Queensland, which expressly applies the grounds of disqualification to the time of nomination. 67

**Territories**

In the Northern Territory, the grounds of disqualification are expressly determined at the date of nomination. 68 However, a literal reading of s 21(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) confines this determination to the date of nomination without clearly giving the grounds of disqualification a continuing effect until the successful candidate takes his or her seat. Hence, a ground of disqualification arising after nominating and before taking the seat is not technically covered.

In the ACT, it is expressly provided that the 'eligibility' of candidates is first determined at the hour of their nomination. However, if events arise after that time but before being elected, it would appear they do not affect the candidate's eligibility until that person becomes a member, which is prescribed to be on the declaration of the poll. 69

**Membership of another House**

The first of the grounds of disqualification to be considered is that of membership of another House. It is important to appreciate that there are two distinct grounds of disqualification to consider here. The first is where a member of one House nominates for election to the other House of that Parliament. The second situation is where a member of one parliament nominates for election to another parliament, such as a State member standing for the Commonwealth Parliament. The Commonwealth Constitution, in s 43, only deals with the first of these situations. In contrast, both situations are substantially covered by State Constitutions.

It is clear that an individual should not be a member in more than one House for two reasons: the impossibility of performing both positions and the conflict of interest likely to arise between the responsibilities of each. However, there is no reason why the transition from one House to another should be unduly difficult. Since Federation, many former members of State parliaments have been elected to the Commonwealth Parliament. The largest such migration occurred with the first

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66 Section 44(2) and (3) *Constitution Act 1975* (Vic).
67 Clause 64 LCARC's draft Parliament of Queensland Bill.
68 Section 21(1) *Northern Territory (Self-Government) Act 1976* (Cth).
69 Section 10 *Australian Capital Territory (Self-Government) Act 1988* (Cth).
Commonwealth Parliament, where over three-quarters of its members had served in the colonial parliaments.\textsuperscript{70}

\textit{Membership of the other House}

\textit{Commonwealth}

Section 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.

This ground of disqualification is only significant in relation to senators and members who, while retaining their seat, nominate for election to the other House of the Commonwealth Parliament. It has no application, however, to members of the House of Representatives who seek election to the Senate at a general election when their seats have already been vacated by the dissolution of the House.\textsuperscript{71} Accordingly, for members of the House of Representatives, the disqualification is only applicable when they seek election to the Senate at a time when the House is not dissolved (that is, at a half-Senate election) or they are chosen to fill a casual Senate vacancy pursuant to s 15. The disqualification is of more significance for senators who could otherwise retain their seats while contesting a seat in the House of Representatives.\textsuperscript{72}

In view of the interpretation given to 'being chosen' in s 44 in \textit{Sykes v Cleary}, s 43, which uses the same phrase, requires a member to resign from his or her House prior to nominating for the election to the other House. A failure to comply with s 43 disqualifies the member only from the second House to which election is sought, not from the House to which the member was originally elected. The disqualification from 'sitting' seems superfluous if election to the second House is precluded altogether. It does ensure, however, that a common informer action may be brought under s 46 of the Constitution when the member is 'incapable of sitting'.\textsuperscript{73} It also covers the case where the member is \textit{appointed} to the Senate pursuant to s 15 of the Constitution.

The 1981 Senate Report\textsuperscript{74} recommended that s 43 be amended to allow a member to stand for election to the other House without having to resign their seat until the declaration of the poll. Although the Constitutional Commission recommended no


\textsuperscript{71} The \textit{Report of the Structure of Government Sub-Committee on Constitutional Qualifications of Members of Parliament} to the 1985 Australian Constitutional Convention (at 6) points out that where a member of the House of Representatives stands for election to the Senate, upon the declaration of the poll, the member has already relinquished membership of the House of Representatives as from its dissolution (see s 28 Constitution).

\textsuperscript{72} For example, John Gorton in 1968; Bronwyn Bishop in 1994; Gareth Evans in 1996.

\textsuperscript{73} There is of course no difficulty with a member sitting in the other House at the invitation of that House or when permitted to do so, such as for the opening of Parliament or the swearing-in of the Governor-General.

\textsuperscript{74} At para 5.61.
Chapter 2: qualifications and disqualifications

change to s 43,75 the amendment recommended by the Senate Report ought to be supported if similar provision is made for the resignation of public officers upon the declaration of the poll (see Chapter 3).

States and Territories

Provisions to the same effect as s 43 of the Commonwealth Constitution are found in the NSW,76 South Australian,77 Victorian78 and Western Australian Constitutions.79 Nomination for election to either House of the Tasmanian Parliament is void under the Electoral Act 1985 (Tas) if the prospective candidate is at that time a member of the other House.80 No such provision is necessary for Queensland, the Northern Territory or the ACT with their unicameral legislatures.

Membership of another parliament

The Commonwealth Constitution prescribes no disqualification where a federal member is also a member of a State Parliament. However, the 1891 draft81 of the Constitution contained provisions dealing with this situation — cl 10 prevented a member of the Commonwealth Parliament from being elected to a State Parliament. In contrast, cl 11 facilitated the reverse situation, that is, the transfer of State members to the Commonwealth Parliament by vacating the State seat on being elected to the Commonwealth Parliament. These clauses were deleted from the 1897 Adelaide draft so as to leave the matter with each State to determine.82 Nonetheless, there was an acceptance at the Sydney Convention in 1897 that State members could be elected to the Commonwealth Parliament while retaining their State seat.83 This was allowed so as not to exclude from the Commonwealth Parliament the political talent in the States. It also reflected a denial of any suggestion of a conflict of interest arising between the interests of the new Commonwealth and the States.84

75 At para 4.863.
76 Section 13C Constitution Act 1902 (NSW).
77 Section 43A Constitution Act 1934 (SA). Note this provision does not expressly prevent a member of the House of Assembly from being elected to the Legislative Council because the House has been dissolved whenever elections for the Legislative Council have been called (see s 14), but it does prevent such a member from being appointed to fill a casual vacancy in the Legislative Council.
78 Sections 29 and 36 Constitution Act 1975 (Vic).
79 Section 34(2) Constitution Acts Amendment Act 1899 (WA).
80 Sections 85(1)(a) and 96(1)(a) Electoral Act 1985 (Tas).
81 See Quick and Garran, above note 8 at 438; Official Report of the National Australasian Convention Debates Sydney 1891 at 877-83.
83 A motion that State members be incapable of sitting in the Federal Parliament was defeated at the Sydney Convention in 1897; Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 996-1011.
84 As above; see 1981 Senate Report para 5.53.
Despite the absence of a constitutional disqualification, Commonwealth and State legislation prevents concurrent membership of Commonwealth, State and Territory legislatures. It is convenient to divide the discussion of this legislation into two aspects: (1) a State or Territory member seeking election to the Commonwealth Parliament; and (2) conversely, a federal member seeking election to a State Parliament or Territory legislature.

(1) Election to the Commonwealth Parliament

In the first situation, where State or Territory members stand for election to the Commonwealth Parliament, s 164 of the *Commonwealth Electoral Act 1918* (Cth) renders them incapable of nominating for election unless they resign their State or Territory seat. In contrast, legislation in four States vacates the State seat where a State member is elected to the Commonwealth Parliament. Of course, this State legislation is of little practical significance so long as s 164 of the *Commonwealth Electoral Act* renders State members incapable of being nominated for election to the Commonwealth Parliament. Assistance is given to members in NSW and Queensland who resign their seat to contest a federal seat by delaying the State by-election until the outcome of the federal election is declared.

Significantly though, neither s 164 nor the relevant South Australian and Victorian provisions prevent the appointment of a State member to fill a casual Senate vacancy under s 15 of the Commonwealth Constitution. In contrast, the Tasmanian and Western Australian provisions, by applying respectively to a State member who 'becomes' or 'is' a member of the Commonwealth Parliament, are sufficiently wide to disqualify a State member who is appointed to the Senate.

In the Northern Territory, disqualification arises if 'an office ... under a law of the Commonwealth' is held or accepted. This disqualification appears not to include membership of the Commonwealth Parliament since the Commonwealth Constitution is not 'a law of the Commonwealth'. In any event, s 164 of the *Commonwealth Electoral Act* prevents Territory members from nominating for election to the Commonwealth Parliament. A member of the ACT Legislative Assembly is no longer eligible to be a member if he or she becomes a member of another Australian parliament or legislature.

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85 Section 47(2) *Constitution Act 1934* (SA); s 47 *Constitution Act 1975* (Vic); s 31(2) *Constitution Act 1934* (Tas); s 34(1)(b) *Constitution Acts Amendment Act 1899* (WA). Also proposed by cl 72(1)(d) LCARC's draft Parliament of Queensland Bill (Qld).
86 Section 79(8) *Parliamentary Electorates and Elections Act 1912* (NSW); s 8A *Legislative Assembly Act 1867* (Qld).
87 Section 31(2) *Constitution Act 1934* (Tas).
89 Also covered by cl 72(1)(d) LCARC's draft Parliament of Queensland Bill (Qld).
90 Section 21(1)(a) *Northern Territory (Self-Government) Act 1976* (Cth).
Chapter 2: qualifications and disqualifications

The 1981 Senate Report queried the constitutional validity of the predecessor of s 164 of the Commonwealth Electoral Act 1918 (Cth) (then s 70) 'as an attempt to set down grounds for membership of the Commonwealth Parliament additional to those in the Constitution'. This comment raises the issue, mentioned in the previous section of this chapter, of the extent to which the Commonwealth may prescribe qualifications for election pursuant to ss 16 and 34 of the Constitution without conflicting with the disqualifications prescribed by ss 43, 44 and 45. The position would seem to be that Parliament is given a wide discretion to prescribe qualifications provided they are not inconsistent with the grounds of disqualification. A further limiting factor is that as qualifications for election, they cannot extend to the conduct of sitting members occurring after their election. That conduct can only be the subject of disqualification, the grounds of which are safeguarded by the terms of ss 43, 44 and 45. Those grounds cannot be added to or altered without complying with the referendum procedure in s 128. Section 164 avoids these restrictions by applying only to candidates and as such is likely to be characterised as a 'qualification' within s 34 of the Constitution.

Finally, it is of interest to note that prior to 1922 the States enacted legislation to allow their members who had resigned from parliament in order to contest a federal seat to be declared re-elected without a poll in the event their attempt was unsuccessful. Commonwealth legislation was swiftly enacted to disqualify any person who stood to benefit from that scheme. This effectively forced the States to repeal their legislation.

(2) Election to a State or Territory legislature

The second situation concerns a federal member seeking election to a State Parliament or Territory legislature. Similarly, in the absence of any Commonwealth constitutional restriction, State legislation disqualifies a member of the Commonwealth Parliament from being elected to a State parliament. The same position applies in the ACT.

92 At para 5.55.
93 Another argument against s 164 which might be mounted is that the exemption in the final paragraph of s 44 of the 'Queen's Ministers for a State' implies that members of State parliaments cannot be disqualified from the Commonwealth Parliament at all.
94 See for example s 2 The Legislative Assembly Act Amendment Act 1921 (Qld) (assented to 24 November 1921).
95 Section 3 Commonwealth Electoral Act 1921 (assented to 15 December 1921).
97 Section 79(7) Parliamentary Electorates & Elections Act 1912 (NSW); s 83(2)(f) Electoral Act 1992 (Qld), but cf 68 LCARC's draft Parliament of Queensland Bill only prevents a federal or other State member from taking a seat in the Queensland Parliament until they resign their other seat; s 44(2)(b) Constitution Act 1975 (Vic); s 47(1) Constitution Act 1934 (SA); s 31(1) Constitution Act 1934 (Tas) and ss 85(1)(d) and 96(1)(d) Electoral Act 1985 (Tas); s 34(1)(b) Constitution Acts Amendment Act 1899 (WA).
While it may have been appropriate in 1901 to facilitate the transfer of political talent from one parliament to another, it is now clearly inappropriate for State members to be concurrently members of the Commonwealth Parliament and vice versa. A clear conflict of interest arises in this situation, including the impossibility of adequately performing both roles. The Commonwealth Constitution ought to expressly prevent the holding of more than one parliamentary seat. This should not depend solely on the separate legislation of the States.

Finally, it should be noted that members of the Western Australia Parliament and of the ACT Legislative Assembly are disqualified if they become a member of another State or Territory parliament.99

Conclusion

Where a member wishes to be elected to the other House or to another parliament, he or she must resign their present seat to nominate for that election. Of course, the risk is that they will lose that election and end up with no parliamentary seat at all. An alternative approach is to allow a sitting member to stand for election to the other House or parliament and be deemed to have vacated the first seat only if elected. As noted earlier, this was the recommendation of the 1981 Senate Report100 in relation to a member of the Commonwealth Parliament wishing to move from one House to another. In that situation, there is little likelihood of any conflict of interest arising during the election period, but that is not the case where a member wishes to move from one parliament to another. In such a case, resignation from one parliament before nominating for the other seems justified.

Foreign allegiance

Foreign allegiance in its various forms, as a ground of disqualification, is concerned with the avoidance of an actual or perceived split allegiance or divided loyalty. Since Federation the nature of such a conflict of interest has clearly altered, with the demise of the British Empire and the emergence of Australia as a sovereign independent nation. Moreover, the modern phenomenon of globalisation further challenges the perception of dual or multiple citizenship as inimical to the ‘national interest’. Whether this ground of disqualification ought to be retained in some form must be assessed in the light of these developments to ensure that it responds to the requirements of the new millennium rather than those at Federation.

99 Section 34(1)(b) Constitution Acts Amendment Act 1899 (WA); s 103(2)(a)(ii) Electoral Act 1992 (ACT). Similar provision is proposed by cl 72(1)(e) LCARC’s draft Parliament of Queensland Bill. 100 At para 5.61.
Chapter 2: qualifications and disqualifications

Commonwealth

Section 44: (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

This ground of disqualification was designed to avoid the risk of foreign governmental influence and, in particular, a conflict of interest arising from a 'split allegiance'.

Its historical origin appears to lie in s III of the Act of Settlement 1701 (Imp) which disqualified those born outside the Kingdoms of England, Scotland and Ireland and the Dominions from holding office in the Privy Council or the Parliament, and from holding any office of trust under the Crown.

There are two principal limbs to this ground in s 44(i).

First limb

The first limb — 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power' — requires an acknowledgment of foreign loyalty. This may be a formal or informal acknowledgment. In view of the second limb of this paragraph, this limb includes acts of acknowledgment other than those given by a subject or citizen of a foreign power or by those entitled to the rights or privileges thereof.

An 'acknowledgment' for the purposes of this first limb would appear to cover: acceptance of a foreign passport; service in one of the foreign armed forces; taking an oath of allegiance to a foreign power (not being a subject or citizen of that state); seeking the protection of a foreign state; or even describing oneself in an official document as a citizen or subject of a foreign state. However, this limb appears not to extend to an appointment as an honorary consul or the acceptance of a foreign award or honour, nor to owing a 'local allegiance' which arises by virtue of temporarily residing in a foreign country.

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102 Prior to 1701, aliens were disqualified at common law: D Limon and W McKay (eds), Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament (22nd ed) 1997, p 40.
103 Nile v Wood (1986) 167 CLR 133 at 140. The Court cites Crittenden v Anderson, an unreported decision of Fullagar J on 23 August 1950, noted in (1977) 51 ALJ 171, and Quick and Garran, above note 8 pp 490-1; above note 82 at 736.
105 As above.
107 As above at 174.
108 R D Lumb, above note 104 (4th ed), para 167 at 69; see also 5th ed para 171 at 97.
109 M Pryles, above note 106 at 178.
Second limb

The second limb prescribes two grounds of disqualification:

• ‘a subject or a citizen [of a foreign power]’;
• ‘or entitled to the rights or privileges of a subject or a citizen of a foreign power’.

The distinction in the first ground between a ‘subject’ and ‘citizen’ is no longer significant; it reflected the distinction in 1900 between a subject in a monarchy and a citizen in a republic. At common law and in accordance with international law, citizenship is determined according to the law of the state of which citizenship is in issue. Hence, the application of the second limb will usually be determined according to foreign law.

As for the other ground of disqualification — ‘entitled to the rights and privileges’ of a subject or citizen of a foreign power — this will apply to persons who, although not in law a subject or citizen, have similar rights, for example, as a permanent resident or even as a refugee. It is unclear whether the entitlement must be to all the rights and privileges of a subject or citizen or whether some reduction is allowed. Presumably the test must be, at least, that the rights and privileges are substantially similar. It also appears that a right to acquire a foreign citizenship is insufficient, as the rights and privileges must be presently enjoyed.

Although foreign citizenship and the rights equivalent thereto are determined according to the law of the foreign state, the High Court held in *Sykes v Cleary* that for the purpose of s 44(1) an attempt in Australia to renounce foreign citizenship or rights is not entirely dependent on foreign law. A majority of the Court excluded from the operation of the second limb those who, in accordance with the law of the foreign state, take ‘all reasonable steps to divest [themselves] of any conflicting allegiance’. That the requirement is to take ‘all reasonable steps’ overcomes those cases where, according to foreign law, divestment is not permitted or depends on an official act which is requested but not performed. According to the majority, both the second respondent, Mr Delacretaz, and the third respondent, Mr Kardamitsis, had not taken all reasonable steps to divest themselves of their respective Swiss and Greek citizenship as neither had applied for an official release of their citizenship.

Both Deane and Gaudron JJ in separate judgements dissented on the grounds that reasonable steps had been taken to renounce their foreign citizenship. Their Honours accorded less significance to the foreign law in deciding what constituted reasonable steps. In the view of Deane J (Gaudron J expressing a similar view),

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110 Quick and Garran, above note 8, p 957.
112 M Pryles, above note 106 at 179.
114 Per Mason CJ, Toohey and McHugh J at 108.
115 Per Deane J at 128-130; per Gaudron J 139-140.
Mr Kardamitsis had done all that was reasonably expected of him to renounce his Greek nationality by renouncing that nationality upon obtaining Australian citizenship in 1975, by taking an oath of allegiance to Australia, and by giving up his Greek passport. In being required to take that oath and give up his Greek passport in order to obtain Australian citizenship, a clear representation had been made to Mr Kardamitsis by the Australian Government that he had formally renounced his foreign citizenship. A factor relevant only in his case was that acceptance in Greece of an application to renounce Greek citizenship required the favourable exercise of a ministerial discretion. As regards Mr Delacretaz, despite his ability to simply renounce Swiss citizenship under Swiss law by making the necessary application, his Honour reached the same conclusion after taking into account his thirty years of Australian citizenship since 1960, lack of a residence in Switzerland and acquisition of Australian nationality.

Gaudron J considered the foreign law only relevant when there has been no renunciation of or other reasonable steps taken to renounce foreign citizenship, or where it has been reasserted after a renunciation. Whether reasonable steps have been taken is determined by Australian law. A formal renunciation would be regarded as sufficient. 116

In relation to members incurring disqualification after being elected, Deane J interpreted both limbs of s 44(i) as requiring some act of acceptance or acquiescence by the person concerned. While this is implicit in the first limb, which refers to ‘acknowledge’, it was also to be implied in the second limb. This approach is particularly important for Australian citizens who develop an association with a foreign state. It prevents a foreign state from unilaterally disqualifying members or Australian citizens from membership of the Commonwealth Parliament by conferring rights upon them without their consent.

Foreign power

The current interpretation of ‘foreign power’ in both limbs of s 44(i) appears to be any polity or state recognised under international law other than the Commonwealth of Australia. Furthermore, it can be said that it refers to a polity whose citizens owe allegiance to that polity rather than to Australia. This would not have been the interpretation of ‘foreign power’ in 1901; then it would have referred to those states outside the British Empire whose subjects owed allegiance to a sovereign other than the Crown of the United Kingdom. At that time all subjects of the British Empire, including those resident in Australia, owed allegiance to Queen Victoria as an indivisible Crown.

However, Australia’s constitutional relationship with the United Kingdom, like that of the other dominions, evolved throughout the 20th century. At some stage

116 Per Gaudron J at 139-140.
between the First and Second World Wars 117 Australia acquired international status as an independent polity, eventually assuming full responsibility for the conduct of its own diplomatic relations. This development was accompanied by a recognition that the Crown was no longer indivisible — the Crown in right of Australia developed as a distinct entity from the Crown in right of the United Kingdom. Consequently, there arose an Australian citizenship which owed allegiance to the Sovereign of the United Kingdom as the Crown in right of Australia. Also significant was the gradual renunciation of power by the United Kingdom Parliament and government first over the Commonwealth and later over the States. This involved, in particular, the principle that the sovereign would act only on the advice of her Australian ministers in relation to Australia. This process was completed by the Australia Acts 1986 (UK and Cth) which declared the termination of all United Kingdom legal and constitutional power over Australia.

All of these stages in Australia's constitutional evolution were relied on by a majority of the High Court in Sue v Hill118 in holding that the United Kingdom was, at least from the enactment of the Australia Acts in 1986, a 'foreign power' within s 44(i). The joint judgment of Gleeson CJ, Gummow and Hayne JJ observed:

Australia and the United Kingdom have their own laws as to nationality so that their citizens owe different allegiances. The United Kingdom has a distinct legal personality and its exercise of sovereignty, for example on entering military alliances, participating in armed conflicts and acceding to treaties such as the Treaty of Rome, themselves have no legal consequences for this country. Nor, as we have sought to demonstrate in Section III, does the United Kingdom exercise any function with respect to the governmental structures of the Commonwealth or the States.119

Their Honours acknowledged that the denotation of 'foreign power' had changed to include those countries formerly part of the British Empire including the United Kingdom itself:

Whilst the text of the Constitution has not changed, its operation has. This reflects the changed identity of those upon whose advice the sovereign accepts that he or she is bound to act in Australian matters by reason, among other things, of the attitude taken since 1926 by the sovereign's advisers in the United Kingdom. The Constitution speaks to the present and its interpretation takes account of and moves with these developments.120

Despite the uncertainty as to when this change in denotation precisely occurred, the majority had no doubt that it occurred at least upon enactment of the Australia Acts in 1986. As Gaudron J put it:

118 (1999) 163 ALR 648 (Gleeson CJ, Gaudron, Gummow and Hayne JJ; McHugh, Kirby and Callinan JJ dissenting).
119 At para 96.
120 At para 78.
Chapter 2: qualifications and disqualifications

At the very latest, the Commonwealth of Australia was transformed into a sovereign, independent nation with the enactment of the Australia Acts. The consequence of that transformation is that the United Kingdom is now a foreign power for the purposes of s 44(i) of the Constitution.121

It seems that the United Kingdom and the other Dominions became ‘foreign’ before 1986. One possibility is that it occurred on the introduction of Australian citizenship by the Australian Citizenship Act 1948 (Cth). If that is so, it casts doubt on the validity of s 69 of the Commonwealth Electoral Act 1918 (Cth) which until 1984 permitted British subjects to stand for election to the Commonwealth Parliament.

In Sue v Hill,122 two electoral petitions were brought against the election to the Senate in 1998 from Queensland of Ms Heather Hill, a Pauline Hanson’s One Nation Party candidate. Her election was challenged on the ground that she was at the time of her nomination a citizen of the United Kingdom and hence a subject of a ‘foreign power’ within s 44(j).123 The only issue was whether the United Kingdom was a ‘foreign power’ within s 44(j). The conclusion of the majority that it was is unsurprising, particularly in view of the Court’s earlier decision in Nolan v Minister for Immigration and Ethnic Affairs124 that a British subject was an alien within the Commonwealth’s ‘naturalization and aliens’ power in s 51(xix). In that case, the High Court acknowledged that the denotation of ‘alien’ had changed since Federation to include British subjects as a result of the ‘emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown which was implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship’.125 The same transformation occurred in relation to ‘office of profit under the Crown’ in s 44(v), which is now confined to the Crown in right of Australia at the federal and State level,126 and with ‘foreign power’ in s 44(i).

What was surprising in Sue v Hill were the dissents of McHugh, Kirby and Callinan JJ on the ground that the High Court sitting as the Court of Disputed Returns did not have jurisdiction under the Commonwealth Electoral Act to hear a petition which, as McHugh J put it, ‘raises the bare question whether a member of the federal Parliament was constitutionally qualified to stand for election’.127 This aspect is

121 At para 173.
123 She was also an Australian citizen.
124 (1988) 165 CLR 178. See also P H Lane (ed), above note 23, pp 9 and 106, who refers to Canada and New Zealand as well as the United Kingdom as foreign powers for the purpose of s 44(i). The definition of ‘foreign country’ in s 22(2)(f) of the Acts Interpretation Act 1901 (Cth) is ‘any country (whether or not an independent sovereign state) outside Australia and the external Territories’.
125 At 185-186.
126 Sykes v Cleary (1992) 176 CLR 77 at 118-119 per Deane J. See also McM v C (No 2) [1980] 1 NSWLR 27.
considered further in Chapter 4.

It is appropriate to note here the curious challenge brought under s 44(i) to the election of a Roman Catholic to the House of Representatives in 1949. In *Crittenden v Anderson*, the respondent's election was challenged on the basis that as a Roman Catholic, he was disqualified for being 'under acknowledgment of adherence, obedience and/or allegiance to a foreign power', namely, the Papal State. Noting its effect would be to disqualify all Roman Catholics from the Commonwealth Parliament, Fullagar J relied on s 116 of the Commonwealth Constitution to reject the challenge on the basis that it amounted to a religious test which s 116 prohibited as a 'qualification for any office or public trust under the Commonwealth'. Moreover, Fullagar J observed that the ban on Roman Catholics sitting in the United Kingdom Parliament was revoked in 1829. Another approach might have been to distinguish the Papal State as a foreign power from the Roman Catholic Church in Australia and thereby distinguish the secular allegiance to a foreign power which s 44(i) refers to from the religious obligation attaching to membership of the Roman Catholic Church.

**Assessment**

In the light of *Sykes v Cleary*, a number of issues arise in relation to this ground of disqualification. Is dual citizenship or other foreign allegiance a legitimate basis for disqualification? If so, what should be the parameters of this disqualification? Should it be prescribed by the Constitution or in ordinary legislation?

To remove this disqualification altogether leaves open the possibility of actual or perceived divided loyalty. Clearly, the appearance of divided loyalty on the part of a prime minister or minister with dual citizenship is most undesirable. While not as serious, candidates and members should also avoid any perceived conflict of interest. This accords with the view expressed in the 1997 House of Representatives Report that '[i]t is essential that new members of parliament owe allegiance and loyalty only to the parliament and the people of Australia'.

A different position could well be justified at the State level where, for instance, the joint Committee on the ICAC recommended the repeal of a similar disqualification in s 13A of the *Constitution Act 1902* (NSW) for two reasons: foreign allegiance hardly posed a serious conflict of interest, and disqualification was too grave a penalty, especially when it arose in innocent circumstances.

Similar recommendations had earlier been made for the repeal of s 44(i) by the 1981 Senate Report and the Constitutional Commission on the basis that

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128 Unreported decision of Fullagar J on 23 August 1950, noted in (1977) 51 ALJ 171.
129 10 Geo IV c 7 s 2.
130 In its report entitled *Aspects of Section 44 of the Australian Constitution — Subsections 44(i) and (iv)* (the 1997 House of Representatives Report) July 1997 para 2.114.
131 *Inquiry Into Section 13A Constitution Act 1902* 1998 paras 5.1-5.20,
132 At paras 2.19-2.20.
persons with dual citizenship should be allowed to stand for Parliament. But what motivated this recommendation was the impossible position in which they thought s 44(i) placed candidates who discovered that their foreign citizenship could not be renounced or whose attempts to renounce were frustrated by the foreign state. To avoid these difficulties, the Senate Report recommended that it should be sufficient for a candidate to take ‘every step reasonably open’ to divest the foreign nationality. As has been seen, this recommendation was actually given effect by the decision in *Sykes v Cleary*.

While the retention of this ground of disqualification may be justified, there are difficulties with its operation. They include: the problem of unknown citizenship or allegiance; the uncertainty of the *Sykes v Cleary* test of taking all reasonable steps to renounce the foreign allegiance; and various uncertainties in the scope of both limbs of the ground. These uncertainties expose members to electoral challenges which may frustrate the functioning of Parliament, especially when the government majority is slight.

One suggestion to resolve these difficulties is to relocate the ground of disqualification in legislation, where its parameters may be redefined by Parliament. The 1997 House of Representatives Report recommended this be done by repealing s 44(i), inserting a constitutional requirement of Australian citizenship for candidates and members and conferring on Parliament a power to prescribe disqualification of foreign allegiance. The Report recommended two possible options: prohibit candidates from taking advantage of foreign citizenship; or require their renunciation of dual citizenship. The latter resembles the present scope of s 44(i).

To overcome the difficulty of unknown foreign citizenship, Parliament might require a renunciation of all unknown foreign allegiance at the time of nominating. This ought to be a sufficient declaration for the purpose of assuring the Australian people of the undivided loyalty of its elected representatives.

There remains to consider the position where disqualification arises if a member accepts foreign citizenship or exercises any privileges of foreign citizenship after election to Parliament. This is clearly more undesirable than a candidate having dual citizenship because it indicates that the member is not focused on the interests of the electorate. It reveals an active rather than a dormant interest in the affairs of a foreign state. Hence, the appearance of a conflict of interest is heightened.

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134 See the 1997 House of Representatives Report at para 2.10 which says that according to the Department of Immigration and Multicultural Affairs there are up to 5 million Australians with dual nationality. Many of these may be unaware of their dual nationality. See also M Pryles, above note 106 at 173-174.

135 For example, foreign pension rights and social security rights may satisfy the second limb (para 2.17 of the 1997 House of Representatives Report).

136 See the 1997 House of Representatives Report at paras 2.7-2.10 and the evidence given by Professor Blackshield of a suggested challenge to Prime Minister Hawke in the 1980s over his status as an honorary citizen of Israel (para 2.19).


138 At para 2.107.
Presumably for this reason most State Constitutions, while not prescribing this disqualification for candidates, do so for members.

Instead of disqualifying those with a foreign allegiance, an alternative approach is to require candidates and members to simply declare any foreign allegiance of which they are aware to a register of interests or on an ad hoc basis. This treats a foreign allegiance as raising just another potential conflict of interest like a pecuniary interest.\(^{139}\)

Whether or not this ground of disqualification is removed, there is considerable support for the view that the requirement of Australian citizenship be a continuing qualification.\(^{140}\) At present, it is only a requirement of the *Commonwealth Electoral Act 1918* (Cth) to nominate for an election. Loss of Australian citizenship after being elected does not disqualify the member, although it should.\(^{141}\)

**States**

All of the States\(^{142}\) (except Victoria) prescribe a disqualification similar to s 44(i) of the Commonwealth Constitution but only in respect of sitting members, not candidates.\(^{143}\) Typical of the State constitutional provisions is s 13A(b) of the NSW Constitution:

\[
\text{takes any oath or makes any declaration or acknowledgment of allegiance,\textbf{\hspace{1cm} }}
\text{obedience or adherence to any foreign prince or power or does or concurs in or adopts any act whereby he may become a subject or citizen of any foreign state or power or become entitled to the rights, privileges or immunities of a subject of any foreign state or power.}
\]

These State provisions operate to render a member's seat vacant only when the member acts in some way after being elected. Hence, they do not disqualify candidates who are Australian citizens with dual citizenship. Consequently they differ from the Commonwealth position in two important respects: (i)

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139 This is in effect the recommendation of the NSW Joint Committee on the ICAC: *Inquiry Into Section 13A Constitution Act 1902* at para 5.20.

140 Clause 72(1)(c) LCARC's draft Parliament of Queensland Bill disqualifies a member who 'stops being an Australian citizen'.

141 The Structure of Government Sub-Committee at the 1985 Australian Constitutional Convention in Brisbane recommended disqualification if the member gives up Australian citizenship but left the matter otherwise to the Parliament to resolve: *Vol II rec 3 at 1*. The Convention itself resolved differently: *Official Record of Debates Item No B7 at 397*.

142 Section 13A(b) *Constitution Act 1902* (NSW); s 7(1) *Legislative Assembly Act 1867* (Qld), cl 72(1)(b) LCARC's draft Parliament of Queensland Bill; s 17(1)(b)-(c) and s 31(1)(b)-(c) *Constitution Act 1934* (SA); s 34(b)-(c) *Constitution Act 1934* (Tas); s 38(b) *Constitution Acts Amendment Act 1899* (WA).

143 Under s 46 of the *Constitution Act 1914* (SA) candidates may be intended to be disqualified on this ground, but the ambiguity of s 46 may lead a court to interpret it otherwise.
some positive act is required on the part of the member after being elected; and
(ii) candidates for election are not disqualified by virtue of any foreign
allegiance provided they are Australian citizens (or a British subject enrolled to
vote prior to 26 January 1984 in all States except Queensland). But if a
candidate with dual citizenship is elected and subsequently acts to affirm the
foreign citizenship, such as by renewing or applying for a foreign passport,
disqualification will be incurred. Only in South Australia is this particular
situation expressly avoided.\textsuperscript{144} In contrast, in Victoria, no disqualification
applies to candidates or members who owe or acknowledge a foreign allegiance.

Generally, this ground of disqualification at the State level arises in the same
circumstances as those covered by both limbs of s 44(i) discussed earlier. In
particular, the same interpretation of ‘foreign power’ will most likely apply.\textsuperscript{145}
This raises in all States (except Queensland, South Australia and Victoria) an
apparent inconsistency between those provisions which permit British subjects
\textsuperscript{146} enrolled to vote before 26 January 1984 to stand for election in those States
(even though not Australian citizens) and those provisions which disqualify
sitting members who act in some way to acknowledge allegiance to a ‘foreign
power’. Since it was held in \textit{Sue v Hill} \textsuperscript{147} that British subjects owe allegiance to a
foreign power, it appears that they are qualified to be elected, but cannot later as
members acknowledge their British allegiance in any way, such as by renewing
their passport.\textsuperscript{148} This effectively requires them to take out Australian citizenship
to avoid the risk of disqualification.\textsuperscript{149}

As noted earlier, the NSW Joint Committee on the ICAC recommended in 1998 to
replace this ground of disqualification with a requirement that candidates declare
any foreign allegiance prior to nominating.\textsuperscript{150} If this approach is adopted, members
ought to be under a similar obligation to declare any foreign allegiance they assume
after being elected.

\textbf{Territories}

No disqualification arises in the Northern Territory or the ACT on account of any
candidate or member having a foreign allegiance.

\textsuperscript{144} Sections 17(2) and 31(2) \textit{Constitution Act 1934 (SA)}.
\textsuperscript{145} Compare M Pryles, above note 106 at 184.
\textsuperscript{146} In Tasmania, aliens — rather than just British subjects — are eligible to vote and be elected
if enrolled before 26 January 1984: ss 28(1) and 29(1) \textit{Constitution Act 1935 (Tas)}.
\textsuperscript{147} (1999) 163 ALR 648.
\textsuperscript{148} This form of allegiance incurs no disqualification in South Australia: ss 17(2) and 31(2)
\textit{Constitution Act 1934 (SA)}.
\textsuperscript{149} It is unlikely that being allowed to vote as a British subject would exclude the United
Kingdom from the interpretation of ‘foreign power’ in State legislation.
\textsuperscript{150} \textit{Inquiry Into Section 13A Constitution Act 1902 1998} at para 5.20.
A comparison of this ground of disqualification at the Commonwealth and State level (at least with five States) reveals two quite different approaches. On the one hand, s 44(i) prevents candidates and members possessing dual citizenship or any other form of foreign allegiance. On the other, five States allow candidates and members these forms of foreign allegiance but disqualify them if they acknowledge that allegiance after being elected. For this reason, unknown foreign citizenship poses no problem at the State level. This disparity between the Commonwealth and those States may be justified on the ground that the Commonwealth is responsible for the conduct of international affairs and the national interest. Accordingly, foreign citizenship of members of the Commonwealth Parliament charged with those responsibilities is more likely to give the appearance of a conflict of interest.

Nevertheless, there remain considerable difficulties with s 44(i), especially in relation to unknown foreign citizenship. The desirable course is to substitute for this paragraph a provision which adopts a two pronged approach:

(i) all candidates must declare in their form of nomination any foreign allegiance of which they are aware; and

(ii) any person who, after nominating for election, acknowledges in any way an allegiance to a foreign power, is incapable of being chosen or of sitting as a member.

Members would also be disqualified under s 45(i) for acknowledging allegiance to a foreign power.

This suggestion follows the State approach by allowing candidates with dual Australian and foreign citizenship to nominate for election and only disqualifying them if they act positively after nominating by acknowledging their allegiance to a foreign power. Moreover, it improves on the State approach by requiring the disclosure of foreign allegiances when nominating. Disclosure is often the mechanism adopted where prohibition is considered too draconian, as it reveals the potentiality of a conflict of interest without imposing unnecessary restrictions on otherwise innocent activities. In this case, it overcomes the difficulties of an unknown foreign citizenship. This benefit appears to outweigh any possible doubt which might arise over the loyalty of those who possess dual citizenship. Whatever doubt might arise is unlikely to undermine public confidence in Parliament to any significant extent.

**Criminal conviction**

This is the first of the grounds of disqualification which is not concerned with the avoidance of a conflict of interest. Rather, it is more punitive in nature, adding to the penalty which the community imposes for criminal conduct. In essence, this disqualification is a moral judgment on the unfitness for office of members who commit criminal offences. The disqualification is not usually permanent, lasting only
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for the period of the sentence for the conviction. However, the formulation of this disqualification at both the Commonwealth and State level is in archaic terms. The challenge is to draft the ground in terms which clearly define the categories of criminal offences which are deemed so reprehensible as to warrant disqualification. In doing so, disqualification should not be disproportionate to the offence committed.

Commonwealth

Section 44: (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.

‘Attainted of treason’

Treason is singled out to disqualify any person ‘attainted’ with that offence from ever being elected to Parliament. Therefore, it is the only ground of permanent disqualification. Although doubt has been expressed whether a conviction is necessary for one to be ‘attainted’, the general view is that some form of judgment is necessary, resulting in a sentence of death, forfeiture of property and ‘corruption of blood’. Other offences similar to treason but given different statutory descriptions are likely also to come within this disqualification. For instance, the Crimes Act 1914 (Cth) provides not only for an offence of treason in s 24 but also for the offences of treachery (s 24AA) and sabotage (s 24AB). The granting of a pardon would appear not to overcome this disqualification.

The 1981 Senate Report recommended retaining this offence as a single permanent disqualification (unless pardoned) since it is ‘the most serious offence which a citizen can commit against his fellow countrymen’. The Constitutional Commission recommended that the offence of treason be expressed as one under Commonwealth law and that disqualification cease upon being pardoned. Although the offence of treachery under s 24AA of the Crimes Act 1914 (Cth) includes acts in relation to the States as well as the Commonwealth, there seems

151 Note the unsuccessful attempts made at the 1891 Constitutional Convention to make a felony conviction a permanent disqualification; see above note 81 p 655 and following.
153 For example Mozley and Whiteleys Law Dictionary (10th ed) Butterworths Sydney 1998 as cited in the NSW Joint Committee on the ICAC para 4.3.
155 At para 3.5; note there has been only one case of disqualification under ss 2 and 7 of the Forfeiture Act 1870 (UK) — Lynch’s case in 1903.
156 At para 4.800. The Brisbane Sub-Committee failed to reach a conclusion on whether treason should be restricted to that under Commonwealth law: Vol II rec 5 at 2.
157 Section 24AA(1)(a)(ii) includes any act ‘to overthrow by force or violence the established government of the Commonwealth, of a State ...’.
no reason for restricting the offence to one under Commonwealth law when all forms of treason warrant disqualification.158

Other offences

In the case of other offences, if a candidate or sitting member is convicted of a Commonwealth or State offence159 punishable by imprisonment for one year or longer and is ‘under sentence, or subject to be sentenced’, he or she is disqualified pursuant to s 44(ii). The sentence actually imposed is irrelevant; it may be a term of imprisonment, a fine or any other form of punishment imposed on conviction. All that is necessary is that one be either ‘under sentence’ or convicted and awaiting sentence. Being ‘under sentence’ refers to the period during which the sentence remains current. This is the case where a person is serving time in prison or on parole; released on probation or on a good behaviour bond; or under an obligation to perform community service. A person would no longer be ‘under sentence’ if released from prison (unconditionally), or the period of parole, probation, good behaviour or community service has expired. In the case of a fine, until the fine is paid, one would be ‘under sentence’.

Therefore, a candidate who has served the sentence and is no longer ‘under sentence’ at the time of nomination is unaffected by s 44(ii). However, a sitting member who is convicted of an offence punishable by imprisonment for one year or longer will be effectively disqualified at the moment of conviction while awaiting sentencing. Consequently, the reference to a person ‘under sentence’ will usually refer to a candidate who has been convicted before nominating but has not yet fulfilled the terms of the sentence.

With the exception of being attainted of treason, it is evident that disqualification does not arise under s 44(ii) because of past convictions where the sentence has been served.160 This seems fair and appropriate for practically all offences — although it is not so clear in relation to serious corruption offences.

Provision is also made under the Commonwealth Electoral Act 1918 (Cth) to disqualify electors161 and hence candidates162 who are under sentence for an offence under Commonwealth, State or Territory law punishable by imprisonment for five years or longer. In addition, unless pardoned, a permanent disqualification is imposed if convicted of treason or treachery. This ground of disqualification is narrower than s 44(ii). Although applicable to electors, it has, with one exception, no practical application to candidates by virtue of the wider operation of s 44(ii) of the Constitution.

The exception is that candidates under sentence for Territory offences are


159 Section 44(ii) does not cover an offence under Territory law although it is covered by the s 93(8)(b) and (c) Commonwealth Electoral Act 1918 (Cth).

160 See Nile v Wood (1988) 167 CLR 133 at 139.

161 Section 93(8)(b) and (c).

162 Section 163(1)(c).
disqualified under the Commonwealth Electoral Act 1918 (Cth). Section 44(ii) does not extend to offences under territory law, given the clear distinction between Territory and Commonwealth laws. Their inclusion by the Commonwealth Electoral Act 1918 (Cth) in disqualifying candidates could raise an argument that this impermissibly derogates from s 44(ii).

Assessment

The Constitution has adopted a formula which makes little attempt to prescribe offences which are sufficiently serious to warrant disqualification from Parliament. Rather, s 44(ii) inadequately assumes that the requisite degree of seriousness is reflected in the length of imprisonment for which one is merely liable, namely, one year or longer. The Constitutional Commission has demonstrated that this assumption is deficient on four grounds.

First, there are inconsistencies in the setting of maximum terms of imprisonment for similar offences between laws in the same jurisdiction, and between federal, State and Territory laws. The 1981 Senate Report referred to the conviction of Senator Georges under the Traffic Act 1949 (Qld) for taking part in an illegal procession and for failing to obey a police order in respect of which the maximum terms of imprisonment were six months and three months respectively. Had he been charged and convicted under s 61 of the Criminal Code (Qld) for taking part in an unlawful assembly, he would have been disqualified from Parliament as that offence carried a maximum term of one year imprisonment. The Report noted:

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 [emphasis added].

Secondly, certain serious offences, often under tax and other regulatory legislation, are only punishable by fine, conviction of which would not disqualify a person from Parliament.

Thirdly, where an order for a suspended sentence or conditional discharge is made, it may be that a person will be ‘subject to be sentenced’ and so disqualified from Parliament for a period beyond that which the offender would have been disqualified if imprisoned.

Finally, conviction of some offences carrying a penalty of one year or more may not warrant disqualification from Parliament.

163 Section 93(8)(b) and (c).
164 At para 3.22.
165 At para 3.23.
166 At para 4.813.
These difficulties encourage the exploration of alternative approaches to that found in s 44(ii). So far, four other approaches have been canvassed.

1. Simply abolish this disqualification in respect of criminal convictions other than for treason. This allows the electorate to judge whether a candidate is suitable for Parliament while it leaves to the House to judge a member who is convicted of an offence. This approach is supported by the 1981 Senate Report and by the Final Report of the Constitutional Commission which recommended the removal of this automatic disqualification except for conviction of treason under Commonwealth law (unless pardoned). This approach also reflects the position in the United Kingdom since 1967 which was adopted after only two members of the House of Commons had been expelled for a criminal conviction since 1900: one in 1922 for fraud and the other in 1954 for forgery.

2. Confer on Parliament the power to determine, generally or in a specific case, whether disqualification should apply. This option overcomes the present difficulty of defining those criminal convictions which warrant disqualification.

3. Another approach is for the Constitution to disqualify members and candidates only if they are under sentence of imprisonment. This was the position in the United Kingdom until 1967 under s 2 of The Forfeiture Act 1870 (UK). The Brisbane Sub-Committee adopted this approach in recommending that a member be disqualified if convicted and under sentence of imprisonment for an offence punishable by imprisonment for five years or longer under Commonwealth, State or Territory law. The NSW Joint Committee on the ICAC recommended disqualification if sentenced to imprisonment for at least a year.

Even in the absence of this ground of disqualification, actual imprisonment for a substantive period would normally incur disqualification for failure to attend the sittings of Parliament. That ground of disqualification is considered in Chapter 4.

4. Finally, there is the option to retain this ground of disqualification in its present

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167 At para 3.38.
168 At para 4.817.
169 See Rt Hon D Houghton 'Financial Interests of Members of Parliament' (1974) 55 The Parliamentarian 1 at 6. The UK repealed this ground of disqualification by the Criminal Law Act 1967 (UK) except in respect of a conviction for treason. Responsibility rests with each House to expel or discipline a member guilty of criminal conduct. But if a member is detained for more than 12 months, his or her seat becomes vacant under the Representation of the People Act 1981 (UK). A candidate is similarly disqualified from standing.
171 33 & 34 Vic c 23 disqualified from the House of Commons those convicted of treason or a felony and sentenced to prison with hard labour or for more than 12 months. In 1875, John Mitchell was held to be disqualified as an escaped prisoner: see Quick and Garran, above note 8 at 492, citing Erskine May 10th ed at 33 and 619.
172 Vol II rec 6 at 2.
173 At para 4.30.
form but to extend beyond one year the period for which the member or candidate must be under sentence. The period might be extended to three years, as was originally proposed at the 1898 Melbourne Constitutional Convention.\footnote{174}

At present no disqualification arises in respect of overseas convictions. It would be unlikely that any candidate or member would still be under sentence for a foreign offence when present in Australia. Past foreign convictions should not incur disqualification if past Australian convictions do not.

Consideration ought to be given, however, to ensuring that disqualification is incurred for a period, or even permanently, after serving a sentence for corruption offences, whether in Australia or overseas. The very nature of these offences should preclude their criminal participants from seeking elected office for a period of time. This is already the case with certain electoral offences (see below) but it should apply to all corruption offences.\footnote{175}

**States**

**Members**

As with the Commonwealth, five States prescribe 'attainted of treason' as a permanent disqualification.\footnote{176} Only Victoria expressly requires an actual conviction.\footnote{177}

In respect of other offences, there is a divergence of approach in defining the disqualification.

1. Certain States merely require conviction of an offence which is given varying descriptions: ‘felony or any infamous crime’ (NSW);\footnote{178} ‘crime or any infamous crime’ (Qld);\footnote{179} ‘felony’ (WA);\footnote{180} ‘indictable offence’ (SA).\footnote{181}

2. Victoria requires conviction for an indictable offence, punishable by

\footnotesize


175 See the Final Report of the Constitutional Commission, 1988, Appendix K Bill No 8 which proposed s 47(b) to give the Commonwealth Parliament the power to prescribe this type of disqualification.

176 Section 7(1) Legislative Assembly Act 1867 (Qld) only applies to members; cl 64(2)(a)(v) and 72(1)(i)(iv) LCARC’s draft Parliament of Queensland Bill cites only a conviction and no pardon; candidates are covered by ss 64 with s 83 Electoral Act 1992 (Qld) which rely on s 93(8)(c) Commonwealth Electoral Act (treason or treachery unless pardoned); s 32(b) Constitution Acts Amendment Act 1899 and s 18 Electoral Act 1907 (WA); s 13A(e) Constitution Act 1902 (NSW); ss 17(1)(g) and 31(1)(g) Constitution Act 1934 (SA); s 34(e) Constitution Act 1934 (Tas).

177 Section 48(2)(a) Constitution Act 1975 (Vic).

178 Section 13A(e) Constitution Act 1902 (NSW).

179 Section 7(1) Legislative Assembly Act 1867 (Qld).

180 Section 32(b) Constitution Acts Amendment Act 1899 (WA).

181 Sections 17(1)(h) and 31(h) Constitution Act 1934 (SA).
imprisonment for life or for at least five years.\textsuperscript{182} This approach reflects the Commonwealth position under s 44(ii).

3. Tasmania requires conviction for a crime and either an actual sentence of at least one year, or ‘subject to be sentenced’.\textsuperscript{183} Similar provision is made in the Northern Territory,\textsuperscript{184} while in the ACT the minimum period of imprisonment must be five years.\textsuperscript{185} In Queensland, LCARC’s draft Parliament of Queensland Bill proposes conviction for an offence against any law for which the member is sentenced to more than a year imprisonment.\textsuperscript{186}

The archaic terminology of ‘felony’ and ‘infamous crime’ in category I above requires elaboration. At common law, a felony was a serious crime which attracted both the death penalty and forfeiture of property but, it appears, did not necessarily require trial by jury.\textsuperscript{187} As for those States where ‘felony’ is adopted, in NSW a felony is an offence punishable by penal servitude,\textsuperscript{188} while in Western Australia it is defined as a crime.\textsuperscript{189} In Queensland (as in Western Australia), a crime is described in s 3 of the Criminal Code Act 1899 as one of three types of criminal offences, the other two being misdemeanours and simple offences.\textsuperscript{190} Crimes and misdemeanours are indictable offences. Interestingly, s 44 of the Commonwealth Constitution in an earlier draft (cl 45) used ‘felony’. However, it was substituted after criticism of its ambiguity at the 1897 Sydney Constitutional Convention from delegates and Sir Samuel Griffith (by submission).\textsuperscript{191}

An ‘infamous crime’ at common law referred to those offences conviction of which resulted in an incapacity to appear as a witness. Offences such as perjury and forgery excluded those convicted from the right to give evidence on the basis that they were incapable of assuming the obligation of an oath.\textsuperscript{192} Although that crime was abolished in 1843,\textsuperscript{193} Maxwell J in \textit{In re Reference by the Legislative Council (NSW); In re Trautwein}\textsuperscript{194} interpreted ‘infamous crime’ in s 19 of the NSW Constitution, conviction for which vacated the seat of a member of the

\textsuperscript{182} Sections 44(3), 46, 48(2) Constitution Act 1975 (Vic).
\textsuperscript{183} Section 34(e) Constitution Act 1934 (Tas).
\textsuperscript{184} Section 21(1)(c) and (2)(a) Northern Territory (Self-Government) Act 1978 (Cth).
\textsuperscript{185} Section 14(1)(a) ACT (Self-Government) Act 1988; same provision for candidates under s 67(4)(c).
\textsuperscript{186} Clause 72(1)(i).
\textsuperscript{188} Section 9 Crimes Act 1900 (NSW).
\textsuperscript{189} Section 3(1) Criminal Code Act 1913 (WA).
\textsuperscript{190} Section 4(1) Criminal Code Act 1899 (Qld).
\textsuperscript{191} See Official Record of the Debates of the Australasian Federal Convention (Second Session), Sydney 1897 at 1012-1014.
\textsuperscript{192} See the passage of Chief Baron Gilbert extracted from Evidence at 139 and quoted by Maxwell J in \textit{In re Trautwein} (1940) 40 SR (NSW) 371 at 374-375.
\textsuperscript{193} By the Evidence Act 6 & 7 Vic c 85.
\textsuperscript{194} (1940) 40 SR (NSW) 371.
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Legislative Council, as having the meaning attributed to that offence at common law when the phrase was first adopted in ss 5 and 26 of the Constitution Bill of 1855. His Honour concluded that ‘whilst illustrations of what is an infamous crime abound, no definition has been attempted nor yet any complete enumeration of the species that are comprehended under it’.

In that case a member of the NSW Legislative Council was held to have vacated his seat on being convicted of an infamous crime, namely, a conviction under s 29(b) of the Crimes Act 1914 (Cth) for falsely representing to the Commonwealth that a document had been duly executed by persons whose signatures it bore in order to avoid bankruptcy. Maxwell J concluded that such an offence was analogous to forgery: it involved a fraud on the State, and could be ‘properly described in the language of the cases which founndered the Common Law doctrine as “contrary to the faith credit and trust of mankind”’.

In so far as these forms of infamous crimes are felonies or crimes, they add nothing to the disqualification. It should be noted that there is no connection with those unnatural offences defined in the Crimes Act 1900 (NSW) as an ‘infamous crime’.

A lifetime disqualification is imposed in all States if attainted of treason, although a pardon removes the disqualification in Tasmania and Victoria. A lifetime disqualification is also imposed in Victoria if convicted of an indictable offence punishable by imprisonment for life or for five years or longer under the law of Victoria or the British Commonwealth of Nations. In Western Australia, a felony conviction also incurs a lifetime disqualification.

Candidates

The State Constitutions generally prescribe the disqualification of members who are convicted while in office. Candidates for election are usually treated somewhat differently.

- New South Wales and Queensland leave the disqualification of candidates to depend upon their qualification for enrolment or nomination under the State’s electoral law. Disqualification arises only when serving or under a sentence of

195 At 377.
196 At 379-380.
197 For example s 104: ‘the crimes of rape, and buggery, or bestiality, with mankind, or even an animal, and every assault with intent to commit, any such offence or crime ...’. See also s 208 of the Criminal Code (Qld).
198 Section 34(e) Constitution Act 1934 (Tas).
199 Section 48(2)(a) Constitution Act 1975 (Vic).
200 Sections 44(3) and 46. Need to be 18 or older at time of conviction. See Re Walsh [1971] VR 33 at 42 in relation to earlier legislation, s 73(c) Constitution Act Amendment Act 1958 (Vic). In that case Mr Walsh was disqualified for having been convicted of a felony 20 years before his election to the Legislative Council.
201 Section 32(b) Constitution Acts Amendment Act 1899 (WA).
imprisonment for a prescribed period at the time of nomination.\textsuperscript{202} Similar provision is made in Tasmania which disqualifies any person from being elected if 'in prison under any conviction'.\textsuperscript{203}

- South Australia, Victoria and Western Australia basically prescribe the same ground of disqualification for candidates and members. In Victoria, slightly different grounds are given for electors\textsuperscript{204} and candidates\textsuperscript{205} both of which grounds, in the end, apply to candidates\textsuperscript{206} but only the former to members.\textsuperscript{207} In Western Australia, s 32 of the \textit{Constitution Act Amendment Act 1899 (WA)} simply states: 'A person is disqualified for membership of the Legislature if he: (b) has been in any part of Her Majesty's dominions attainted or convicted of treason or felony.' As noted earlier, this appears to constitute a lifetime disqualification. Similarly, in South Australia, candidates appear to be subject to a lifetime disqualification if convicted of an indictable offence before being elected.\textsuperscript{208} This approach in both States imposes an excessive penalty on those who have served their sentence and wish to resume a role in the community.

The Northern Territory prescribes the same disqualification for members and candidates who are convicted and under sentence for an offence under Commonwealth, State or Territory law. They must be under sentence of imprisonment for one year or longer.\textsuperscript{209} Qualification to be elected may be lost if they lose the right to be elected and that occurs if they lose the right to vote at a House of Representatives election.

In the ACT, no specific ground of disqualification for a criminal conviction is prescribed other than in respect of certain electoral offences (see below). However, a conviction within the terms of the disqualification provision for electors under

\begin{itemize}
  \item \textsuperscript{202} Sections 21(b), 79(1) and 81B(1) \textit{Parliamentary Electorates and Elections Act 1912 (NSW)} if serving a sentence of imprisonment of 12 months or longer for a crime or offence in NSW or elsewhere; s 83(2)(d) \textit{Electoral Act 1992 (Qld)} disqualifies from nomination if in prison or subject to a periodic detention order, cl 64(2)(a)(i) LCARC's draft Parliament of Queensland Bill disqualifies candidates who have been released on parole, home detention, leave of absence or otherwise without being discharged from all liability. Those whose imprisonment has been suspended are not disqualified.
  \item \textsuperscript{203} Section 14(2) \textit{Constitution Act 1934 (Tas)}.
  \item \textsuperscript{204} Section 48(2)(a) \textit{Constitution Act 1975 (Vic)}: convicted of treason or treachery and not pardoned; (b) under sentence for an offence punishable by imprisonment for five years or longer under the law of Victoria, Commonwealth, other States and Territories.
  \item \textsuperscript{205} Section 44(3): convicted at 18 years or older of an indictable offence punishable upon first conviction by imprisonment for life or for five years or longer under the law of Victoria or any part of the British Commonwealth of Nations.
  \item \textsuperscript{206} Section 44(1): to be nominated must be qualified to be an elector.
  \item \textsuperscript{207} Section 46(a): member loses seat if no longer qualified to be an elector.
  \item \textsuperscript{208} Sections 17(1)(h), 31(1)(h) and 46 \textit{Constitution Act 1934 (SA)}.
  \item \textsuperscript{209} Section 21(1)(c) and (2)(a) \textit{Northern Territory (Self-Government) Act 1978 (Cth)}.
\end{itemize}
Chapter 2: qualifications and disqualifications

the Commonwealth Electoral Act 1918 (Cth) will result in making a candidate or member not eligible.\textsuperscript{210}

In Queensland, a proposed ground of disqualification is conviction within two years of nominating of any offence for which the sentence exceeded one year's imprisonment.\textsuperscript{211}

Electoral offences

It should not be surprising that conviction for serious electoral offences may incur disqualification from being elected or remaining as a member.\textsuperscript{212} Mostly, the general ground of disqualification in relation to a criminal offence covers these electoral offences. However, given their proximity to the electoral process, it seems desirable that a penalty of disqualification be expressly referred to. This is the case in several States and with the Commonwealth.

Under s 386 of the Commonwealth Electoral Act 1918 (Cth) any person convicted of an offence against s 326 (electoral bribery) or s 327 (interference with political liberty) of that Act or against s 28 of the Crimes Act 1914 (Cth) (violent interference with political liberty) is incapable of being chosen or of sitting as a member of the Commonwealth Parliament for a period of two years. It should also be noted that by s 362 of the Commonwealth Electoral Act 1918 a candidate's election is void if they are found by the Court of Disputed Returns to have committed or attempted to commit bribery or undue influence.

In South Australia\textsuperscript{213} and Western Australia,\textsuperscript{214} there is a two year disqualification period for anyone convicted of bribery or undue influence at an election. In Victoria, it is for five years in the case of the Legislative Council and until the next general election in the case of the Legislative Assembly.\textsuperscript{215} In Tasmania, the period of disqualification is four years if convicted of any crime under the Electoral Act 1985 (Tas).\textsuperscript{216} In addition, the election of a candidate to the Legislative Council will, in the absence of special circumstances, be declared void if found to have breached the expenditure limits imposed under the Electoral Act 1985 (Tas).\textsuperscript{217} Members of both Houses are required to make a declaration on their first sitting day that they have not contravened the Electoral Act and its regulations nor unduly influenced any

\textsuperscript{210} This occurs by virtue of ss 72 and 103(1)(c) Electoral Act 1992 (ACT). Section 93(8)(b) and (c) of the Commonwealth Electoral Act 1918 (Cth) disqualifies electors who are under sentence for an offence under Commonwealth, State or Territory law punishable by imprisonment for five years or longer. And unless pardoned, permanent disqualification arises if convicted of treason or treachery.

\textsuperscript{211} Clause 64(2)(a)(ii) LCARC’s draft Parliament of Queensland Bill.

\textsuperscript{212} Indeed Erskine May states that this ground of disqualification is imposed by the common law of Parliament: see 21st edition at 45, citing Rogers on Elections, 1928 edition vol II p 27-28.

\textsuperscript{213} Section 133 Electoral Act 1985 (SA).

\textsuperscript{214} Section 186 Electoral Act 1907 (WA).

\textsuperscript{215} Section 249 The Constitution Act Amendment Act 1958 (Vic).

\textsuperscript{216} Section 250.

\textsuperscript{217} Section 203(5) Electoral Act 1985 (Tas).
elector. Failure to so declare within three sitting days renders the seat vacant unless the House resolves otherwise.\textsuperscript{218}

In Queensland, ss 83(2)(e) and 176 of the \textit{Electoral Act 1992} (Qld) disqualify candidates for three years if convicted of offences under ss 154, 168 and 170 of that Act.\textsuperscript{219} These offences are:

- under s 154 — to give a document for the purpose of the Act which is false, misleading or incomplete;
- under s 168 — to influence the vote of a person by violence or intimidation; and
- under s 170(a) — to vote in the name of another person or (b) to vote more than once.

It is surprising that other \textit{Electoral Act} offences of a serious nature are not included, such as those under s 155 (electoral bribery), s 158 (interfering with electoral rights and duties) and s 159 (forging electoral papers). However, under ss 59 and 60 of the \textit{Criminal Code} (Qld),\textsuperscript{220} a member is disqualified from ‘sitting or voting as a member of the Legislative Assembly’ for seven years if convicted of the crime of receiving a bribe in respect of the performance of his or her duties as a member.

In NSW,\textsuperscript{221} the election of a candidate is void if they are found by the Court of Disputed Returns to have committed or attempted to commit the offences of bribery or undue influence. The Court may also, in ‘just’ cases, declare the election void where the elected candidate or anyone else engaged in other illegal practices which were likely to have affected the election result.

In the ACT, a person is not eligible to be a member for two years from the date of conviction for specified electoral offences\textsuperscript{222} or if a finding is made by the Court of Disputed Returns that those offences have been committed.\textsuperscript{223}

In the Northern Territory, anyone convicted of the offence of undue influence (s 87) or bribery (s 88) is disqualified from voting and being elected to the Legislative Assembly for three years. The seat of any member so convicted is vacated.\textsuperscript{224}

It is surprising that disqualification is not imposed for violations of all serious election offences. In 2000, the Queensland Constitutional Review Commission expressed concern that disqualification was not incurred in that State for electoral roll offences:

\begin{quote}
The Commission believes that offences against the integrity of the electoral rolls
\end{quote}

\begin{itemize}
\item \textsuperscript{218} Section 256. See Forms 45 and 46 of the \textit{Electoral Regulations 1985}.
\item \textsuperscript{219} These are referred to in cl 64(2)(a)(iii) and 72(1)(i)(ii) LCARC’s draft Parliament of Queensland Bill.
\item \textsuperscript{220} These are referred to in cl 64(2)(a)(iv) and 72(1)(i)(iii) LCARC’s draft Parliament of Queensland Bill.
\item \textsuperscript{221} Section 164 \textit{Parliamentary Electorates and Elections Act 1912} (NSW).
\item \textsuperscript{222} Under the \textit{Electoral Act}, bribery under s 285, violence and intimidation under s 288 and a comparable offence under s 28 \textit{Crimes Act 1914} (Cth).
\item \textsuperscript{223} Section 103(4) \textit{Electoral Act 1992} (ACT).
\item \textsuperscript{224} Section 89 \textit{Criminal Code} (NT).
\end{itemize}
are amongst the most serious that may be committed, and deserve appropriate sanctions.\textsuperscript{225}

Timing of disqualification

The report of the NSW Joint Committee on the ICAC noted the uncertainty which occurs where this ground of disqualification arises on a conviction which is subject to appeal. This concern was raised initially by the ICAC\textsuperscript{226} in relation to s 13A(e) of the \textit{Constitution Act 1902} (NSW). Is the disqualification reversed if the appeal against conviction is successful? What if there has been a by-election meanwhile?

This issue has been considered by an English court in \textit{A-G v Jolles}\textsuperscript{227} in relation to a member of the House of Commons whose conviction for a corrupt practice within the \textit{Representation of the People Act 1983} (UK) was quashed within a month by the Court of Appeal. During that month, the Speaker declared that the member's seat was vacant, although no writ was issued for a by-election. The Act provided that a member so convicted 'shall from [the date of the conviction] vacate the seat ...'. The Court held that the member's seat had been vacated on conviction but as this vacancy had not been filled by the return of an election writ, the member was entitled to 'resume' her seat on the conviction being quashed. The Court indicated that the position would have been different had the Act declared the election void.\textsuperscript{228}

Although the outcome in \textit{A-G v Jones} was fair to the member, it is difficult to find in the terms of the Act an intention to allow a member to 'resume' a seat previously vacated. On the facts, such a resumption caused no inconvenience to anyone since no writ had issued for a by-election. But even if a writ had been issued, the Court seemed to require the return of the writ before resumption of the seat was precluded. Resumption of a seat would occasion considerable inconvenience if this occurred during a by-election campaign — and yet it is unreasonable to expect the unrepresented electorate to wait an indefinite period to allow all avenues of appeal to be exhausted before issuing a writ for a by-election.

Interestingly, the Court did not refer to the principle that a conviction is void \textit{ab initio} when quashed. Professor Lane has applied this principle to s 44(ii), arguing that on a conviction being set aside, no disqualification is deemed ever to have occurred.\textsuperscript{229}

\begin{flushright}
\textsuperscript{225} Report on the Possible Reform of the Changes to The Acts and Laws that relate to the Queensland Constitution February 2000, at 84.
\textsuperscript{226} Second Report, Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles (April 1996) which concerns were referred in June 1997 by both Houses of the NSW Parliament to the Joint Standing Committee on ICAC.
\textsuperscript{227} [1999] 3 WLR 444 (Queen's Bench Division: Kennedy LJ and Mitchell J).
\textsuperscript{228} At 449.
\textsuperscript{229} P H Lane (ed), above note 23, p 106.
\end{flushright}
Court recognised a significant qualification to that principle, namely, that ‘proceedings which, although based upon a judgment, are brought to completion before its reversal are not avoided’. This suggests that at least where a by-election has been held, resumption is precluded. But in the interests of the electorate and those campaigning in the by-election, there is a strong case for regarding the mere issue of the writ as sufficient to preclude resumption. Unfortunately, this leaves the fate of the convicted member awaiting the outcome of an appeal process in the hands of the government which authorises the issue of the writ. It would be preferable to qualify this power by requiring the relevant House to certify that a writ may be issued.

On present authority, it appears that where the seat of a member is vacated on conviction, resumption of that seat is possible if the conviction is set aside provided, at least, that a by-election has not occurred. However, statutory provision may be necessary to ensure that resumption is precluded once the writ for a by-election is issued and this be made conditional on the House certifying its release.

In Queensland, cl 74 of LCARC’s draft Parliament of Queensland Bill provides that where a conviction is quashed, the disqualification is taken never to have occurred. However, the member must appeal within one month of being convicted and no writ can be issued until either that period has expired with no appeal lodged, or the appeal has been unsuccessful.

**Conclusion**

It is by no means an easy task to define the nature of a criminal conviction which is sufficiently serious to warrant disqualification from Parliament. The conviction must be for an offence which will generally be accepted by the community as one which requires denial of the privilege of serving as a representative of the people. It ought to be one which demonstrates the incapacity of the candidate or member to be vested with the public trust. Yet it is virtually impossible to formulate a ground in terms of particular convictions which goes no further than is necessary to achieve those objectives.

An alternative approach is to focus on the nature of the punishment, since this is likely to reflect the community’s perception of the seriousness of the crime. This is of course what s 44(1)(ii) does, but only in terms of the potential range of punishment. A more accurate measure of community attitude is the actual punishment imposed. Disqualification should more appropriately be based solely on the criterion of serving or being under a sentence of imprisonment for whatever period — such a sentence demonstrates their unfitness for public office. Once served, disqualification ceases except for treason and corruption offences, which should incur continuing disqualification. Those with past convictions are left to be judged by the electorate. These suggestions also leave the electorate to judge the suitability of candidates and members in the vast range of situations where they are convicted of criminal offences and not sentenced to imprisonment.

230 (1935) 53 CLR 220 at 225.
Many of these offences should disqualify but, to avoid injustice in those cases where this is not warranted, it seems a reasonable compromise to defer judgment to the people.

Bankruptcy

Bankruptcy as a ground of disqualification reflects the 19th century view of the disgrace, if not the immorality, of being unable to pay one’s debts. This was the view of Sir John Downer at the 1898 Melbourne Constitutional Convention:

"It will be a bad day for Australia, as it would be for any country, if bankruptcy is considered merely a venial matter, and not one that involves great disgrace."

Since that view is not so strongly held today, care is required in assessing whether the consequence of disqualification remains justified. Indeed, while there was little opposition at the Melbourne Convention to the view that bankruptcy of a sitting member warranted disqualification, there was considerable debate as to whether candidates should be disqualified on this ground.

Commonwealth

Section 44: (iii) Is an undischarged bankrupt or insolvent.

This paragraph prescribes two grounds of disqualification: being ‘an undischarged bankrupt’ and being ‘an undischarged ... insolvent’. It is accepted that ‘undischarged’ relates to both bankrupt and insolvent. As for the distinction between being bankrupt and insolvent, the preferable interpretation is that they are synonymous, reflecting the colonial legislation which referred either to insolvency or bankruptcy.

The High Court in Nile v Wood referred to ‘insolvent’ as meaning ‘adjudicated insolvent’. This approach avoids the dilemma which otherwise would have

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232 As above at 1932-1941. A motion by Mr Caruthers to remove this disqualification for candidates was defeated.
233 See Nile v Wood (1987) 167 CLR 133 at 139-140.
234 See Nile v Wood (1987) 167 CLR 133 at 139-140. See also 1981 Senate Report paras 4.4 to 4.18; UK position: s 427 Insolvency Act 1986 where the seat of a sitting member becomes vacant only six months after bankruptcy.
235 See for example Insolvency Act 1890 (Vic); Insolvency Act 1874 (Qld); Insolvent Act 1886 (SA); see the Official Record of the Debates of the Australasian Federal Convention Sydney 1897 at 1015-1019, Melbourne (1898) at 1932-1940.
arisen in determining the precise date of disqualification if the ground had simply been one of being factually insolvent. For s 44(iii) to operate, both the date one first becomes an undischarged bankrupt or insolvent and the date one is discharged must be precisely ascertainable. Accordingly, the date at which this disqualification arises is when the law adjudges a person bankrupt or insolvent. Under the Bankruptcy Act 1966 (Cth), this occurs, in the case of a creditor's petition, on the date the sequestration order is made, or, in the case of a debtor's petition, when the petition is accepted. Similarly, the date of discharge or annulment of the bankruptcy is capable in each case of being ascertained with certainty by the effluxion of time or by the occurrence of a particular event.

A candidate will avoid disqualification under s 44(iii) if discharged from bankruptcy prior to nominating for election. However, a discharge after nomination, even before polling day, will not avoid disqualification. Where a member is declared bankrupt, the member's seat is automatically vacated under s 45(i) and s 44(iii). In the absence of a procedure for notifying the House of a member's bankruptcy, it has been suggested that the relevant court would notify the Clerk of the House who would advise the presiding officer whereupon the House would be informed and a writ for a new election issued.

**Relationship with s 45(ii)**

Consideration must also be given to s 45(ii) which vacates the place of any sitting member who '[t]akes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors'.

This ground of disqualification applies only to members who take the 'benefit' after being elected and does not extend to candidates for election. The reason for this discrimination may be found in the Constitutional Commission's view that s 45(ii) was intended to cover the situation where a member avoids disqualification under s 44(iii) by entering into an alternative statutory arrangement to that of bankruptcy. However, the Commission noted that s 45(ii) is so widely drafted that, taken literally, it catches solvent members and even trustees and creditors who participate in a scheme to benefit a debtor.

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237 Section 43(2) Bankruptcy Act 1966 (Cth).
238 Section 55(4A) Bankruptcy Act 1966 (Cth).
239 As above; discharged under s 149(1) three years from the date the bankrupt filed the statement of affairs.
240 As above; discharged under Div 3 of Pt VII on trustee signing certificate of early discharge annulment under s 74(5) on date of special resolution of meeting of creditors, under s 153A(1) on date last debt paid, and under s 153B on making of a court order.
244 As above.
Chapter 2: qualifications and disqualifications

This problem was previously recognised in the 1981 Senate Report, which refers to the case of Mr Baume MP who in 1977 entered into an agreement with the trustee of Patrick Partners, a collapsed stockbroking firm, to settle the firm's claim against him. At the same time, the partners of the firm signed a Deed of Arrangement under Pt X of the *Bankruptcy Act 1966* (Cth) whereby the creditors covenanted not to bring any claim against Baume. The House of Representatives rejected a motion that Baume's position be referred to the Court of Disputed Returns for taking the benefit of Pt X of the *Bankruptcy Act*. The House adopted the view, supported by various legal opinions, that s 45(ii) only applied where the member was a party to the arrangement under the *Bankruptcy Act*. A distinction was drawn between a member who 'takes the benefit' and one who 'receives the benefit'. While Baume received the benefit of the covenant in the arrangement, he did not 'take' the benefit as he was not a party to the arrangement.

A further difficulty, discussed earlier in this chapter, is the precise time at which all the grounds of disqualification under s 45 first come into effect. It has been suggested that the preferable view is that this occurs when the member takes his or her seat in the Parliament immediately after subscribing an oath or affirmation of allegiance pursuant to s 42 of the Constitution.

*States and Territories*

Two different approaches have been adopted at the State level. The first approach, adopted in NSW\(^{246}\) and Tasmania\(^{247}\) is that disqualification only arises where a sitting member becomes bankrupt. Bankrupt candidates are not disqualified from being elected, nor indeed are disqualified members who seek re-election. The most notable case in NSW is that of Sir Henry Parkes who was twice declared bankrupt while a member of the NSW Legislative Assembly; on each occasion he resigned his seat and was re-elected.

The 1981 Senate Report\(^{248}\) noted that this first approach was advocated by Mr Carruthers at the 1897 Constitutional Convention\(^{249}\) in Sydney, being then the position in NSW, Queensland and South Australia. The effect of bankruptcy in those States was therefore confined to removing the member from his or her seat. The former member was entitled to stand for re-election, leaving his suitability to be judged by the electorate. Mr Carruthers' motion was defeated amid concerns of protecting the Commonwealth from the danger of unscrupulous bankrupts. Those who were innocent of any impropriety would be able to obtain a speedy discharge and hence be eligible for re-election.\(^{250}\)

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245 At paras 4.25-4.31, especially 4.29.
246 Section 13A(c) *Constitution Act 1902* (NSW).
247 Section 34(d) *Constitution Act 1934* (Tas).
248 At para 4.34.
249 Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1015.
250 As above at 1017-1019.
The other approach, presently found in Queensland, South Australia, Victoria, Western Australia and the Northern Territory, is that undischarged bankrupt candidates as well as bankrupt members are disqualified. This of course reflects the position under s 44(iii). No disqualification on the basis of bankruptcy arises in the ACT.

Disqualification from State Parliaments also arises on the following related grounds:
(1) as an ‘insolvent debtor’ — in South Australia and Queensland — this requires that the debtor be adjudged insolvent, as the Commonwealth interpretation of s 44(iii) in Nile v Wood presumably applies (whether it includes those who take advantage of alternative arrangements such as those under Pt X of the Bankruptcy Act 1966 (Cth) is doubtful);
(2) taking the benefit of any law relating to bankruptcy or for the relief of bankrupt debtors — in all States, although in Queensland only candidates are so disqualified; and
(3) as a ‘public defaulter’ — in NSW, Queensland, South Australia and Western Australia. In Queensland this ground only applies to members (not candidates) and is a composite ground with that of becoming a ‘public
debtor’.
Chapter 2: qualifications and disqualifications

contractor'. The meaning of both public defaulter and public contractor is elusive. Uncertainty over the meaning of 'public defaulter' in the early drafts of the Commonwealth Constitution resulted in its deletion. However, opinions were then expressed that it referred to one who has escaped the law, for example, by absconding. It may also refer to a person who has defaulted in the payment of a tax or defaulted on a government contract.

Conclusion

This ground of disqualification reflects the community attitude during the 19th century that bankruptcy and insolvency were immoral and rendered persons unsuitable for parliament. Community perceptions of bankruptcy have changed, especially the realisation that debt may be incurred in circumstances beyond one’s control. Both the 1981 Senate Report and the Constitutional Commission recommended the deletion of s 44(iii) and s 45(ii) as reflecting a now outdated view of the immorality of bankruptcy. A further benefit of dispensing with this ground of disqualification is to remove a risk in defending defamation actions. If this ground of disqualification is removed, candidates and members ought to be required to disclose their bankruptcy either prior to their election or if it arises subsequently, to the House or to a register of interests.

On the other hand, there remains a case for retaining this ground of disqualification. While the stigma of immorality may no longer apply to bankruptcy, the vulnerability of bankrupt members to financial pressure of varying kinds remains. Similar considerations disqualify directors and other corporate officers from continuing to hold their positions. If retained, s 44(iii) should be amended to refer only to bankruptcy under the law. Further, s 45(ii) should be repealed and those arrangements to which it refers should be included in the grounds of disqualification prescribed by s 44(iii), provided they are confined to those arrangements to which the candidate or member is a party.

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266 The report of the NSW Joint Committee on ICAC at para 6.8 concluded that its meaning was obscure but that ‘presumably [it] relates to the non-payment of debts’.
267 See cl 45(ii) of the 1891 draft. It was deleted from the 1898 draft with no apparent explanation.
268 See the comments of Edmund Barton at the 1897 Adelaide Convention, above note 82 at 1020.
269 At paras 4.32-4.45.
270 At para 4.819.
271 See the comments of Mr Pickering at the 1985 Australian Constitutional Convention, Official Record of Debates at 252.
272 By s 224(1)(c) of the Corporations Law, the office of a director is vacated if the director becomes insolvent under administration, that is (s 9) an undischarged bankrupt or a party to a deed of arrangement or composition under Pt X of the Bankruptcy Act 1966 (Cth) where the terms of the deed or composition have yet to be fully complied with. See also s 229(1).
members of parliament: law and ethics
Chapter 3:

Disqualifications: public offices and pensions

Public offices

The holding by a member of parliament of another public office within the executive or judicial branches of government raises the most obvious conflict of interest. This chapter briefly traces the historical origins of this ground of disqualification before considering the current position in Australia. It is evident that significant difficulties remain in the implementation of this ground. First, the precise identification of those public offices which are incompatible with parliamentary office is elusive. Secondly, those in public office at any level of government in Australia are presently forced to resign from their office in order to contest a federal seat with no constitutional right of re-appointment. This operates as a significant impediment to those wishing to exercise their democratic right to stand for election to parliament.

There are three principal reasons for disqualifying from parliament those who hold public office:

(1) to reduce the influence of the executive in the parliament which otherwise would be enhanced by members holding a non-ministerial executive office (this may be seen as an aspect of the doctrine of separation of powers);¹

¹ See A Doig, Corruption and Misconduct in Contemporary British Politics Penguin Books Middlesex 1984, pp 36-67 for an historical account of Crown patronage, especially from 1688. With the enhanced power of the Parliament, the Crown needed to secure its position with support in the House of Commons. This was achieved by awarding, inter alia, contracts and public offices to members of the House of Commons. But even the
(2) to avoid any conflict of interest which might arise between parliamentary duties and those of any other public office (this includes the inability to adequately perform the duties of both positions given the modern full-time role of members of parliament); and

(3) to maintain the principle of ministerial responsibility whereby those who determine and execute government policy remain accountable to parliament through the appropriate minister (this role may be hindered if officers attached to the minister are members of parliament).2

These grounds were recognised in *Sykes v Cleary* in the joint judgment of Mason CJ, Toohey and McHugh JJ as underlying s 44(iv) of the Commonwealth Constitution:

The exclusion of permanent officers of the executive government from the House was a recognition of the incompatibility of a person at the one time holding such an office and being a member of the House. There are three factors that give rise to that incompatibility. First, performance by a public servant of his or her public service duties would impair his or her capacity to attend to the duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the Minister of his or her department and would not bring to bear as a member of the House a free and independent judgment.3 Thirdly, membership of the House would detract from the performance of the relevant public service duty.4

**Historical origins**

The origins of this disqualification lie in the dominance of the Crown over parliament during the 17th century. In 1784, Soame Jenyns wrote in reference to members of the House of Commons:

Take away self-interest, and all these will have no star to steer by ... A Minister ... must be possessed of some attractive influence, to enable him to draw together these discordant particles, and unite them in a firm and solid majority, without which he can pursue no measures of public utility with steadiness or success ... Parliaments have ever been influenced, and by that means our constitution has so long subsisted; but the end and nature of the influence is perpetually

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misrepresented and misunderstood. They are seldom, very seldom, bribed to injure their country, because it is seldom the interest of Ministers to injure it; but the great source of corruption is, that they will not serve it for nothing. Men get into Parliament in pursuit of power, honors, and preferments, and until they obtain them, determine to obstruct all business, and to distress Government; but happily for their country, they are no sooner gratified, than they are equally zealous to promote the one, and support the other.\(^5\)

During the 18th century, however, a series of legislative reforms, some enacted as economic reforms, attempted to reduce the extent of Crown influence. The first general form of disqualification for holding public office appears in the *Act of Settlement 1701*:

No person who has an office or a place of profit under the King shall be capable of serving as a member of the House of Commons.

Cast too widely, this provision was repealed before it came into effect, thus facilitating the evolution of responsible government. Nonetheless, in 1707 the Statute of 6 Anne, c 7 was enacted, which in s 24 disqualified, in addition to those in receipt of a pension payable during the pleasure of the Crown, those who held certain specified offices as well as those holding 'new' offices created after 25 October 1705.\(^6\) Only members were disqualified by s 25 for accepting any office of profit under the Crown, although they were allowed to seek re-election. This provision has been interpreted as applying only to 'old offices'.\(^7\)

As Alan Doig notes, these reforms reflected the enormous changes in society at that time:

The changes were also partly inspired by and partly introduced through the influence of political, social, economic, and religious ideas which aided the development of fundamentally different concepts of public duty and office, based on service, ability, accountability, and responsibility.\(^8\)

But even during the 18th and 19th centuries, the system of Crown patronage continued to sap the independence of parliament. Various measures were introduced to alleviate this problem. These included Mr Speaker Abbott’s ruling in 1811 on the ad hoc disclosure of members’ pecuniary interests\(^9\) and the 1830

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7 Sir W Anson, above note 6.
8 A Doig, above note 1, p 46.
resolution of the House of Commons declaring it against the law and usage of Parliament to accept fees for managing private Bills through the House. The discontinuance in 1834 of the practice of buying public offices, together with the Introduction of public service examinations in 1855, led to the development of a career public service.

The form of this ground of disqualification was radically changed in 1957 and is now contained in the *House of Commons Disqualification Act 1975* (UK). Instead of relying on any general category of offices of profit under the Crown, this Act disqualifies only those holding specific positions under the Crown. Apart from judges, civil servants, defence personnel and members of legislatures outside the Commonwealth, all the disqualifying positions are specifically listed in Pts I to III of Sch 1.

**Commonwealth**

Section 44: (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. ... 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, 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.

Paragraph (iv) prescribes two grounds of disqualification: holding a public office and receiving a Crown pension. The former is of considerable significance. The latter is now redundant and is briefly considered at the end of this chapter.

Section 44(iv) disqualifies all those who fall within the category of 'offices of profit under the Crown'. As with the other grounds of disqualification in s 44, para (iv) applies to both elected candidates and (via s 45(i)) to sitting members. For candidates who hold positions in the public service and aspire to a political career, this disqualification impacts in a particularly harsh manner. In order to nominate for election, they must resign from their Crown employment and later face the task of regaining a position with the government or elsewhere in the event they fail to be elected. The Constitutional Commission concluded for this reason that 'public servants do not have equal rights with other citizens to seek election to parliament'. This problem has been the principal focus of recommendations for...
reform which are considered later. Other difficulties with s 44(iv) derive from the uncertainty of the category of 'office of profit under the Crown' and certain outdated exemptions in the final paragraph of s 44.

First, each of the elements of this ground of disqualification require consideration: 'office', 'of profit', 'under the Crown' and 'hold'. The High Court considered the meaning of all but the last of these expressions in Sykes v Cleary, the most significant decision on the public office disqualification in s 44(iv).

'Office'

As noted earlier (in Chapter 2), Mr Cleary, a Victorian State school teacher on leave without pay, was held by a majority of the High Court in Sykes v Cleary to be disqualified under s 44(iv) for holding, at the time of his nomination for election to the House of Representatives, an office of profit in the Victorian Education Department. While Deane J dissented on the time when disqualification is ascertained, there was unanimity in the Court on the interpretation of s 44(iv).

Although acknowledging the meaning of 'office of profit under the Crown' as 'obscure', the Court accepted the established view that all permanent public servants who are officers of a government department are disqualified by virtue of holding offices of profit under the Crown. They acknowledged that a government teacher is not 'the archetypical public servant at whom the disqualification is aimed' but recognised even with teachers the incompatibility of holding both a public office and a seat in parliament. Further, officers granted leave without pay were also disqualified, as they still held permanent positions as public officers. In this respect, the Court relied upon the status accorded teachers under the Teaching Service Act 1981 (Vic) as 'permanent officers employed in the teaching service' as well as the recognition given by that Act to 'unattached officers' as those without any designated position such as Mr Cleary.

The joint judgment of Mason CJ, Toohey and McHugh JJ expressed the general view that 'the disqualification must be understood as embracing at least those persons who are permanently employed by government'. The Court rejected the submission to restrict the categories of public servants who are disqualified to those who are in senior positions in the public service. Such a distinction is clearly

16 Mason CJ, Brennan, Dawson, Toohey, Gaudron, and McHugh JJ; Deane J dissenting.
17 See, for example, Mason CJ, Toohey and McHugh J at 95.
18 Mason CJ, Toohey and McHugh J at 95-97 with whom Brennan J at 108, Dawson J at 130 and Gaudron J at 132 agreed. See also Deane J at 116-118.
19 Mason CJ, Toohey and McHugh J at 97.
20 Mason CJ, Toohey and McHugh J at 97-98.
21 Section 2.
22 Sections 4(4), 8A(3)(b), 12, 36(2) and 62A(3).
23 (1992) 176 CLR 77 at 96.
unsustainable given the underlying rationale of this disqualification; obviously, it is
difficult to perform adequately both the functions of a teacher as well as those of
a member of parliament. However, the Court offered nothing in terms of a
justification for applying the disqualification to those on leave without pay. This
might be based on the underlying rationale referred to above, namely, the need
to avoid the potential for conflict of interest and to reduce the opportunity for
executive influence of members on the basis of future prospects within the
government. Yet it is debatable whether the need to avoid these dangers
outweighs the further difficulty imposed upon public servants who seek
parliamentary office.

The Court also refused to interpret 'office' restrictively, along the lines of that
suggested by the Federal Court in Gready v Commissioner of Taxation: namely, that
it 'usually connotes a position of defined authority in an organisation, such as
director of a company or tertiary educational body, president of a club or holder of
a position with statutory powers'. Also rejected was the view that 'officer' meant 'a
subsisting permanent substantive position which exists independently of the person
who fills it from time to time'.

While holding that permanent public servants at all levels of the public service
occupied offices of profit under the Crown, the Court provided little guidance on the
requisites for an 'office'. This was because the Victorian legislation clearly accorded
Cleary with holding an 'office' as a teacher, even though he had no designated
position and was on leave without pay. But even in the absence of such a clear
statutory designation, 'office' in s 44(iv) was interpreted broadly in Sykes v Cleary to
encompass all persons employed (at least full-time) by the executive government.
There should be no reason for doubting that part-time employees of the executive
also occupy an 'office' under the Crown. Of the three attributes of 'office of profit
under the Crown', it would appear that 'office' is the least problematic.

'Of profit'

The office under the Crown must have attached to it a right to a salary or some
other form of emolument. Whether such a payment is actually received or waived
is not pertinent to the nature of the office. Accordingly, in Sykes v Cleary, having
leave without pay did not avoid disqualification. Moreover, it follows from the
nature of 'profit' that a right to mere reimbursement of expenses is insufficient to

24 Mason CJ, Toohey and McHugh JJ at 96-97.
26 At 411.
27 (1992) 176 CLR 77 at 96.
28 See for example s 29B Public Service Act 1922 (Cth) which empowers the Secretary of a
Department to make an office part-time.
29 See In re The Warrego Election Petition (Bowman v Hood) (1899) 9 QdR 272; 1981 Senate Report
at para 5.2.
chapter 3: Disqualifications: public offices and pensions

constitute an office of profit.30 A notable case is the appointment in September 1932 of Mr Stanley Bruce as High Commissioner in London while a member of the House of Representatives and an Honorary Minister. The Government defended Mr Bruce from the charge that he had vacated his seat under s 44(iv) on the ground that he received only his expenses as High Commissioner.31 In the following year, he resigned from the parliament while remaining as High Commissioner.32

Both the effect of a waiver and of reimbursement of expenses were at issue in In re The Warrego Election Petition (Bowman v Hood)33 where a member of the Queensland Legislative Assembly held two positions. As a member of the Central Rabbit Board, he was entitled to receive only travelling expenses, and as a member of the Board of Stock Commissioners, he had waived his entitlement to a fee for each meeting attended. He was held by Rea J, sitting as the Court of Elections Tribunal, to hold an office of profit only in the latter case since he was entitled to the fee.34 His Honour relied on the office of the Chiltern Hundreds, appointment to which operates as a resignation from the House of Commons despite the fact that the wages and fees attached to the office are never paid.35

Whether the Crown must be liable for the payment (the right to which attaches to the office) is unclear. Given that the office must be ‘under the Crown’, it would be an exceptional case where the Crown is not so liable. But this might occur where, for instance, the Crown has arranged outside funding for the office. It can be argued that this should make no difference, since the right to payment attached to that office still derives directly from the Crown. Support for this view may be gathered from Clydesdale v Hughes,36 where Dwyer J held that the source of the payment or profit need not be the Crown — in that case it was a percentage of profits from subscriptions to a State lottery. However, the ground of disqualification under the Western Australian Constitution was at that time in different terms: an office of profit from the Crown.37

It should be noted that s 7(10) of the Remuneration Tribunal Act 1973 (Cth) declares that any member of or candidate for the Commonwealth Parliament appointed to a

30 See In re The Warrego Election Petition (Bowman v Hood) (1899) 9 QLJ 272 at 272 per Real J in relation to the travelling expenses of the Central Rabbit Board; G Sawyer, 'Councils, Ministers and Cabinets in Australia' (1956) Public Law 110 at 127. Note the provision made in s 4 of the Parliamentary Secretaries Act 1980 (Cth) for payment to parliamentary secretaries of only reasonably incurred expenses.
31 HR Debates 135:514.
33 (1899) 9 QLJ 272. Contrast the practice in Saskatchewan, where receipt of expenses is sufficient to incur disqualification as an office of profit; see G Ronyk, 'Independence Compromised? Private Members on Government Boards, Commissions and Agencies' (1983) 51 The Table: The Journal of the Society of Clerks-at-the-Table in Common Law Parliaments 59 at 60.
34 (1899) 9 QLJ 272 at 278.
35 At 275.
36 (1934) 36 WALR 73 at 85.
37 Section 38 Constitution Acts Amendment Act 1899 (WA).
public office is not entitled to any remuneration or allowances, only expenses reasonably incurred. This general provision appears to avoid a member incurring disqualification under s 44(iv) for accepting an appointment to, for example, the Council of the National Library whose members (two of whom are members of each Commonwealth House) receive remuneration and allowances as determined by the Remuneration Tribunal. 38 Similarly, in Queensland, members of the Queensland Parliament are eligible to be appointed to a public office provided they waive entitlement to all remuneration other than allowances.39

Whether 'profit' ought to be an essential element of this ground of disqualification is debatable. Any service to the Crown performed by a member even without a right to payment has the potential for conflict of interest. However, the issue is whether the perceived or actual conflict of interest warrants the drastic penalty of disqualification. A conflict of interest where no profit is involved is far less likely to warrant disqualification. Disclosure of such a conflict through other appropriate mechanisms like a register of interests would be sufficient.

'Under the Crown'

As with the other elements of this ground, the phrase 'under the Crown' lacks judicial exposition. As for being 'under' the Crown, it refers at least to an appointment made by the Crown either by the Governor-General in Council or by a minister, whereby the Crown retains some supervisory power over that office.40 This definition excludes judges who, although appointed by the Crown, are otherwise independent of the executive. Also excluded are appointments made by the parliament and possibly by the judiciary itself. Hence, the offices of President of the Senate and Speaker of the House of Representatives, while offices of profit, are not offices under the Crown as they are appointed by their respective Houses.41 Nor would the staff of members of parliament occupy an office under the Crown. However, the Members of Parliament (Staff) Act 1984 (Cth) has changed that position by deeming their staff to hold a Commonwealth office within the Public Service Act 1922 (Cth).42

As for the reference to 'the Crown', there is the issue of whether this includes all entities within 'the shield of the Crown'. The general view is that they are caught by

38 Section 13 National Library Act 1960 (Cth).
39 Parliamentary Members (Office of Profit) Amendment Act 1999 (Qld).
40 Clydesdale v Hughes (1934) 36 WALR 73 at 75. See also Report from the Select Committee on Offices or Places of Profit under the Crown, HHC 120 (1940-41) Appendix 1, Third Memorandum by Mr Attorney-General (quoted in K Cole, 'Office of Profit under the Crown' and Membership of the Commonwealth Parliament Parliamentary Research Service Issues Brief no 5 April 1993, p 3). While s 44(iv) states 'under the Crown', the phrase from the Crown' seems to have a narrower scope in referring to appointments made directly by the Sovereign: see Report of the Select Committee on Offices of Profit, HC 120 (1940-41) at 12.
42 Section 24.
chapter 3: Disqualifications: public offices and pensions

s 44(iv) so that employees of statutory authorities are disqualified. Their position is considered further below. To exclude those categories from ‘the Crown’ is problematic both in drawing a boundary and in terms of the objectives of the ground of disqualification.

Which Crown?

Since Cleary was an officer of the Victorian Education Department, the other significant issue in Sykes v Cleary was whether the disqualification included offices of profit under the Crown in right of the States. The Court concluded that it did, relying on the text of s 44(iv) and the potential conflict of interest of State public officers having to act in the interests of both the Commonwealth and the State. Textual support included not only the reference to ‘any office of profit’ but also the express exclusion from s 44(iv) in the final paragraph of s 44 of ‘the Queen’s Ministers for a State’. This exclusion was inserted to enable existing State Ministers to stand for the new Commonwealth Parliament. The Court unanimously agreed that s 44(iv) contemplated offices of profit under the Crown in right of the States, otherwise there was no need expressly to exempt State Ministers and the officers and members of the ‘Queen’s navy and army’.

Deane J, in agreeing with the majority on this issue, noted that in 1900 the indivisibility of the Crown throughout the then British Empire would have meant that under s 44(iv) disqualification would have arisen for holding any office of profit under the Crown anywhere in the Empire. His Honour accepted that with full independence in Australia, New Zealand and Canada, the common law has recognised a separate capacity of the Crown in each of these nations. While he intimated that this would mean that s 44(iv) might not include offices of profit under the Crown in right of other sovereign nations, he maintained that this development has not altered the inclusion of offices of profit under the Crown in right of the States and of the self-governing Territories.

‘Hold’

An example of the uncertainty which surrounds the scope of these public offices is the debate over Senator Gair’s appointment in 1974 as Ambassador to the Republic of Ireland. At issue was whether an ambassador holds an office of profit under the Crown. Although the edition of Erskine May’s Parliamentary Practice current during the drafting of the Constitution regarded an ambassador as not holding such an office,
Professor Sawer regarded 'an ambassadorship as par excellence an office of profit under the Crown'.\(^47\) He argued that Erskine May's view was based on the peculiarity of British ambassadors and therefore had no application to Australia, where they are 'in every sense a servant of the central executive government and paid a salary'.\(^48\)

However, the more significant issue raised by the Gair appointment was: when does one 'hold' a public office? At some date\(^49\) prior to Senator Gair's resignation from the Senate on 3 April 1974, he had been offered and had accepted the ambassadorship, although the offer may not have been formally accepted until 3 April. Nevertheless, it was argued by the Government\(^50\) that on formally accepting the appointment, his seat in the Senate had been vacated prior to 3 April 1974 pursuant to ss 44(iv) and 45(i) for holding an office of profit under the Crown. The issue was whether formal acceptance of a position constituted 'holding' an office. It would appear that this depends on the nature of the position and the process of appointment. A distinction exists between accepting a position and taking up an appointment by assuming the duties of the position. There appears to be some force in the view that only on assuming the rights and duties of an office does one 'hold' an office. Consistent with this approach is the view taken by Professor Sawer that Gair did not hold his office as ambassador prior to 3 April and that this may not have occurred until he presented his formal documents of appointment in Dublin.\(^51\)

This view has since been applied in \textit{R v Jones} where the President of the Western Australian Legislative Council was held not to have been disqualified under s 34(1)(a) of the \textit{Constitution Acts Amendment Act 1899} (WA) on merely being appointed to the position of that State's Agent General for a period in the future. Malcolm CJ (with whom Ipp J agreed) held that '[t]here is a clear distinction between the appointment to an office' and went on to hold that 'disqualification does not operate until the term of the appointment commences'.\(^52\)

Consequently, this view allows a member to secure an appointment before actually resigning from parliament, thereby providing an opportunity for executive influence before resignation.\(^53\) On the other hand, if mere acceptance constitutes

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48 As above p 37; also the view of the Constitutional Commission para 4.855.

49 On 14 March 1974 the Prime Minister advised the Governor-General to approve Gair's appointment, which he did on the same day. On 21 March the Governor-General approved a Minute paper in the Executive Council meeting which required the Minister for Foreign Affairs to fix Gair's salary and the other terms of his appointment; see G Evans (ed), \textit{Labor and the Constitution 1972-1975} Heinemann Melbourne 1977, p 192.

50 Both the Attorney-General and the Solicitor-General gave opinions that Gair was disqualified on 14 and 21 March respectively.

51 G Sawer, above note 47, p 37.


53 An amendment to the 1897 draft Constitution (cl 48) which prohibited acceptance of an office of profit under the Crown within six months of leaving Parliament. This was designed to prevent, as Edward Braddon stated, 'the purchase of a vote in the Federal Parliament by any promise of an appointment' (1897 Adelaide Constitutional Convention at 741). That amendment was later removed for fear of denying the government the best possible appointees.
the holding of a position, the member would have to resign from parliament before accepting the position. An alternative approach is suggested by Professor Hanks who discounts the relevance of whether Gair had assumed his ambassadorial office, preferring a more functional test: ‘whether the appointment of Gair to that office had proceeded so far that his independence and integrity as a “Parliament man” was compromised’. While there is merit in this approach, it is difficult to infer this test from the language of s 44(iv). It is submitted that ‘holds any office’ means ‘occupy an office’ which requires the member to assume the responsibilities of the position. Even if it may be desirable to cast the net wider, mere acceptance of the position prior to taking up those duties appears not to satisfy s 44(iv).

Specific categories

The following categories of positions have aroused particular confusion as to whether they constitute ‘offices of profit under the Crown’.

Members and employees of Commonwealth, State and Territory statutory authorities

Both members and employees of Commonwealth, State and Territory statutory authorities are likely to hold offices of profit under the Crown, provided they possess a right to some form of remuneration and their authority is subject to some measure of executive control. This latter requirement is satisfied where the statutory authority comes within the shield of the Crown.

The 1981 Senate Report noted that the greatest confusion arises here. That report relied on the decision in Clydesdale v Hughes, which held that a member of the Legislative Council of Western Australia who accepted appointment as a member of the Western Australian Lotteries Commission was disqualified under s 38 of the Constitution Acts Amendment Act 1899 (WA) for accepting an office of profit ‘from’ the Crown in right of Western Australia. Appointments to the Commission were made by the responsible minister and the remuneration was a percentage of the gross subscriptions to each lottery. Dwyer J was inclined to read ‘from the Crown’ as having a wider meaning than ‘under the Crown’ — if they were different. Those expressions do appear to differ: the former is wider in not necessarily requiring any continuation of Crown power over the entity, whereas the latter requires some

55 See P W Hogg, Liability of the Crown (2nd ed) Law Book Company Sydney 1989. Note that Pt IV of the Public Service Act 1922 (Cth) regulates the transfer of officers between the Australian Public Service and public authorities.
56 (1934) 36 WALR 73; WA Full Court reversed on appeal to the High Court (1934) 51 CLR 518 but only on the basis that s 2 of the Constitution Acts Amendment Act 1933 (WA) retrospectively avoided disqualification. The WA Full Court did not recognise its retrospective effect.
57 (1934) 36 WALR 73 at 85.
measure of control. This would appear to be the crucial test when advising whether members and employees of statutory authorities, semi-government and partly privatised government bodies are disqualified.58

There are various bodies to which members of the Commonwealth Parliament are appointed by the Executive and, but for the absence of any right to remuneration, disqualification would result: see, for example, the Australian National University Act 1991 (Cth) which provides for the appointment by the Governor-General of two members of the Commonwealth Parliament to the Council of the University one each on the recommendation of the Prime Minister and of the Leader of the Opposition.59 No reference is made in that Act to any right of remuneration. These appointments can be contrasted with the appointment of a member by each House of the Parliament to the Council of the National Library of Australia.60 As parliamentary appointments, no offices under the Crown are involved within the scope of s 44(iv), although s 45(iii) may apply (see Chapter 4).

In making its recommendations, the 1981 Senate Report distinguished between employees and members of statutory authorities. It accepted that employees of such authorities should be disqualified from sitting in parliament but that at times it would be useful for members of parliament to be able to serve as members of a Commonwealth public authority. Such an appointment would be acceptable provided they were nominated by parliament, received only reimbursement of their reasonable expenses, and the authorities to which they could be appointed were prescribed by the parliament.61 Appropriate appointments would be those where: there was no political controversy; it was physically possible to perform both duties; impartial judgment was unaffected; and there was no enhancement of executive control or influence.62 Hence, appointments to research and advisory authorities may be more appropriate than to those of a commercial nature.63

While these recommendations facilitate the appointment of members after their election, candidates would be unable to take advantage of this concession. However,
the 1981 Senate Report recommended, as with public servants, there is a need to allow for members and employees of government authorities to stand for parliament and only if elected should they have to resign.\footnote{1981 Senate Report, para 5.47.}

**Full-time defence personnel**

While part-time Commonwealth defence personnel are expressly exempted from disqualification by the final paragraph of s 44, the accepted view is that *full-time* Commonwealth defence personnel are disqualified under s 44(iv) as they clearly hold offices of profit under the Crown.\footnote{See 1981 Senate Report, para 5.64. See also the comments of Edmund Barton in the Official Record of the Debates of the Australasian Federal Convention Adelaide 1897 at 754-755. In *Free v Kelly* (1996) 185 CLR 296 Kelly conceded her disqualification under s 44(iv), being still an officer of the RAAF at the time of her nomination for election to the House of Representatives in 1996. Her application to transfer to the Reserve force had been lodged but not given effect before nominating; Evans (ed), *Odger's Australian Senate Practice* (9th ed) Department of Senate Canberra, p 154.}

This view is based on the assumption that full-time Commonwealth defence personnel are not included in the exemption provided by the final paragraph of s 44 for ‘the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen’s navy or army’. The ‘Queen’s navy or army’ refers to the British armed forces, including the Australian colonial forces before 1900 and those of the other colonies of the British Empire.\footnote{See 1981 Senate Report, para 5.64.}

This was the view of Edmund Barton at the Convention Debates in Adelaide in 1897:

> The reason [the Queen’s navy and army] are exempted is that they are not holding an office of profit under the Commonwealth at all, but their pay comes from the Imperial Government.\footnote{Official Record of the Debates of the Australasian Federal Convention Adelaide 1897 at 754.}

Quick and Garran\footnote{Quick and Garran, above note 41, p 494.} also refer to the ‘Queen’s navy or army’ as the ‘Imperial navy or army’, equating the exemption with s 27 of the Statute of 6 Anne c 41, which exempted commissions in the navy and army.

No difficulty arises with the other references to ‘Queen’s’ in the same paragraph: ‘Queen’s Ministers of State for the Commonwealth’ and ‘Queen’s Ministers for a State’ clearly refer to the Ministers of the Commonwealth and of the States. Nor is the reading down\footnote{See *Sykes v Clancy* (1992) 176 CLR 77 per Deane J at 118-119.} of ‘Crown’ in s 44(iv) to the Crown in right of the Commonwealth and of the States inconsistent with the above view given the subsequent exemption in the same paragraph for part-time members of the ‘naval or military forces of the Commonwealth’. That expression clearly describes the
Commonwealth’s defence forces as s 68 of the Constitution vests the command of the ‘naval and military forces of the Commonwealth’ in the Governor-General.

The disqualification of full-time members of the Commonwealth’s defence forces as members of the Commonwealth parliament is clearly justified on the basis of the actual or perceived conflict of interest which might arise between the loyalty owed to the executive as a defence force member and the loyalty owed to the parliament. The 1981 Senate Report considered whether there ought to be this disqualification during wartime, given that 11 members of the Parliament fought in the Second World War. The Report concluded that in wartime there was a greater need to avoid any conflict of interest and constituents would be disenfranchised if members were allowed to join up and remain as members of the Parliament.\(^\text{70}\) However, the Report suggested members wishing to fight for the nation could seek leave from their respective House under ss 20 or 38 of the Constitution as had occurred during the Second World War.\(^\text{71}\) It further recommended that when granted such leave, members forfeit their parliamentary salary and receive only their military entitlements.\(^\text{72}\) Yet while these recommendations avoid disqualification arising under ss 20 and 38 for failing to attend the House for two consecutive months of any session, they do not avoid disqualification under s 44(iv). To avoid that provision, they would need to accept a commission in the Commonwealth defence force to which there was attached no entitlement to any allowance other than the reimbursement of their reasonable expenses.

The position of those who are members of the part-time defence forces is considered below in relation to the exemption given in the last paragraph of s 44.

*State members of parliament*

The position has already been considered whether one can be a member of more than one parliament.\(^\text{73}\) While the Commonwealth Constitution is expressly silent on the issue, s 44(iv) likewise is of no effect in this situation. A member of a State Parliament does not hold an office of profit ‘under the Crown’ in right of that State unless a Minister of the Crown. Even then, State Ministers are exempted by the final paragraph of s 44.

Nevertheless, as noted earlier, this lack of constitutional provision is remedied by both Commonwealth and State legislation. By s 164 of the *Commonwealth Electoral Act 1918* (Cth), members of State parliaments and Territory legislatures are disqualified from nominating for election to either House of the Commonwealth Parliament.\(^\text{74}\)

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\(^\text{70}\) At paras 5.66-5.67.

\(^\text{71}\) See HR Debates 21 June 1940 p 133; 20 August 1940 p 420.

\(^\text{72}\) At para 5.68.

\(^\text{73}\) See Chapter 2.

\(^\text{74}\) Reference was made in Chapter 2 to the issue of whether s 164 is open to challenge for impermissibly adding to the grounds of disqualification under ss 43, 44 and 45, or derogating from an implication drawn from the exemption in the final paragraph of s 44 for the Queen’s Ministers for a State that members of State Parliaments were not to be prevented from being elected to the Commonwealth Parliament.
Correspondingly, by virtue of State rather than Commonwealth legislation, a member of the Commonwealth Parliament is ineligible to be elected a member of a State parliament or Territory legislature.\(^{75}\)

**Elected local government councillors and staff**

As elected officials, local government councillors are unlikely to hold offices of profit ‘under the Crown’ within s 44(iv). Political practice seems to confirm this view, with at least 20 members of previous Commonwealth parliaments holding concurrent local government positions. These included former Prime Minister Mr Ben Chifley, and former Opposition Leader Mr Arthur Calwell when both were backbenchers.\(^{76}\)

However, according to the 1997 House of Representatives Report, the matter is not clear.\(^{77}\) The reason for this doubt appears to be that the position depends on the extent of Crown control over local councils which could vary between the States. However, it is unlikely that the level of control will outweigh the predominant characteristic of local councils as democratically elected bodies directly accountable to their electors.\(^{78}\)

As for local government officers and employees, whether they hold an office of profit under the Crown is dependent on the status they are accorded by the relevant local government legislation. Their status does not necessarily follow that of their elected local government councillors.

Interestingly, members of the Queensland Legislative Assembly are deemed to have resigned their seat on being elected to a local council, under s 224 of the *Local Government Act 1993* (Qld) (see cl 72(1)(f) of the LCARC’s draft Parliament of Queensland Bill).

**Staff of members of parliament**

The *Members of Parliament (Staff) Act 1984* (Cth) regulates the employment of the staff of senators and members, in addition to ministerial consultants and the staff of officeholders.\(^{79}\) As they are all deemed to hold a Commonwealth office within the

\(^{75}\) Section 79(7) *Parliamentary Electorates & Elections Act 1912* (NSW); s 83(2)(f) *Electoral Act 1992* (Qld); s 47(1) *Constitution Act 1934* (SA); s 31(1) *Constitution Act 1934* (Tas) and ss 85(1)(d) and 96(1)(d) *Electoral Act 1985* (Tas); s 44(2)(b) *Constitution Act 1975* (Vic); s 34(1)(b) *Constitution Acts Amendment Act 1899* (WA); s 103(2)(a) *Electoral Act 1992* (ACT).


\(^{77}\) At para 3.31. See also K Cole, above note 60, pp 19-21.

\(^{78}\) Support for this view is found in the NSW Court of Appeal decision in *Sydney City Council v Reid* (1994) 34 NSWLR 506 at 520 per Kirby P (with whom Meagher and Powell JA agreed) in holding that employees of NSW local government authorities were not employed ‘in the service of the Crown’ and so were unable to appeal to a statutory tribunal in relation to promotions.

\(^{79}\) Defined in s 3; includes a minister, opposition leader and the leader of any other recognised political party.
Senators-elect

The status of a senator-elect arises because senators elected after a normal half Senate election only take their seat on 1 July following their election. This means they may have to wait for up to 12 months after being elected before taking their seat in the Senate. During the period between their election and taking their seat, they may wish to accept an appointment to a public office. Whether they can do so depends on the precise operation of ss 44 and 45.

Section 45 appears inapplicable since it only applies after a person has become a senator or member and has taken his or her 'place'. A senator-elect has not become a senator nor taken his or her seat. 'Place' and 'seat' seem synonymous in this context.

On the other hand, s 44 renders 'any person ... incapable' in two distinct respects — 'of being chosen or of sitting as a senator or member'. It is probable that the second of these incapacities refers to the first sitting after being elected. Accordingly, a person may have been validly chosen (or elected) but before taking his or her seat incurs a ground of disqualification. The duly elected member thereby becomes incapable of taking that seat, at least if the disqualifying ground continues. Where a ground of disqualification listed in s 44 arises after the member has taken his or her seat, this is dealt with under s 45(i). That subsection applies where 'the senator or member ... (i) becomes subject to the disabilities' in s 44. Interpreted in this manner, there is no chronological gap or overlap in the operation of the two sections.

The position is not so clear, however, where the disqualifying ground arises after being elected but is removed before the first sitting day. This is the problem of senators-elect wishing to accept an office of profit under the Crown only during the interregnum. There are two possible interpretations of s 44 in this situation. The first and, it is submitted, preferable view is that s 44 does not operate during this interregnum, but only operates during the process of choosing a member and then when the member wishes to take his or her seat in parliament. Accordingly, a disability which arises after being elected is of no effect if it is removed before taking one's seat. This interpretation accords with the natural and literal meaning of the language of the section. Some support may also be gathered from the drafting history of s 44, which as cl 46 in the 1891 draft rendered any person incapable of being chosen or of sitting 'until the disability was removed'.

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80 Sections 10, 17 and 24.
81 See K Cole, above note 60, pp 17-18.
82 Commonwealth Constitution s 13.
83 Quick and Garran, above note 41, p 494, refer to s 44 as applying to 'the continuing existence of a disqualifying status'.
84 That clause only imposed a disability in respect of foreign allegiance, bankruptcy and certain offences.
On the other hand, it might be argued that the absence of that phrase in s 44 suggests that the incapacity of sitting under s 44 has immediate effect as soon as the ground of disqualification arises after the election. The section is capable of that interpretation in so far as it states as a separate incapacity 'shall be incapable ... of sitting as a senator or member'. This interpretation avoids the gap which would otherwise arise of allowing a member to flirt with the grounds of disqualification between being elected and taking his or her seat. If s 44 is not given that interpretation, senators-elect fall into a gap between the respective operations of ss 44 and 45 and are unaffected by the grounds of disqualification except during the process of being chosen and on taking their place in the Senate. Yet there appears to be little risk of a conflict of interest arising during that period which might impact on the performance of future parliamentary duties.

The above discussion is based on the assumption that a successful candidate becomes a member only on being sworn-in, that is, on taking his or her seat in the House. If, however, a successful candidate becomes a member before taking his or her seat, such as at the declaration of the poll, the disqualification from sitting under s 44 does not remove the member from his or her seat. Nor does s 45 remove the member until the member has taken his or her place. The only other basis for removal is under s 38, for failing to attend the House. But as this section renders the 'place' vacant, the member must first have taken a seat by being sworn in. These difficulties support the correctness of the assumption relied on.

The position of senators-elect has been considered on at least three occasions without any authoritative ruling being made. In 1980 a senator-elect was engaged as a temporary 'legislative assistant' to a member of parliament. The Attorney General, Senator Durack, gave an opinion that s 44 should apply to senators-elect because it would be highly anomalous for candidates to be disqualified for holding public office when elected but not to be during the interregnum (that is, after their election and before taking their place). The mischief remains in both situations. The opinion concluded that as legislative assistants were appointed under the Public Service Act 1922 (Cth) as temporary employees, the senator-elect was holding an office of profit under the Crown.

While the Durack opinion acknowledged a lack of authority on this issue, it referred to the case of Senator-elect Doug McClelland which was raised in the House of Representatives in 1962. Mr McClelland resigned as a Commonwealth court reporter in November 1961 in order to stand for the Senate at the 9 December election. Upon his election, he had to wait until 1 July 1962 before taking his seat. Despite the fact that Mr McClelland had a young family to support and so was in

85 Quick and Garran, above note 41, p 488, express the view that unsworn members enjoy the privileges of members despite being unable to vote or sit: s 42.
86 This was the view of Isaac Isaacs at the 1898 Melbourne Constitutional Convention: see Official Record of the Debates of the Australasian Federal Convention Melbourne 1898 at 1943.
87 See 1981 Senate Report, para 5.58 and Appendix 2 to the opinion.
88 See HR Debates 7 March 1962 vol 34 pp 585-586.
need of employment until that date, the Commonwealth Solicitor-General declined to sanction his re-employment in the public service during that period.

The most recent case is that of Senator Jeannie Ferris from South Australia, who was elected at the 1996 election. As a senator-elect, prior to the return of the writ, she accepted an appointment on the staff of a parliamentary secretary for a period before taking her seat in the Senate. Her position was challenged in the parliament and so, to avert a Senate reference to the Court of Disputed Returns on the effect of this appointment, Ferris resigned from the Senate. She was then immediately chosen by the South Australian Parliament to fill the casual vacancy which her resignation was thought to have created, pursuant to s 15 of the Constitution. Odgers' Australian Senate Practice\(^\text{89}\) is of the view that Ferris's appointment disqualified her pursuant to s 44(iv) either because a senator-elect is subject to s 44 or because the process of choosing her was not finalised until the return of the writ.

Odgers' second point raises the issue, referred to in Chapter 2, of when the process of choosing is finalised for the purposes of s 44. Odgers' contemplates the return of the writ to the State Governor as the completion of the process of choosing. While the Durack opinion considered that the process of choosing a member would be at least complete at that stage, it is arguable that the process of choosing for the purposes of s 44 is completed earlier, at the declaration of the poll. This view is supported by Deane J's dissent in Sykes v Cleary which considered the declaration of the poll as the final stage of the process of choosing a member which was, in his Honour's view, the appropriate time to judge the successful candidate's disqualification.\(^\text{90}\) However, the earliest date is that suggested by the joint judgment of Mason CJ, Toohey and McHugh JJ in Sykes v Cleary: polling day, which is the day the people actually make their choice. In their view, the declaration of the poll was merely the formal announcement of the people's choice.\(^\text{91}\)

It is significant that the few opinions given on the position of senators-elect support the view that an elected member is liable to be disqualified on any of the grounds in s 44 even if those grounds arise after being elected but are removed before taking one's seat. While this problem has so far arisen only in relation to holding an office of profit under the Crown, it could also arise with the other disqualifying grounds of being a government contractor and being in receipt of fees and honoraria. However, it is unlikely to arise in relation to the grounds of foreign allegiance, criminal conviction and bankruptcy, which are likely to remain current when taking a place in the Senate.

It is evident that the operation of s 44 must be clarified. Either it operates during the interregnum or it does not. Which is the preferable approach? Should senators-elect be allowed to work for the executive during this interregnum?

The case for not allowing them to do so rests on the potential conflict of interest which would exist during that period and thereafter as a senator. Here again the seriousness of the conflict needs to be assessed in deciding whether disqualification

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89 Evans, above note 65, at 149.
90 (1992) 176 CLR 77 at 125.
is justified. Relevant to that assessment is the nature of the executive position held. A distinction probably needs to be drawn between senior policy positions and other executive positions. It is suggested later in this chapter that the preferable approach to this general ground of disqualification is to require most public officers to relinquish their office only on being elected and not before. Senior policy officers would still be required to resign their office before nominating. The same approach could be adopted in relation to senators-elect: they would be allowed to accept a public office during the interregnum other than in senior policy positions.

*Final paragraph of s 44*

The final paragraph of s 44 exempts from para (iv) four categories of persons, of which only the first and last categories now seem required:

- Queen's Ministers of State for the Commonwealth;
- Queen’s Ministers for a State;
- receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen’s navy or army; and
- 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.

*Queen’s Ministers of State for the Commonwealth*

Without this exemption, Commonwealth ministers of state entitled to remuneration for their ministerial services would be disqualified. Difficulty arises, however, in respect of other ‘ministerial’ appointments, such as assistant ministers and parliamentary secretaries. Do these appointments incur disqualification under ss 44 or 45 as an ‘office of profit under the Crown’? If so, are they exempted by this category of the ‘Queen’s Ministers of State’?

Since Federation, members of both Houses have been appointed by the executive to one or other of these positions. An assistant minister is appointed by the Governor-General in Council to assist a minister of state in the administration of his or her department of state. On the other hand, a parliamentary secretary to a minister of state is appointed by the Prime Minister to represent the minister in parliament. Over the years, other descriptions have been given to these positions, such as minister without portfolio and parliamentary under-secretary.

As executive appointments, both of these ‘ministerial’ positions constitute offices under the Crown. But to avoid disqualification under s 44(iv), they have never been remunerated. It appears that no reliance can be placed on the exemption of the

92 Section 3(1) *Parliamentary Secretaries Act 1980* (Cth).

93 See s 4 *Parliamentary Secretaries Act 1980* (Cth); paras 6.4-6.5 of the 1981 Senate Report, especially the comment of Professor Crisp in para 6.4. Also note Sawer, above note 30 at 125-128 in relation to the Speaker’s challenge to the appointment of four ‘parliamentary under-secretaries’ in 1952.
members of parliament: law and ethics

‘Queen’s Ministers of State for the Commonwealth’. This view is based on s 64 of the Constitution which provides that the officers appointed by the Governor-General ‘to administer such departments of State of the Commonwealth as the Governor-General in Council may establish ... shall be the Queen’s Ministers of State for the Commonwealth’ (emphases added). In other words, only Ministers in charge of a government department are the Queen’s Ministers of State and so within the exemption from s 44(iv).94 Nevertheless, there is no constitutional impediment95 to appointment as a minister without portfolio, an assistant minister, or a parliamentary secretary, provided they are not remunerated other than by way of reimbursement for reasonable ‘out of pocket’ expenses.96

In the absence of a constitutional amendment to s 44(iv), several suggestions have been made to remunerate these forms of ministerial appointment without infringing that paragraph.

1. Appoint more than one minister to administer a department. The 1981 Senate Report concluded that the overwhelming balance of opinion was that more than one minister could administer a department.97 This was later confirmed by Beaumont J in Zoeller v Attorney-General (Cth).98

2. Appoint a ‘Minister Assisting the Minister’ to head a notional department known as the ‘Department of the Minister Assisting the Minister for ...’ or, to actually administer a small department as well as assist the minister of a larger department.99

3. Professor Sawer100 suggested that parliamentary secretaries (or, as he described them, ‘Majority Leaders’) be appointed by resolution of a House to assist the passage of legislation. In those circumstances, the office is not ‘under the Crown’ and hence can be remunerated by parliament.

For assistant ministers, the first of these options has been adopted by successive federal governments. Constitutional amendments which resolve the problem include replacing s 44(iv) with a prescription of offices incurring disqualification, as proposed by the 1981 Senate Report. Alternatively, the exemption of the Queen’s Ministers of State for the Commonwealth might be extended to include, as the Senate Report recommended: ‘or any of the Queen’s Assistant Ministers of State for the Commonwealth or any person holding a like office’.101

96 Therefore it is not an office ‘of profit’: Sawer, above note 30 at 127.
97 1981 Senate Report, para 6.19. See also Sawer, above note 30 at 124.
98 (1987) 76 ALR 267 at 278-279 — the appointment of Mr Duffy as the Minister of State for Trade Negotiations was upheld despite being in respect of the same department of state for which Mr Hayden was the Minister of State for Foreign Affairs and Trade.
101 At para 6.34.
But, as the 1977 House of Representatives Report noted, either of these suggestions may result in more appointments of members to executive positions, thereby diluting the efficacy of parliament to hold the executive accountable. Consequently, the rationale for this ground of disqualification invokes the need for a limit on the number of such appointments. The Report recommended a ceiling of 20 per cent on the total number of members so appointed.102

As for parliamentary secretaries, these have remained unremunerated until 2000 when the Ministers of State Act 1952 (Cth) was amended to provide for the appointment, in addition to the usual 30 ministers, of a further 12 ministers to be designated on their appointment by the Governor-General as parliamentary secretaries.103 The validity of this approach is doubtful if the exemption for the ‘Queen’s Ministers of State’ is confined to ministers appointed to administer a department under s 64.104

Queen’s Ministers for a State

This exemption is now regarded as redundant since it was originally designed to allow the election of ministers from the States to the new Commonwealth Parliament in 1901.105 Then it complemented the absence of any disqualification of State members from entering the Commonwealth Parliament. However, that is no longer the case (see Chapter 2) nor can it be a justified exemption today.106

Officers and members of the Queen’s Navy and Army (in receipt of pay, half pay or a pension)

As noted earlier, the generally accepted view is that this category refers to the British armed forces which prior to 1900 would have included the Australian colonial forces, as well as those of the other colonies of the British Empire.107 It does not incorporate the Australian defence forces. This is clear from the distinction drawn within the paragraph between the ‘Queen’s Navy or Army’ and the ‘naval or military forces of the Commonwealth’. Only the latter phrase which also appears in s 68 of the Constitution can refer to the Commonwealth’s defence forces.

It might be argued that with the development of independent Crowns that ‘Queen’s’ refers now to the Queen in right of the Commonwealth in the same way

103 Ministers of State and Other Legislation Amendment Act 2000 (Cth).
104 See Senate Debates 16 and 17 February 2000.
105 This exemption was moved by Sir John Forrest at the 1898 Melbourne Constitutional Convention, above note 85 at 1941, noting that in time it would become unacceptable.
106 See 1997 House of Representatives Report para 3.38. However, note the argument (referred to in Chapter 2) that an implication could be drawn from this exemption that members of State Parliaments were not to be prevented from being elected to the Commonwealth Parliament.
that the 'Crown' in s 44(iv) was interpreted by Deane J in Sykes v Cleary\textsuperscript{108} to refer now only to the Crown in right of the Commonwealth and in right of the States. Indeed, in Nolan v Minister for Immigration and Ethnic Affairs,\textsuperscript{109} the High Court interpreted 'subject of the Queen' to now mean subject of the Queen in right of the Commonwealth. However, it is strongly arguable that such an interpretation is precluded by the reference in the same paragraph to the naval or military forces of the Commonwealth as a distinct force to that of the 'Queen's navy or army'. This exemption from s 44 is clearly outdated and unnecessary.\textsuperscript{110}

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 category exempts from s 44(iv) only those officers and members of the Commonwealth's defence forces 'whose services are not wholly employed by the Commonwealth'. This covers reserve members\textsuperscript{111} and other part-time officers and members. As noted above, full-time members of the Commonwealth's defence forces are disqualified as holders of an office of profit under the Crown. This disqualification is justified in view of the clear conflict of interest which may arise and the impossibility of performing both roles as a parliamentarian and as a member of the defence forces. Since those concerns do not arise to the same degree with part-time defence personnel, their exemption from disqualification appears justified.

There is, however, a difficulty in so far as a member receives any remuneration from the Commonwealth for performing part-time defence duties. On its face, this constitutes the receipt of a 'fee ... for services rendered to the Commonwealth' which by s 45(iii) vacates the member's seat. Accordingly, there is an apparent conflict between this exception in the final paragraph of s 44 and s 45(iii). One approach is to read down s 45(iii) to accommodate the express exception in s 44 in accordance with the maxim \textit{generalia specialibus non derogant}. The meaning of 'fees' in s 45(iii) would be confined so as not to include part-time defence force allowances. Otherwise, these provisions can only be reconciled by allowing part-time defence force members to be elected to parliament without having to resign their positions, but once elected they are unable to continue to receive their allowances. This appears to be the view taken by the 1981 Senate Report which regarded them as not disqualified provided they only accept their reasonable expenses.\textsuperscript{112}

Provision for reappointment to public office if not elected

Even prior to the High Court's decision in Sykes v Cleary,\textsuperscript{113} the generally accepted

\textsuperscript{108} (1992) 176 CLR 77 at 118-119.
\textsuperscript{109} (1988) 165 CLR 178 at 186.
\textsuperscript{111} But the 1997 House of Representatives Report paras 3.41-3.46 considered the ambiguity here where a reservist is wholly employed for a period.
\textsuperscript{112} At para 5.70.
\textsuperscript{113} (1992) 176 CLR 77.
view, later endorsed in that case, was that the grounds of disqualification in s 44 were to be determined when *nominating* as a candidate for election. Hence, public servants and others holding offices of profit under the Crown were advised to resign their positions prior to nominating as candidates. Provision was and is still made in some cases for their reappointment to their former positions in the event their election bid is unsuccessful. In most cases, reappointment is at the discretion of the relevant authority. The 1981 Senate Report was critical of this discretion, recommending that reappointment be mandatory to ensure that public servants not be discriminated against in seeking election to parliament.\footnote{At paras 5.30-5.37.}

### Outline of current reappointment provisions

1. **Defence personnel**

   The *Defence (Parliamentary Candidates) Act 1969* (Cth) allows officers of all three services to apply for a transfer to the appropriate Reserve in order to nominate for Commonwealth, State or Territory elections and then to apply for reinstatement if unsuccessful (ss 7 and 10). Provision is also made for enlisted members (ss 8 and 11) and full-time Reserve members (ss 9 and 12) of the three services to apply to be discharged and to seek re-appointment. Reinstatement or reappointment in each case is within the discretion of the chief of staff upon application being made. But even in the absence of such application, officers and enlisted members may be deemed to have been re-enlisted if required by notice to so apply (ss 13 and 14).

   In *Free v Kelly*,\footnote{(1996) 185 CLR 296.} Mrs Kelly requested a transfer to the RAAF Reserve but as this request was not acted on before her nomination, she had to concede before the Court of Disputed Returns that she was disqualified from being elected to the House of Representatives at the 1996 general election.

2. **Commonwealth public servants**

   Following the recommendation of the 1981 Senate Report,\footnote{At para 5.16.} the *Public Service Act 1922* (Cth)\footnote{Section 47C.} was amended in 1986\footnote{Section 34 Public Service Legislation Streamlining Act 1986 (Cth) Before this amendment, s 47C (since its enactment in 1960) had only provided a discretionary power to reappoint.} to provide for a *right* of automatic reappointment to the Commonwealth public service for its officers (other than a departmental secretary) who resign their public office within six months of the closing date for nomination for Commonwealth, State or Territory elections and are unsuccessful. They must apply for their former position within two months of the declaration of the poll or of the determination of any challenge by the Court of...
Disputed Returns. Reappointment is to one’s former office or equivalent if available, otherwise to an unattached position at the same classification.

(iii) State public servants

If State public servants unsuccessfully contest a federal election, provision is made in Queensland, Tasmania, and Victoria for their reappointment by the Governor-in-Council in the exercise of its discretion. Similar provision is made in Western Australia where the discretion is vested in the Public Service Board. In contrast, a right to be reappointed is conferred in NSW, South Australia, the Northern Territory and the ACT.

The danger of relying on a discretionary power of reappointment is illustrated by the experience of Mr Bill Wood, whose case was raised by Senator Colston in 1978. Mr Wood, resigned from the Queensland Education Department to stand as an ALP candidate at the 1977 election for the House of Representatives. Having not been elected, he applied for reappointment to the Department. This was refused, allegedly on political grounds after the intervention of the then Queensland Premier, Mr Joh Bjelke-Petersen. In the light of this case, the 1981 Senate Report recommended a right to reappointment to prevent discriminatory treatment.

Constitutional validity?

Doubt, however, has been raised as to the constitutional validity of a statutory right to reappointment in the circumstances described above. In a submission to the House of Representatives Committee, the Attorney-General’s Department queried the validity of such a right if it means that the position was not really vacated for the purposes of s 44(iv). A similar point could be raised with ss 13 and 14 of the Defence (Parliamentary Candidates) Act 1969 (Cth) which deem officers and enlisted members to have been re-enlisted in the absence of any application for

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119 Section 3 Crown Employees Act 1958 (Qld).
120 Section 3 Crown Servants Reinstatement Act 1970 (Tas).
121 Section 49 Constitution Act Amendment Act 1958 (Vic).
122 Administrative Instruction of the Public Service Board, 18 February 1981.
123 Section 2(2) Public Service (Commonwealth Elections) Act 1943 (NSW); see also s 93 Police Service Act 1990 (NSW) and s 98 Teaching Services Act 1980 (NSW).
124 Section 54 Public Sector Management Act 1995 (SA).
125 Section 38 Public Sector Employment and Management Act 1993 (NT).
126 Section 111 Public Sector Management Act 1994 (ACT).
128 As above at 2018.
129 See paras 5.32-5.38.
130 At para 3.119 — rec 7.
131 See footnote 44 of the Attorney-General’s Department’s submission (dated 5 March 1997) to the 1997 House of Representatives Report.
reappointment. The counter-argument to the Department's view is that no right to reappointment arises until the candidate fails to be re-elected and makes application in accordance with the prescribed procedure. Until these statutory preconditions are fulfilled, the candidate does not occupy any office of profit under the Crown. Nor can it be said that the possibility of reappointment confers on a candidate any unfair advantage over other candidates. In particular, there is no greater risk of a conflict of interest arising in these circumstances.

Another approach: no remuneration

In order to avoid disqualification under s 44(iv), provision has been made at the Commonwealth level to withhold remuneration for certain 'offices' at least for such time as one is a candidate or member.

For instance, s 7(10) of the Remuneration Tribunal Act 1973 (Cth) denies remuneration to those persons whose positions are remunerated pursuant to that Act in the event they become a candidate or member of the Commonwealth Parliament:

A member of, or a candidate for election to, either House of Parliament is not entitled to be paid, and shall not be paid, any remuneration or allowances in respect of holding, or performing the duties of, a public office¹³² but he shall be reimbursed: ... [by the corporation or company concerned or out of the Consolidated Revenue Fund] such expenses as he reasonably incurs in respect of his holding, or performing the duties of, that office.

This provision is confined, of course, to the public offices under that Act. Similar provision is made by s 4 of the Parliamentary Secretaries Act 1980 (Cth) in relation to appointment as a Parliamentary Secretary. It has been suggested that all Commonwealth employees might derive the benefit of a similar provision if inserted in the Public Service Act and the Defence Act or even by way of a general provision.¹³³

There is, however, a significant difficulty with that approach: it depends on a temporary termination or suspension being distinguishable from the granting of 'leave without pay' which in Sykes v Cleary¹³⁴ failed to avert disqualification. That distinction is not easily made. A right to an emolument exists in each of these situations to render the office one of profit. Although the receipt of reasonable expenses is insufficient to create an office of profit,¹³⁵ the office is already of that kind by virtue of the right to the emolument attached to it.

¹³² 'Public office' is extensively defined in s 3(4) paras (a)-(g) with exclusions in paras (j)-(v).
¹³³ See the Attorney-General's Department's submission to the 1997 House of Representative Report at paras 57-58.
¹³⁴ (1992) 176 CLR 77.
¹³⁵ See discussion earlier under title 'of profit'.

81
Reform

1981 Senate Report: Recommendations on s 44(iv)

The 1981 Senate Report recommended the deletion of s 44(iv) and the insertion of a new s 44A. The Report's precise recommendations\textsuperscript{136} are reproduced in Appendix 3 and were based on the following two 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.\textsuperscript{137}

The Report's principal recommendation is that instead of disqualification attaching to those who hold public office at the time of nominating, they be allowed to continue in that office until elected. Then they are deemed to have vacated their public office on becoming entitled to a parliamentary allowance under s 48 of the Constitution. The Report, however, recognised that it would be undesirable for those working in politically sensitive areas to continue to do so up to election day.\textsuperscript{138}

The other notable feature of the Report's recommendations is that the proposed s 44A makes no reference to ‘offices of profit under the Crown’. Instead, the offices which members of parliament are prevented from holding are prescribed: Commonwealth, State and Territory public servants employed on a wage or salary; permanent defence force personnel; positions in Commonwealth, State and Territory statutory authorities; and members of State parliaments and Territory legislatures.

The Report also recommended\textsuperscript{139} that s 45 be altered to reflect the prescribed categories of public office which elected members of parliament should not hold. However, s 45 would continue to vacate a member's place in parliament if he or she accepted any of those positions while still a member.

In 1978, an attempt to reform s 44(iv) was made by Senator Colston who introduced a private member's Bill, the Constitution Alteration (Holders of Offices of Profit) Bill 1978. This Bill proposed adding a further paragraph to s 44 to provide that the holding of a public office within s 44(iv) only prevents a member from sitting and voting in parliament and not from being chosen. This proposal allowed a candidate to retain the public office position until required to take up his or her seat. However, it failed to have regard to s 45(i), which would have vacated the seat.

\textsuperscript{136} At para 5.83.
\textsuperscript{137} At para 5.37.
\textsuperscript{138} At para 5.22.
\textsuperscript{139} At para 5.83.
as soon as it was obtained. Apart from this defect, there was also the danger that
the member would not resign the public office once elected. Accordingly, the Senate
Report recommended that the Colston Bill not proceed.

Constitutional Commission recommendations

According to the Constitutional Commission, any amendment to this ground
should ensure the principle that

apart from the member's salary and reimbursement of reasonable expenses,
a member of Parliament should not receive remuneration from the Crown
'in right of the Commonwealth, a State or a Territory. The prohibition is to
avoid 'double-dipping', and the possibility of divided loyalty.

The Commission's recommendations basically follow those of the 1981 Senate
Report. The Commission proposed new s 45 and 46 in its draft bill, Bill No 8 of
Appendix K. In the event of a candidate being successfully elected, s 45 terminated
certain prescribed public office appointments. These reflected the Senate Report list
of positions with the addition of judicial appointments. The automatic vacating
of public office was to occur on the day immediately before becoming a member of
parliament rather than on the day the new member became entitled to a
parliamentary allowance. The Bill also empowered parliament to exclude from
this ground of disqualification members and employees of particular public
authorities or of a class thereof.

It should be noted that the proposed s 45 which deemed any person elected to the
Commonwealth Parliament to have vacated his or her public office, operated in
respect of offices held at all levels of government. While the Commonwealth would
attain this power by constitutional amendment, it is clear that the States enjoy no
comparable capacity.

Conclusion on Commonwealth position

This ground of disqualification ought to be reformed at least for candidates to
provide for the automatic termination of their public positions if elected to
parliament. With one important exception, candidates would be required only to
take leave from their public position in order to contest the election. If unsuccessful,
the candidate simply returns to his or her public employment. in this way, the
democratic right to stand for election is restored to public officers.

The important exception is that senior public office holders ought to resign from
their positions before nominating. The positions subject to this obligation are those
which may place the candidate in an advantageous position or which might
compromise the standing of the public office.

In each case, the public office positions need to be defined as precisely as
possible. This task is best left to parliament. The 1997 House of Representatives
Report recommended a similar approach\(^\text{146}\) in substituting s 44(iv) for a provision
which deemed most public offices to be vacated if the holder is elected to
parliament, provided they took leave from their office before nominating. Other
specified public office holders automatically vacated their offices if they
nominated, while federal justices were required to resign from their judicial
office. As for sitting members, their disqualification must be maintained if they
accept a public office position within the category of positions already prescribed
for candidates.\(^\text{147}\)

The reforms suggested here for the Commonwealth are already in place in
several States.

**States and Territories**

As a general rule, public officers in all States except Tasmania are not required to
resign their office before standing for election to their State parliament. If elected,
provision is made in those States for automatic vacating of the public office or the
option to resign within a prescribed period.\(^\text{148}\) However, in Western Australia a
distinction is drawn between the State's most senior public offices, which must be
vacated before being elected, and the general range of public offices. This reflects the
approach advocated above for the Commonwealth. Consistently with the
Commonwealth position, public officers in the Northern Territory are required to
resign their office before nominating for the election. The position is different,
however, in the ACT where public officers are not required to resign until the
declaration of the poll.

Hence, a comparison of the position at the State and Territory level in Australia,
demonstrates the three options which are available:

1. automatic disqualification from parliament;
2. disqualification from parliament if there is a failure to resign from the public
   office; or
3. automatic loss of the public office.

Some States, such as Western Australia, adopt two or three of these options by
distinguishing between members and elected candidates, or by differentiating

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146 Aspects of Section 44 of the Australian Constitution — Subsections 44(i) and (iv) para 3.92 — rec 3.
147 As above rec 4 p 93.
148 Discussed in detail below.
between the public office positions. As a result, one can distil essentially four approaches.

(1) Automatic disqualification from parliament

This is the approach adopted in Tasmania\(^{149}\) and the Northern Territory\(^{150}\) in relation to members and candidates for election who are disqualified from parliament if they hold an office of profit under the Crown. Accordingly, as with the Commonwealth Parliament, they are required to resign from their public office before being elected. However, former public officers in the Northern Territory\(^ {151}\) are entitled to be reappointed at their former salary.

Western Australia also imposes disqualification upon both members and candidates who hold a public office listed in Pt 1 of Sch V of the Constitution Acts Amendment Act 1899 (s 34(1)). Those offices are the most senior offices in the State, including all judicial and quasi-judicial positions and the CEOs of all government departments and organisations. South Australia only imposes disqualification on members who assume a public office, whereas elected candidates are treated differently (see below)\(^ {152}\).

(2) Disqualification if no resignation of public office

This approach is adopted generally in NSW\(^ {153}\) in relation to both members and candidates. Each has the opportunity to resign from the public office within a prescribed time of their election or their appointment, as the case may be, and with the approval of the House, avoid disqualification from parliament. The procedure to be followed involves several steps. First, notice must be given to the House pursuant to its Standing Orders of the holding of the public office. It is unclear who gives notice and when it must be given. Within seven days of the House being given that notice, the member must resign or cease to hold the public office and the House must pass a resolution that it is satisfied that the member no longer holds that office.

A similar approach is adopted in Western Australia for candidates who are elected while holding a public office with the Commonwealth, another State or Territory. To avoid disqualification, they must resign their public office within 21 days of being elected.\(^ {154}\) Also, sitting members who accept another public office avoid

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149 Section 31 and 32 Constitution Act 1934 (Tas). Note the special legislative protection afforded Reginald Hope MLC by the Constitution (Disqualification Removal) Act 1980 (Tas) when appointed to a Tasmanian statutory authority, the Fire Service Advisory Council. The Act overrode s 32 of the Constitution Act 1934 to prevent his disqualification provided he resigned from that position before the commencement of the Act (s 2(2)).

150 Section 21 Northern Territory (Self-Government) Act 1978 (Cth).

151 Section 38 Public Sector Employment and Management Act 1993 (NT).

152 Section 45(1) Constitution Act 1934 (SA).

153 Section 13B Constitution Act 1902 (NSW). See also s 92 Police Service Act 1990 (NSW).

154 Section 36 Constitution Acts Amendment Act 1899 (WA). If elected to the Legislative Council, the member must resign by 22 May following (s 36(9)).
disqualification if two requirements are met: they resign or cease to hold the public office, and a resolution is passed by both Houses directing that the disqualification be disregarded.\footnote{Sections 38 and 39 Constitution Acts Amendment Act 1899 (WA).} In contrast, candidates, on being elected, automatically vacate their public office positions in Western Australia (if they are positions listed in Pts 2 or 3 of Sch V).\footnote{Section 37(1)-(3).} Hence, Western Australia distinguishes between those public positions held under the Crown in right of Western Australia, which are automatically vacated, and those positions held outside the State, in respect of which the view was taken that it was beyond the territorial competence of the State to deem as vacated. This aspect is considered further below.

A further variation exists in South Australia where elected candidates can avoid disqualification by resigning their public office before the declaration of the poll.\footnote{Section 45(2) Constitution Act 1934 (SA).} Sitting members automatically lose their seat if they accept an office of profit from the Crown.\footnote{Section 45(1).} Similarly, in the ACT, holders of a public office or appointment under any Australian law and employees of any authority or body established by a law are not required to resign before nominating\footnote{Section 104(b) Electoral Act 1992 (ACT).} but need to do so in order to become a member\footnote{Section 103(2)(a).} on the declaration of the poll.\footnote{Section 10 Australian Capital Territory (Self-Government) Act 1988 (Cth).} It appears that if a sitting member accepts one of these positions, his or her seat is lost as that person is no longer eligible to be a member.\footnote{Section 103(2) Electoral Act 1992 (ACT).}

(3) Automatic loss of public office only by elected candidates

This is the position in Victoria under s 61 of the Constitution Act 1975. On being elected, candidates are deemed to have resigned their public office position in that State. However, members who obtain a public office position\footnote{Presumably, only in Victoria.} after their election are disqualified under ss 49 and 55(d). Similarly in Western Australia, candidates simply vacate their public office (if it is one listed in Pts 2 or 3 of Sch V) automatically upon their election.\footnote{Section 37(1)-(3) Constitution Acts Amendment Act 1899 (WA).} The same approach is taken in New Zealand,\footnote{Section 53(2) Electoral Act 1993 (NZ).} although provision is made for reinstatement in the event that the election is later set aside.\footnote{Section 53(3).}

The effect of deeming the public office vacated is confined in each State to those offices under the Crown in right of that State.

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155 Sections 38 and 39 Constitution Acts Amendment Act 1899 (WA).
156 Section 37(1)-(3).
157 Section 45(2) Constitution Act 1934 (SA).
158 Section 45(1).
159 Section 104(b) Electoral Act 1992 (ACT).
160 Section 103(2)(a).
161 Section 10 Australian Capital Territory (Self-Government) Act 1988 (Cth).
162 Section 103(2) Electoral Act 1992 (ACT).
163 Presumably, only in Victoria.
164 Section 37(1)-(3) Constitution Acts Amendment Act 1899 (WA).
165 Section 53(2) Electoral Act 1993 (NZ).
166 Section 53(3).
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**(4) Automatic loss of public office: no disqualification from parliament**

This final approach is that adopted in Queensland since 1978, although it was introduced originally in 1945.\(^{167}\) An elected candidate vacates his or her public office on being elected to parliament, and if a member is appointed to a public office the appointment is void. In both instances, the public office is expressly confined to ‘any office or place of profit under the Crown’ in right of Queensland.\(^{168}\)

This approach subjects candidates and members to the least inconvenience by removing them from their public office without affecting the validity of their parliamentary or electoral position. The intention was to avoid the difficulties experienced by members in the past.\(^{169}\) Earlier legislation\(^{170}\) had been enacted which vacated the seats of members who in the future accepted a wide range of Crown appointments. This legislation was short-lived, being repealed by the 1978 amendment to the *Legislative Assembly Act 1867* (Qld).

LCARC’s draft Parliament of Queensland Bill proposes to alter the position in several respects. Candidates would be required to take leave from their ‘paid public appointment’ for the election period (currently optional) and, as at present, their office is terminated if elected (cl 66). However, those who hold certain prescribed senior government positions are required to resign before nominating or else be deemed to have done so (cl 67).\(^{171}\) These positions are generally those concerned

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167 Currently two Acts seem to apply to similar effect although the later probably has impliedly repealed the earlier. The earlier is s 5 of the *Officials in Parliament Act 1896* (Qld) inserted in 1945. The later is s 7A of the *Legislative Assembly Act 1867* (Qld) inserted in 1978. These provisions and the issue of implied repeal are discussed in Electoral and Administrative Review Commission’s 1993 Report on Consolidation and Review of the Queensland Constitution, 76-83 and the Crown Solicitor’s Opinion in Appendix E.

168 Section 7D(2) *Legislative Assembly Act 1867* (Qld).

169 The *Legislative Assembly and Another Act Amendment Act 1978* (Qld) inserted new ss 7A-7D, which were assented to 17 May 1978: see Legislative Assembly Debates 16 May 1978 at 775. The new sections were intended to prevent any disqualification arising in respect of a Member, Mr Liew Edwards, who had been appointed to the board of trustees of Ipswich Grammar School, and in respect of a member, Mr Booth, who had been appointed to the Dairy Products Stabilisation Board.

170 *Constitution Act and Another Act Amendment Act 1977* (Qld) introduced new ss 7B and 7C into the *Constitution Act 1867* (Qld), assented to 21 April 1977. These were repealed by the *Legislative Assembly and Another Act Amendment Act 1978* (Qld). This legislation was intended to protect Mr Eric Deeral (NP, Cook) for receiving expenses for attending a meeting of the advisory committee of the Cook Shire Council and also the Survey Minister, Mr John Greenwood, who had appeared as a barrister for the Crown in legal proceedings.

171 Clause 64(3) LCARC’s draft Parliament of Queensland Bill expressly disqualifies those who occupy vice-regal positions and any judicial office.
with the administration of parliament, of justice and police, and of the electoral system. Those who hold crown and parliamentary positions outside the State must resign those positions before taking a seat, although the holding of such a position does not affect the validity of their election (cl 68). Members are prevented from accepting any 'paid State appointment' (cl 69) and if they accept one outside the State, this disqualifies them (cl 72(1)(e)).

The Bill adopts the expression 'paid public appointment' instead of office of profit under the Crown. Expressly included in this description are officers and employees of the executive, parliament, the courts and of local government who are engaged 'for reward'. Not included are positions for which there is only an entitlement to 'out-of-pocket expenses reasonably incurred' (cl 58(5)).

Categories of public office

A comparison of the categories of 'public office' within the above approaches and their respective exceptions reveals some measure of consistency within Australia.

The usual description is: an office of profit under the Crown. Some expressly include:

- positions held in statutory authorities;
- judges of the State or Territory courts.

A quite different approach is adopted in Western Australia, where the basic premise in s 33 of the Constitution Acts Amendment Act 1899 (WA) is that no disqualification arises for holding a public office position under the Crown in right of Western Australia unless it falls within one of the detailed lists in Pts 1, 2 or 3 of Sch V. Much uncertainty is obviated by these extensive lists of positions, although they do not include Crown positions held outside the State. Exceptions also become unnecessary. This approach essentially follows the United Kingdom model noted earlier.

Of which Crown?

Most States confine the public office to those under the Crown in right of the State

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172 See for example s 138 Constitution Act 1902 (NSW). This is not the position (as noted earlier) in the ACT where members are precluded from holding any public offices and appointment under an Australian law or being an employee of any authority or body established under Australian law: s 103 Electoral Act 1992 (ACT).

173 Section 32(1) Constitution Act 1934 (Tas); s 36 Constitution Acts Amendment Act 1899 (WA); ss 7A and 7D(1) Legislative Assembly Act 1867 (Qld); s 21 Northern Territory (Self-Government) Act 1978 (Cth).

174 Section 44 Constitution Act 1975 (Vic); s 44 Constitution Act 1934 (SA); s 32(3) Constitution Act 1934 (Tas) disqualifies only judges of the Supreme Court.

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concerned. On the other hand, Western Australia and the Northern Territory expressly include public offices under all Crowns in Australia. The same approach is taken in the ACT in relation to offices, appointments and employees under not only its own law but also under any law of the Commonwealth, State or another Territory. This difference arises depending on which of the above approaches is adopted. Where the holding of a public office incurs disqualification from parliament ((1) and (2) above), there is no difficulty including public offices outside the State. But where no disqualification arises and instead the member is deemed to have vacated the public office ((3) and (4) above), there are constitutional difficulties with a State deeming the vacating of public offices outside that State — in other words, the State may lack the extra-territorial competence to go beyond its own public offices. A State has the legislative capacity to enact laws which operate beyond the State's boundaries provided there is a sufficient connection between that extra-territorial effect and the interests of the State for the law to be one for the peace, order and good government of that State. Although a connection might be found in these circumstances, it is more likely that such an interference with the government of the other State will not be allowed.

The solution is to adopt a twofold approach: that is, deem on election the vacating of a State's own public offices and require, within a prescribed period of being elected, resignation from any public office held outside the State. This is the approach taken in Western Australia following the recommendations of the 1971 Report of the WA Law Reform Committee. A further difficulty with out of State public offices is that it is impractical to specify the particular offices from which resignation is required, so a general formula is still required.

Finally, it should be noted that the holding of a public office in another jurisdiction is just as incompatible with being a member of parliament as the holding of a public office within that jurisdiction — although, admittedly, incompatibility in the former situation arises more from the impossibility of performing the duties of both positions than from the danger of executive influence.

176 Section 13B(3)(a) Constitution Act 1902 (NSW); s 7D(2) Legislative Assembly Act 1867 (Qld); and s 45 Constitution Act 1934 (SA), s 32 Constitution Act 1934 (Tas), and ss 49, 55(d) and 61 Constitution Act 1975 (Vic) seem to confine their disqualification to offices under their own Crown.

177 Section 36 Constitution Acts Amendment Act 1899 (WA); s 21 Northern Territory (Self-Government) Act 1978 (Cth).

178 Section 103(2) Electoral Act 1992 (ACT).

179 Section 2(1) Australia Acts 1986 (Cth & UK).

180 Also the view of the WA Law Reform Committee in its 1971 Report at para 35. On the scope of intergovernmental immunity, see Victoria v The Commonwealth (Industrial Relations Act case) (1976) 187 CLR 416; Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority (Henderson's case) (1997) 190 CLR 410.

181 See this view expressed by the WA Law Reform Committee in its 1971 Report at para 31. The Attorney-General of Victoria, Mr B L Murray, submitted the contrary view to the Qualifications
Exceptions

The categories of exception depend upon the width of the public office category. The most common exception is for Ministers of the Crown. Other exceptions are:

- a part-time member of the Commonwealth’s defence forces;
- a salaried member of a parliamentary committee or royal commission;
- an office required or allowed by statute to be held by a member; and
- a non-remunerated office under the Crown.

In Queensland, the position was amended in 1999 to allow members to accept appointment to an office of profit under the Crown provided they waive for all legal purposes the ‘profit’ element, that is, any right to receive any fee or reward which attaches to that office. The amendments also restore to members the capacity to accept an office under the Crown which confers no right to any fee. Provision is made, however, for members to accept reimbursement of reasonable expenses incurred for accommodation, meals, domestic air travel, taxi fares, public transport charges or motor vehicle hire. These amendments were sought by the executive to enable members to be appointed to a range of government bodies where their involvement would be beneficial for the community. It is important for the executive not to abuse this exception by making appointments for blatant political purposes rather than in the public interest.

Impact of a republic

Obviously, a minimalist transformation to a republic requires the description of ‘office of profit under the Crown’ to be altered. The Constitution Alteration (Establishment of Republic) Bill 1999 proposed to amend s 44(iv) to read

Committee, a Victorian Joint Select Committee; see Appendix A at 4-5 of the Interim Report from the Qualifications Committee upon the Law relating to Parliamentary Disqualification in respect of Conflicts of Interest, April 1973. His submission refers to Sir Bryan O’Loughlin whose seat in the House of Commons was vacated upon his appointment as Attorney-General of Victoria in the 19th century — this indicates that under the ‘Crown’ was given a wide scope.

Sections 59 and 53(1) Constitution Act 1975 (Vic); s 45(1a) Constitution Act 1934 (SA); s 13B(a) Constitution Act 1962 (NSW); s 32(2) Constitution Act 1934 (Tas); s 7A(4) Legislative Assembly Act 1867 (Qld).

Section 60 Constitution Act 1975 (Vic); s 36 Constitution Acts Amendment Act 1899 (WA).

Section 54 Constitution Act 1934 (SA).

Section 45(1) Constitution Act 1934 (SA); s 7A(4) Legislative Assembly Act 1867 (Qld).

Section 13B(3)(a) Constitution Act 1902 (NSW) but can receive attendance fees and reasonable expenses; see also s 7A(4) Legislative Assembly Act 1867 (Qld) which requires an Order in Council.

Parliamentary Members (Office of Profit) Amendment Act 1995 (Qld).

This reverses the effect of In re The Warrego Election Petition (Bowman v Hood) (1899) 9 QLJ 272 which held that members were unable to waive a right to a fee.
as follows:

(iv) holds any office of profit under the Executive Government of the Commonwealth, a State or a Territory, or any pension payable, during the pleasure of the Executive Government of the Commonwealth, out of any of the revenues of the Commonwealth. 190

This proposal, in substituting for ‘the Crown’ the ‘Executive Government of the Commonwealth, a State or a Territory’ in relation to the office of profit limb, reflects the interpretation given in Sykes v Cleary that the Crown refers to the Crown in right of the Commonwealth, the States and the Territories. 191 The disqualifying pensions remain confined to those payable by the Commonwealth. These amendments do not resolve, nor were they intended to resolve, the difficulties which arise under this paragraph. Who or what falls within ‘the Executive Government’ will be as elusive as ‘the Crown’.

Conclusion

It is clear that most State public officers are in a superior position to exercise their right to stand for election in their State Parliament compared with their counterparts at the Commonwealth and Territory level. The Commonwealth can learn from the State experience to fashion amendments to s 44(iv) which achieve parity here. No doubt the flexibility of State Constitutions compared with the rigidity of the Commonwealth Constitution has contributed to their divergent approaches.

Pensions

The disqualification of candidates and members on the ground of holding a pension payable during the pleasure of the Crown is also designed to avert executive influence. However, it would appear that those kinds of pension have not been granted for over a hundred years. Even during the Convention Debates in the 1890s, this ground was considered redundant and unnecessary. However, fear of the resurrection of these archaic pensions persuaded the delegates to include this ground of disqualification in s 44(iv).

Commonwealth

Section 44:(iv) Holds ... any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth.

This ground of disqualification is limited to pensions payable at the pleasure of the Crown, not those payable pursuant to statute 192 or those referred to during the

190 Clause 18 Sch 2.
192 1981 Senate Report para 5.75.
Constitutional Debates as ‘permanent pensions’. The Constitutional Commission in 1988 noted that ‘such pensions are now largely defunct’ as government pensions are now payable pursuant to statute. Apparently, this ground of disqualification was inserted out of an abundance of caution to insure against the ‘vast abuse’ which, according to Sir George Grey at the 1891 Sydney Constitutional Convention, had occurred in the United Kingdom in the not too distant past.

Similarly, the 1981 Senate Report concluded that this ground of disqualification was essentially redundant:

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.

It is therefore more pertinent to ask today whether the receipt of statutory pensions ought to be a ground of disqualification. Since their terms and benefits are controlled by statute, the only likelihood of a conflict of interest arising is when proposals are made for their amendment. In such a case, other requirements should operate to require the member to disclose his or her personal interest during the parliamentary debate.

The final paragraph of s 44(iv) exempts the receipt of a pension by ‘an officer or member of the Queen’s navy or army’. For reasons outlined above, these pensions are not payable by the Crown in right of the Commonwealth.

Impact of a republic

As noted earlier in relation to the office of profit ground in s 44(iv), the Constitution Alteration (Establishment of Republic) Bill 1999 also proposed to amend s 44(iv) in relation to this ground. Ideally, this limb of para (iv) should have been repealed as a redundant provision, but the minimalist nature of the proposed republican transition prevented that occurring. The substitution of ‘Executive Government of the Commonwealth’ alters in no degree the present scope of this ground. The disqualifying pensions remain confined to those payable by the Commonwealth.

194 At para 4.859 (c).
195 But the 1997 House of Representatives Report at para 3.34 referred to doubts expressed by Mr Geoffrey Lindell and Professor Blackshield and so concluded the meaning of the paragraph to be not absolutely clear.
197 At para 5.75.
chapter 3: Disqualifications: public offices and pensions

States and Territories

Four States disallow members from receiving Crown pensions, but in each case the pension must be one payable during the pleasure of the Crown\(^\text{198}\) and/or for a fixed term.\(^\text{199}\) Since there are few if any remaining Crown pensions of either type still payable, this disqualification has little effect today. No State or Territory disqualification arises from receiving Social Security pensions or those from State superannuation funds.

Two States prescribe exempted pensions: when retired from Crown employment;\(^\text{200}\) and pensions from other Crowns.\(^\text{201}\)

Conclusion

This ground of disqualification in Australia no longer serves any purpose. It should be repealed.

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198 Section 32(1) Constitution Act 1934 (Tas), if paid out of the 'Public Account'.
199 Section 13B Constitution Act 1902 (NSW); s 5(1) Officials in Parliament Act 1896 (Qld);
   s 45(1) Constitution Act 1934 (SA) looks wide, but s 46A exempts pensions paid to retired
   Crown employees.
200 Section 46A Constitution Act 1934 (SA).
201 Section 13B(3)(a) Constitution Act 1902 (NSW).
Further disqualifications; consequences of disqualification

The disqualification of government contractors has not attracted the same degree of concern in recent times as the disqualification of holders of offices of profit under the Crown. Yet it is a ground which is, both at the Commonwealth and State level, devoid of clear parameters and fraught with risk for members. At the Commonwealth level, fundamental difficulties arise in reading down s 44(v) to avoid disqualification in hard cases, while in some States, the position is practically incomprehensible because of the range of conflicting provisions. Fortunately, this state of affairs has not induced a rash of challenges.

In wading through these problems, one must focus on the purpose of this ground: namely, to avoid conflicts of interest created by executive preferment. Of course, that purpose links this ground clearly with that of holding a public office under the Crown.

Historical origins

The origin of this disqualification lies in the House of Commons (Disqualification) Act 1782 (Imp) (the 1782 Act).¹ Significantly, the objective of this legislation, according to

¹ 22 Geo III c 45 s 1.
its preamble, was ‘further securing the Freedom and Independence of Parliament’. 2
Section I comprised two limbs which disqualified those seeking election to the
House of Commons:

[First] any person who shall, directly or indirectly, himself, or by any person whatsoever
in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or
enjoy, in the whole or in part, any contract, agreement, or commission made or entered into
with, under, or from the Commissioners of His Majesty's Treasury, ... or with any other
person or persons whatsoever, for or on account of the public service, or ...'

[Second] ‘shall knowingly and willingly furnish or provide, in pursuance of any
such agreement, contract, or commission which he or they shall have made or
entered into as aforesaid, any money to be remitted abroad, or any wares or
merchandise to be used or employed in the service of the public ... shall be
incapable of being elected, or of sitting or voting as a Member of the House of
Commons, during the time that he shall execute, hold, or enjoy any such contract,
agreement, or commission, or any part or share thereof, or any benefit or
emolument arising from the same [emphasis added].

Section II, in disqualifying members of the House of Commons who after their election
engaged in government contracts, prescribed the equivalent of only the first limb of s I:

if any person, being a member of the House of Commons, shall, directly or indirectly,
himself, or by any other person whatsoever in trust for him or for his use or benefit,
or on his account, enter into, accept of, agree of, undertake, or execute in the whole or
in part, any such contract, agreement, or commission as aforesaid; or if any person,
being a member of the House of Commons, and having already entered into such
contract, agreement, or commission, or part or share of any such contract,
agreement, or commission, by himself or by any other person whatsoever in trust
for him, or for his use or benefit, or upon his account, shall, after the
commencement of the next session of Parliament continue to hold, execute, or
enjoy the same or any part thereof, — the seat of every such person in the House
of Commons shall be and is hereby declared to be void [emphasis added].

In 1801, the House of Commons (Disqualifications) Act3 was enacted to extend the
1782 Act to Ireland. Then in 1931 the House of Commons Disqualification (Declaration
of Law) Act4 was enacted to resolve doubts which had arisen over the precise scope of

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2 Earlier Acts prohibited members of the House of Commons from sitting or voting while
occupying the offices of farmers of excise (5 Will & Mary, c.7, s 57) and when acting as
commissioners of customs (12 & 13 Will III, c 10, ss LXXXIX-XCII); see ‘Members of
Parliament and Government Contracts’ (1948) 17 Journal of the Society of Clerks at the Table
in Empire Parliaments 289, 289-290.
3 41 Geo III c 52.
4 21 Geo V c 13.
the 1782 and 1801 Acts. The effect of this 1931 Act is considered below. In the end, this ground of disqualification for both candidates and members was repealed in the United Kingdom in 1957 on the basis that it was redundant — apparently there had been no abuse by members involving government contracts for over 100 years. But if abuse were to arise in the future, the House would discipline the member concerned.

In Australia, certain States retain this ground of disqualification in terms similar to s 1 of the 1782 Act. On the other hand, the Commonwealth provision in s 44(v) bears little resemblance to its English ancestor. A comparison of the two provisions helps to identify the peculiar requirements of s 44(v) which are examined below. The most obvious difference is the nature of the connection the candidate or member must have with the government contract. Under s 44(v), the connection is 'any direct or indirect pecuniary interest' in the government contract. This seems wider than 'undertake, execute, hold, or enjoy' a government contract under s 1 of the 1782 Act. It is arguable that no privity of contract is required under s 44(v) although it was probably required in most cases under the 1782 Act. Another apparent difference is that the contract under s 44(v) must be with 'the Public Service of the Commonwealth', whereas under s 1 of the 1782 Act the contract had to be with any person 'for or on account of the public service'.

Commonwealth

s 44(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.

The only judicial interpretation of s 44(v) is the judgment of Barwick CJ in In re

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5 House of Commons (Disqualification) Act 1957 (UK).
6 See the Report from the House of Commons Select Committee on Members' Interests (Declaration) 1969 (the Strauss Report) at para 14. Also see UK Attorney-General in the House of Commons Parliamentary Debates (5th Series 1956-57, vol 562, cols 1282-3) where he submitted to the Select Committee that the disqualification of government contractors was 'in their present form, indefensible; their effect in law is obscure; and their effect in practice is both anomalous and absurd'.
7 New South Wales, Queensland, Tasmania and Victoria.
8 In contrast, G Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution' (1975) 49 ALJ 464 at 466 suggests under s 44(v) the candidate or member must be party to the contract. His reliance on Miles v McIlwraith (1883) 8 AC 120 (PC) and Proudfoot v Proctor (1887) 8 NSWR 459 ignores the difference between s 44(v), which only requires an interest in a contract with the public service, and the provisions those cases were concerned with, which more clearly require privity of contract with the member.
Webster\(^9\) sitting alone\(^{10}\) as the Court of Disputed Returns.

**In re Webster**

The issue referred to the Court of Disputed Returns by the Senate\(^{11}\) was whether Senator James Webster (Country Party, Vic) was disqualified under s 44(v) at the time of his election to the Senate in May 1974, and subsequently, for having a pecuniary interest in agreements between his family company, J J Webster Pty Ltd, and two government departments: the Postmaster-General’s Department and the Department of Housing and Construction. The Senator was one of nine shareholders in, as well as the managing director, secretary, and manager of, the company. His only remuneration was a fixed salary as manager, which was unrelated to the company’s turnover or profits. The company tendered for contracts to supply timber to those government departments as and when specific orders were placed with it.

Barwick CJ accepted that the company’s tenders constituted a standing offer but that no agreement arose with the two departments until an order was placed with the company.\(^{12}\) Upon receiving an order to supply, an executory contract existed until the timber was supplied. In these circumstances, his Honour concluded that no disqualification arose because s 44(v) required a contract which was of a continuing kind and exposed the member to Crown influence. Therefore, according to **In re Webster**, the nature of the government contract is critical for the operation of s 44(v).

**Nature of government contract**

The first issue is whether *any* contract or agreement with the Commonwealth Public Service may give rise to disqualification. Common sense indicates that this cannot have been intended — otherwise, a member would be disqualified for purchasing a copy of the Constitution from the government printer (assuming this remains part of the Commonwealth Public Service). Yet s 44(v) does not expressly exempt a range of contracts which is a common feature of State constitutions,\(^{13}\) nor is the subject matter of the contract expressly confined to any particular categories.

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\(^{9}\) (1975) 132 CLR 270.

\(^{10}\) The Chief Justice can be criticised for refusing an application to refer the matter, one involving the interpretation of the Constitution, to the Full Court — a course later adopted by Mason CJ in **Sykes v Cleary** (1992) 176 CLR 77.

\(^{11}\) Pursuant to s 184 **Commonwealth Electoral Act 1918** (now s 376).

\(^{12}\) See (1975) 132 CLR 270 at 283-5.

\(^{13}\) See for example s 13(4) **Constitution Act 1902** (NSW).
Provision of goods and services?

It is not entirely surprising to find in Quick and Garran an interpretation of s 44(v) which confines it to contracts where the person must supply goods or provide a service to the Commonwealth Government. They, of course, point to the most obvious contractual arrangement in which members may be tempted to indulge for personal profit. Indeed, as noted earlier, the disqualification of government contractors in the United Kingdom was confined in 1932 to contracts where money or goods were being supplied for the service of the Crown. As will be seen, Queensland has similarly confined this ground of disqualification.

Although the contracts at issue in Webster's case were for the supply of timber to the Crown, the Chief Justice did not suggest that the paragraph was inapplicable where the goods are supplied or the service performed by the Commonwealth to the person in question. However, in that situation, it would be necessary to exclude those contracts where the Crown supplies goods and services on the same terms and conditions as they are supplied to the public. In such cases the risk of a conflict of interest arising is minimal. Indicative of the ill-defined parameters of this ground of disqualification, the Constitutional Commission noted that some uncertainty exists as to whether such contracts may incur disqualification.

To avoid the absurdity of disqualification arising for entering into those common transactions with Commonwealth departments, it is clearly necessary to confine the nature of the government contract required for disqualification under s 44(v). As Barwick CJ recognised in In re Webster, this can be achieved by resorting to the purpose of the ground. However, even on this issue there is debate. Two views, one wider than the other, have been advocated.

Narrow view

Barwick CJ in In re Webster relied on the preamble to the 1782 Act and judicial interpretation of ss I and II thereof to confine the purpose of s 44(v) to protecting the independence of the Parliament from Executive or Crown influence. The Chief

15 See G Evans, above note 8 at 467-8, who suggested that the agreements with the public service within s 44(v) be of a 'peculiarly public service character'; that is, be for the provision of goods and services to the Commonwealth.
16 House of Commons (Disqualification) Act 1931 (21 Geo V c 13).
18 In particular: Re Samuel [1913] AC 514; Royse v Birley (1869) LR 4 CP 296; Tranton v Astor (1917) 33 TLR 383.
19 Quick and Garran, above note 14 p 493, appear to endorse this purpose: 'The reason for the disqualification of Government contractors is that they are supposed to be liable to the influence of their employers.'
members of parliament: law and ethics

Justice referred to the opinion of Viscount Haldane LC in *In re Samuel* for the purpose behind the 1782 Act:

This Act of Parliament itself declares that it was made to preserve the freedom and independence of Parliament; and the mischief guarded against is the sapping of that freedom and independence by members being admitted to profitable contracts.20

Accordingly, in his view, the contract had to be of a continuing or executory nature in order for the Crown to exert influence over the member:

[An] agreement to fall within the scope of s 44(v) must have a currency for a substantial period of time, and must be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs by the very existence of the agreement, or by something done or refrained from being done in relation to the contract or to its subject matter, whether or not that act or omission is within the terms of the contract.21

On the facts, the Chief Justice concluded that all the agreements between the company and the Commonwealth departments were not of a continuing nature but were 'really casual and transient'. The company's tenders only resulted in binding contracts when a specific order was placed with the company for the supply of timber. These contracts were executed as soon as the timber was supplied. Further, any orders resulted from the usual public tender process conducted by government departments. Hence, his Honour concluded that it was not 'conceivable' that the Executive would be in a position to influence Senator Webster in relation to his parliamentary affairs.22 With respect, that conclusion is debatable. Nor are the English decisions on the 1782 Act relied upon, *Royse v Birley*23 and *Tranton v Astor*,24 sufficiently authoritative to confine s 44(v) to executory contracts.

In *Royse v Birley*, the election of a member to the House of Commons was

20 [1913] AC 514 at 524.
21 (1975) 132 CLR 270 at 280. Gareth Evans, above note 8 at 467 had earlier suggested that s 44(v) be confined to contracts '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'.
22 [1975] 132 CLR 270 at 286. A similar conclusion was reached in the 1981 Report of the Select Committee of the Legislative Council of Montserrat on a Minister. The Committee interpreted the disqualification of a member who becomes a party to any government contract by s 10(3)(e) of the Constitution and Elections Ordinance (Cap 153 Revised Laws of Montserrat) as requiring a long standing relationship in order for a member to have the status of a 'government contractor' (pp 9-10 of the Report). A single contract for the supply of washing machines to a government hospital was insufficient to confer that status.
23 (1869) LR 4 CP 296.
24 (1917) 33 TLR 383.
challenged on the basis of two different contracts entered into by his firm as India-rubber manufacturers. The first was a contract for the supply of goods to the Secretary of State for India in Council which was performed prior to the election, but payment for which remained outstanding. Willes J (with whom Montague Smith J25 and Brett J26 agreed) relied on both the object and wording27 of the Act to hold that it did not apply to fully executed contracts where all that remained was a mere creditor-debtor relationship:

I think that the enactment refers to the case of a man having a contract under which he is to derive some future benefit from dealing with the government, in respect of which they might control him; as, for instance, by directing their officers not to look too closely to the sort of goods he sent in, or the like.28

Here, the member 'had ceased to be a person holding or enjoying a contract within the meaning of that statute, and had been converted into a mere creditor of the government'.29 A further factor was to avoid the injustice of disqualification arising simply as a result of the failure of the Government to make payment when due.

The second contract involved the supply of three dozen India-rubber chambers to the Broadmoor Asylum, the order for which was accepted by the member's firm prior to the election but with delivery occurring after his election. Although there was an executory contract at the date of his election, the Court held that no disqualification arose because the firm was unaware that they were dealing with the Government.30

Royse v Birley was followed in Tranton v Astor31 where Tranton sought £29,000 in penalties from Major Waldorf Astor for sitting as a member of the House of Commons when disqualified. Major Astor was the sole proprietor of the Observer newspaper which had published advertisements on behalf of the British Government. Low J held that no disqualification arose for two reasons: first, the contracts were not of the type within the Act — they were executed on the insertion of the advertisements for which only payment by the Government was required; and secondly, there was no privity of contract between the Government and the Observer because all contracts were made with and through the Caxton Advertising Agency. His Honour expressly adopted the reasoning of the Court in Royse v Birley in holding that the acceptance by a newspaper of a government advertisement:

25 (1869) LR 4 CP 296 at 317: 'only to contracts of a continuing nature, such as contracts for the building of works, and contracts for a recurring supply of goods'; but his Honour acknowledged that a contract for a single supply of goods might fall within the section if it was in an executory state (that is, the goods had still to be supplied).

26 At 321.

27 At 311: 'disqualification is limited to the time during which the person contracting should "execute, hold, or enjoy any such contract, agreement, or commission".'

28 At 311-312.

29 At 310-311.

30 Per Willes J at 315-6; per Montague Smith J at 318; per Brett J at 322.

31 (1917) 33 TLR 383.
is not a contract or agreement within the meaning of this legislation at all, and such casual or transient transactions are not the kind of contracts covered by these statutes, but that what are meant to be covered are contracts of a more permanent or continuing and lasting character, the holding and enjoying of which might improperly influence the action both of legislators and the Government.32

How far do these cases really apply to s 44(v)? The 1782 Act referred to 'holding or enjoying' government contracts. That wording suggests contracts of a continuing or executory nature, whereas s 44(v), in requiring a direct or indirect pecuniary interest in an agreement with the Public Service, focuses on the existence of an interest rather than the agreement as such. Further, Willes J in Royse v Birley referred to a 'mere' creditor relationship and to a contract for the delivery of the goods where payment was due 'on the spot'.33 There are many stages before these where a contract may be partly executed and the opportunity for executive influence remains.

Certainly the approach taken by Barwick CJ in In re Webster alleviates the possibility of absurd applications of s 44(v).34 But even if the purpose of the disqualification is confined to averting executive influence of members of Parliament, executed contracts are not immune from that danger. In this respect, the Chief Justice's technical examination of the status of the contractual relationship contrasts with the cursory but critical conclusion that these contractual arrangements were unlikely to allow the executive to influence the senator. Royse v Birley raises the interesting question of mens rea in holding that no disqualification was incurred as the member's firm was unaware that it was dealing with a government institution. There appears little scope for incorporating mens rea in s 44(v).

The 1981 Senate Report acknowledged the need to read down s 44(v) to avoid the absurdities which a literal interpretation would cause. While the Committee agreed with the restrictive approach taken in the Webster case, it was concerned that the paragraph might still apply to innocent transactions. However, it is unclear whether the Committee accepted Barwick CJ's view that the paragraph is not concerned with the avoidance of conflicts of interest. One of its conclusions seems inconsistent with his Honour's approach:

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 [emphasis added].35

32 At 386.
33 (1869) LR 4 CP 296 at 312.
34 Gareth Evans, above note 8 at 466 suggests that 'considerations of elementary justice' might persuade an Australian court to follow these cases.
35 At para 7.18.
A wider view, however, can be taken of the purpose of this ground of disqualification.

**Wide view**

It has been suggested that the wording of s 44(v) is deliberately different from the 1782 Act in order to indicate a wider purpose. In disqualifying those who 'execute, hold or enjoy' any contract with the Crown for or on account of the public service, the 1782 Act was designed to protect members of Parliament from Crown or Executive influence. The expression 'pecuniary interest' in s 44(v), it is suggested, indicates that the drafters of the Constitution were concerned with members abusing their positions for personal advantage rather than simply with the danger of executive influence.

Before Federation, this wider problem of a personal conflict of interest was addressed at the local government level by colonial legislation which referred to 'pecuniary interest'. Avoidance of a conflict of interest was also the purpose of Mr Speaker Abbott's ruling in 1811 which precluded members of the House of Commons from voting on matters in which they had a direct pecuniary interest.

Further, the 1896 Report of the House of Commons Select Committee on Members of Parliament (Personal Interest) identified the potential for a conflict of interest arising between a member's personal interests and his or her public duty. This report may have been available to the drafters of the Constitution, as references to this wider concern of conflict of interest appear in the Convention Debates.

However, Barwick CJ in *In re Webster* refused to interpret s 44(v) as having this wider purpose; in his view, the paragraph was inserted solely to protect the independence of Parliament. In particular, he rejected the relevance of the colonial local government legislation on the ground that 'the obligations of a member of Parliament cannot be compared to the duties of local government or statutory officials. The member is in a significantly different situation.' With respect, this is not entirely so; nor does it refute a wider purpose for s 44(v). His Honour's readiness to allow executed contracts on the basis that they posed no vehicle for executive

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37 As above at 94 and following: the evolution of s 44(v) through the Convention Debates is outlined.
38 For example s 173 *Local Government Act 1890* (Vic): 'No councillor shall vote upon or take part in the discussion of any matter in or before the council in which such councillor has directly or indirectly by himself or his partners any pecuniary interest...'. See J D Hammond, above note 36 at 94.
39 HC Debates (1811) 20, cc 1001-1012.
40 See the Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1023.
41 (1975) 132 CLR 270 at 278-279.
42 At 279.
influence has also been questioned. Professor Hanks\(^4^3\) has argued that a series of short term contracts such as those in the *Webster* case might still pose a threat to Parliament's independence, as well as give rise to conflicts of interest within the wider view of the paragraph.

The Chief Justice maintained the narrow purpose of s 44(v) despite the concerns expressed in the Convention Debates of members of colonial legislatures engaging in fraudulent activity behind the shield of private companies.\(^4^4\) For instance, Isaac Isaacs observed at the 1897 Sydney Convention Debates: 'The object of [cl 47] is to prevent individuals making personal profit out of their public positions.'\(^4^5\) Sir John Downer similarly remarked, 'I think it inexpedient to allow members of Parliament to have any contractual relations which might suggest to any one that their position might be impure.'\(^4^6\)

These comments suggest that the purpose of s 44(v) was to prevent members from benefiting from government contracts, rather than simply to protect the independence of Parliament.\(^4^7\) This view is supported by the terminology of 'pecuniary interest', which focuses on the benefit received by the member rather than on the benefit to be derived by the executive. For these reasons, the purpose of s 44(v) appears to be the avoidance of conflicts of interest between the parliamentary obligations of members and their private interests. Indeed, this purpose is simply a natural extension of the narrow view. Both views are designed to protect the independence of Parliament: the narrow view protects against executive influence, whereas the wide view expands the protection from all other sources of illegitimate influence.

**A suggested test**

If the purpose of s 44(v) is to prevent members from using their positions to obtain, or appear to obtain, pecuniary advantage from government contracts (that is, if the wide view is correct), then it is that view which must confine the nature of the agreement. The relevant inquiry is not to define the agreement in terms of what is sold and to whom — rather, the test is:

Does the agreement, irrespective of its subject matter, create the impression


\(^4^5\) Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1023.

\(^4^6\) As above at 1025.

\(^4^7\) This wider view was taken of s 7 of *Representation of the People Act 1951* (India) by the Supreme Court of India in *Chatturbhuj Vithaldas Jasani v Moreshawar Parasram* AIR 1954 SC 236 and *Satyanatham v Subramanyam* AIR 1965 SC 459. Section 7 resembles s 44(v) as it refers to 'has any share, or interest in a contract for ...': see V K Agarwal, 'Government Contract — An Election Disqualification!' (1971) 13 *Journal of the Indian Law Institute* 497 at 502-3.
that the member has allowed his or her personal interests to benefit from the government contract to such an extent that it impairs public confidence in the member’s capacity to act solely in the public interest? 48

In applying this suggested test, it ought to be kept in mind that the circumstances of the contractural interest, including the impact on public confidence, must warrant the penalty of disqualification from Parliament. It must not be forgotten that the other equally elusive element of s 44(v), a ‘direct or indirect pecuniary interest’, is required in this assessment.

**Direct or indirect pecuniary interest**

Under s 44(v), the pecuniary interest in the government contract may be direct or indirect. Such an interest exists in all of those circumstances mentioned in ss I and II of the 1782 Act where a member directly or indirectly undertakes, executes, holds or enjoys a government contract. These circumstances require the member to be privy to the contract or be the *cestui que* trust in relation to the contract. In each of these situations the member undoubtedly has a pecuniary interest in the contract. What is unclear is whether in other circumstances a member may have directly or indirectly a pecuniary interest in a contract. The answer to that inquiry depends on whether ‘pecuniary interest’ is accorded its technical legal meaning or whether it looks to the practical financial effect of the contract on the member.

Although Barwick CJ in *In re Webster* seemed to adopt a technical legal meaning (see under ‘Shareholders’ below), there are at least two indications in s 44(v) that the appropriate test is the broader financial effect: the reference to ‘indirect’ pecuniary interest, and the exclusion of shareholders in companies of more than 25 members. Further support can be found in the parliamentary rules concerned with the disclosure of interests by members. Probably the earliest such rule is that from 1695 whereby a member cannot vote in the House of Commons on a matter in which the member has a direct pecuniary interest. The nature of this interest was later codified in 1811 by the ruling of Mr Speaker Abbott which specified that the interest had to belong to the member personally and not be in common with the general public nor be on a matter of state policy. While this ruling restricted the obligation of disclosure, it did not do so by any technical legal interpretation of a direct pecuniary interest. Further, the Riordan Report defined ‘pecuniary interest’ 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’. It is clear that pecuniary interest is such an exhaustive term as to exclude very little from its parameters. 49

48 The test proposed above by the Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (the 1981 Senate Report) bears a resemblance to that suggested here although it may be an attempt to confine s 44(v) to a narrower view.

A further factor is the need to give effect to the purpose of the disqualification. Artificial arrangements to avoid disqualification could not have been intended to escape the effect of s 44(v). Whether its purpose is only to prevent executive influence of members, or whether it is that wider purpose of avoiding conflicts of interest by using one’s position to profit from government contracts, in neither case could it have been intended to allow avoidance of disqualification by artificial arrangements based upon a narrow technical interpretation of 'pecuniary interest'.

While the drafters of s 44(v) may have borrowed the terminology of pecuniary interest from local government legislation, care is required in relying on its case law. Disqualification of councillors from discussing and/or voting on matters was imposed for having a 'pecuniary interest' in respect of 'a matter' as well as a contract. Proof of a pecuniary interest in a matter is easier to establish than a pecuniary interest in a contract — although of course the latter interest will satisfy the former, as occurred in *The Attorney-General v The Mayor of Emerald-Hill*. In that case the relevant provision was s 122 of the *Boroughs Statute 1869* (No 359) which provided that 'No councillor shall vote upon or take part in the discussion of any matter in or before the council in which such councillor shall directly or indirectly, by himself or his partners, have any pecuniary interest' (emphasis added). Several councillors voted in favour of a resolution that the Council contract with a gas company of which they were shareholders or directors for lighting the public lamps of Melbourne. On appeal the Court affirmed that the resolution was vitiated by the incapacity of those councillors who as shareholders and directors in the company had a pecuniary interest in the contract.

Some assistance may be gathered from statutory provisions which define the nature of an indirect pecuniary interest. For instance, s 95 of the *Local Government Act 1972* (UK) deems a member of a local authority to have an indirect pecuniary interest in a contract or 'other matter' if:

(a) he or any nominee of his is a member of a company or other body with which the contract was made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration.

(b) he is a partner, or is in the employment, of a person with whom the contract was made or is proposed to be made or who has a direct pecuniary interest in the other matter under consideration.

Notice that this provision regards as sufficient for an indirect interest: (a) membership of a company which has contracted; and (b) employment with a concern which has contracted.

Precisely what constitutes a direct and indirect pecuniary interest in a contract for the purposes of s 44(v)? The following is offered as a guide: a direct pecuniary

50 (1873) 4 *Australian Jurist Reports* 135 (Vic).
51 See the English authorities on comparable provisions: *Lapish v Braithwaite* [1926] AC 275; *England v Inglis* [1920] 2 KB 636; *Brown v DPP* [1956] 2 QB 369; *Rands v Oldroyd* [1959] 1 QB 204.
interest in a contract arises in those cases where the member is a party to the contract and thereby has assumed liability in respect of the performance of the contract. An indirect interest arises where the member although not privy to the contract is entitled to some benefit from the contract.

A clear example of the latter is where A agrees to supply a government department with an item of furniture produced by C. Although C has no direct interest in that contract since A and the department have agreed that a purchase will be made from C, C has an indirect interest in the contract.

In Chapter 10, there is a suggestion that an indirect pecuniary interest may be found to exist where the member's spouse or family possesses or receives a direct pecuniary benefit. However, that suggestion is made in relation to the obligation to declare direct and indirect pecuniary interests to a register of interests or on an ad hoc basis. Although that view may be appropriate in relation to those mechanisms of disclosure, it would impose an intolerable burden on candidates and members if their qualification to be elected was dependent on the interests of their spouses or family of which they may have little knowledge.

Finally, it should be remembered that a pecuniary interest need not be beneficial — it may be 'a pecuniary advantage or disadvantage'.

Shareholders

Section 44(v) exempts from disqualification members of an incorporated company consisting of more than 25 persons. Agreements entered into by such companies are deemed therefore to have no impact on the qualification of their corporate members. Despite clarifying their position, it leaves members of companies of 25 or fewer members in an uncertain position. The exclusion of those who are shareholders in a company of more than 25 members infers that those who are shareholders in companies of 25 or fewer members have a direct or indirect pecuniary interest. The phrase used in s 44(v) to introduce the exemption — 'otherwise than' — supports that inference. However, such an inference cannot be conclusive.

The origin of this exemption also lies in the 1782 Act which by s III exempted contracts entered into by 'any incorporated trading company in its corporate capacity, [or] any company now existing and consisting of more than ten persons'. Note that the specification of a minimum number of members only applied to companies then existing, whereas all incorporated trading companies were exempted. This differs from the position in Australia where the

52 Brown v Director of Public Prosecutions [1956] 2 QB 369 per Lord Goddard CJ at 375. Councillors who were tenants of council houses voted on a matter relating to the conditions of their tenancies in a way that was to their pecuniary disadvantage. Hence they were obliged to disclose their pecuniary interest and abstain from participating in the Council's proceedings under s 76 of the Local Government Act 1933 (UK).

53 This view is supported by C W Williams (ed), Rogers on Elections Vol II (20th ed) London 1928 p 23.
exemption only arises in respect of companies comprising more than a prescribed number of members. The exemption in s III of the 1782 Act sits oddly with the requirement in ss I and II of that Act for the candidate or member to be privy to the government contract. The most obvious explanation is that the view was taken in 1782 that the interest which the candidate or member has in the contracting company as a shareholder was sufficient to incur disqualification under ss I and II.  

The limit imposed on this exemption by s 44(v) to incorporated companies comprising more than 25 members was intended to ensure that only legitimate companies were exempted and not those which were in reality 'one man companies'.

Whether a shareholder has the necessary pecuniary interest (direct or indirect) in a company was also considered by Barwick CJ in In re Webster. Although strictly unnecessary for the decision, the Chief Justice considered whether Senator Webster as one of nine shareholders, as well as being the managing director, a director and manager of the family company, had a pecuniary interest in the relevant agreements, assuming they were of the type which fell within the paragraph. Consistent with his strict interpretation of the other aspects of s 44(v), his Honour adopted the common law position on the rights of shareholders: they possess no legal or equitable interest in any of the company's assets, including its contracts. Accordingly, his Honour concluded that 'a person who is no more than a shareholder in a company does not, by reason of that circumstance alone, have a pecuniary interest in any agreement the company may have with the Public Service'.

In his view, the purpose of the exception in s 44(v) was to exclude members who are shareholders in large 'public' companies from the disqualification, and 'to ensure that shareholders in a company of small membership are not included in the exception'. It did not indicate that a shareholder in a small company has the necessary pecuniary interest. Some other factor is required in order to establish such an interest in the company's contract. His Honour concluded in that case that there were no other circumstances which conferred on Senator Webster a pecuniary interest in those agreements. Being one of nine shareholders, and holding various positions with the company, were insufficient to give rise to such an interest.


55 See Isaac Isaacs at the Sydney Constitutional Convention; Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1023. Note that the benchmark of 25 members was inserted to cover recent legislation in Victoria which allowed 'proprietary companies' with a maximum of 25 members — the limit in the other States was 20.

56 (1975) 132 CLR 270.

57 At 287; cites Macaura v Northern Assurance Co per Lord Buckmaster LC [1925] AC 619 at 626.

58 At 287.

59 At 287.
Although his Honour's approach is not untenable, it does, with respect, ignore the wider picture. It is clear that shareholders possess no legal or equitable interest in the assets of the company. Their legal rights are confined to the right to a dividend if declared and the right to participate in the distribution of the assets of the company (if any remain) upon a dissolution of the company. But his Honour gave no consideration to the possibility of an 'indirect' interest or benefit which the member may derive from the contract. As for the exclusion of shareholders in companies of over 25 members, this most likely indicates that the nature of a shareholding interest is sufficient to constitute a direct or indirect pecuniary interest in those companies' contracts. This would appear to have been the assumption of the participants in the Constitutional Convention debates. Their concern was to prevent public deception by those who contrive to avoid the disqualification of government contractors by incorporating their businesses in order to continue to contract with the government. Indeed, an amendment was proposed to tighten the exemption by prescribing a limit of 1/20 of the share capital — otherwise one could establish a company of more than 25 members but retain the bulk of the share capital and still contract with the government. This proposal was defeated because of the impossibility of creating a watertight exemption. During the debate, even the level of control over the management of the company was raised, since a large shareholding does not always mean a role in management.

Given the purpose of this ground of disqualification, which is to avoid conflicts of interest, the preferable position in relation to shareholders of companies contracting with the executive branch is to interpret the shareholder exemption as indicating that shareholders in companies of less than 25 members are deemed to have an indirect interest in such contracts and hence are disqualified. However, no disqualification ought to be imposed on those who are employees in those companies.

60 See Macaura v Northern Assurance Co [1925] AC 619 at 626 per Lord Buckmaster LC, at 630 per Lord Sumner; followed in Commissioner of Stamp Duties (NSW) v Millar (1932) 48 CLR 618 at 632 per Rich, Dixon & McTiernan JJ; and in Suli v Suli (No 2) (1975) 6 ALR 561 at 575 per Jenkyn J.

61 See cases cited above.

62 See P J Hanks, 'Parliamentarians and the Electorate' in Gareth Evans (ed), above note 43, pp 197-8. Hanks questions the view expressed by Barwick CJ that a shareholder in a company does not have, per se, a pecuniary interest in contracts engaged in by the company. He points out that it is sufficient that the interest is an 'indirect' interest.

63 Gareth Evans, above note 8 at 469, is more dogmatic on this issue, asserting that 'there is no room for the argument that owning shares is, as such, insufficient to amount to having a pecuniary interest ...'. He suggests the interest of a debenture holder and certainly that of an employee would be too remote.

64 See the Official Record of the Debates of the Australasian Federal Convention. (Second Session) Sydney 1897 at 1022-1027; especially the comments of Mr Kingston at 1024-1025.

65 Proposed by Mr Glynn (SA) at the 1897 Sydney Constitutional Convention: Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1022.

66 Raised by Fraser at the 1897 Sydney Constitutional Convention: Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1026.
The Public Service

Section 44(v) requires the agreement to be with 'the Public Service of the Commonwealth'. Agreements with other governments are not covered by this disqualification, although disqualification may still arise where the agreement involves an office of profit under the Crown in right of a State (s 44(iv)), or involves payment for services rendered in the Commonwealth Parliament for a State (s 45(iii)).

The 'Public Service of the Commonwealth' clearly includes all Commonwealth government departments and their officers. There is the issue whether it also includes Commonwealth statutory authorities and instrumentalities as well as other entities related to the Commonwealth or within the shield of the Crown. The distinction drawn between the 'Crown' in para (iv) and the 'Public Service of the Commonwealth' in para (v) suggests that the latter is not as wide an expression as the Crown. Gareth Evans has suggested a restricted view of the 'Public Service' to its departments and authorised officers. Reinforcing this view is the comparison between para (v) and the expression used in the 1782 Act: 'for or on account of the public service'. As this expression was interpreted in In re Samuel to mean 'for or on account of the any service of the Crown anywhere', it was clearly not confined to the departments of state but would include all entities under the Crown. It is submitted that this is unlikely to be the position under s 44(v) which appears confined to the Departments of State, collectively recognised by the Public Service Act 1922 (Cth) as the Australian Public Service. According to s 10 of that Act, the Australian Public Service is constituted by the Secretaries, Senior Executive Service officers, other officers and employees of the Departments of State.

Invalid contracts

As a matter of principle, in the absence of any judicial indication, it would seem that no disqualification arises unless there is a valid agreement or contract. An invalid or unenforceable contract confers no benefit to which a member is legally entitled. On the other hand, where a member of the Commonwealth Parliament actually receives a benefit under an invalid contract, the receipt of that benefit will be caught by either limb of s 45(iii) of the Constitution if it is received in return for a service provided to the Commonwealth or provided for anyone else within the Parliament.

Reform proposals

It is evident from the above analysis that s 44(v) should not be left in its current form. Although the 1782 Act may have been narrower in scope, at least in requiring

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67 G Evans, above note 8 at 465-6.
68 [1913] AC 514 at 525.
privity of contract with the member, the comments of Smith J in *Royse v Birley* in 1869 seem just as apposite today in relation to s 44(v):

> I cannot help thinking that it would be very desirable that this Act should be revised, because it certainly appears to me to be totally inapplicable to the present state of commerce, and that it really provides a pitfall into which men who wish to walk uprightly and according to law may unwittingly tumble.69

There appear to be three options. The first is to amend s 44(v) to clarify its scope. The second is to replace it with a provision which allows the Commonwealth Parliament to prescribe in ordinary legislation those contractual relationships which warrant disqualification. The final option is simply to repeal this ground of disqualification altogether. Each of these options is considered in turn.

(i) amend s 44(v)

This option provides the opportunity to clarify, along the lines already discussed, the uncertainties as to the scope of the paragraph, in particular:

- the nature of the agreement;
- the nature of the pecuniary interest; and
- the position of shareholders.

Amending s 44(v) also provides the opportunity to confer on each House the power to override disqualification in appropriate cases.70

(ii) replace s 44(v)

The recommendation of the 1981 Senate Report,71 which appears to have been followed by the Constitutional Commission,72 was to retain this basic ground of disqualification but to vest in the Parliament the power to prescribe more carefully the circumstances in which disqualification arises.

Consequently, the Senate Report recommended the repeal of ss 44(v) and 45(iii) and conferral upon the Commonwealth Parliament of power to 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;

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69 (1869) LR 4 CP 297 at 319.
70 These points were canvassed in the submissions of the Solicitor-General and of the Chief Parliamentary Counsel to the 1972-3 Victorian Joint Select Qualifications Committee, *Interim Report upon the Law relating to Parliamentary Disqualification in respect of Conflicts of Interest*, April 1973, Appendix A and B.
71 At para 7.37.
(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.

Significantly, the Senate Report\textsuperscript{73} affirmed the need to retain this ground of disqualification to provide a mechanism for avoiding actual or apparent conflicts of interest. They saw this as helping to restore the confidence of the electorate in the integrity of members. For these reasons, they disagreed with the repeal of this disqualification in the United Kingdom.

Also, the Senate Report\textsuperscript{74} accepted the list of exceptions originally compiled by Gareth Evans and adopted by the Riordan Report,\textsuperscript{75} but added two of its own ((h) and (i)):

- (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.
- (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.

The Constitutional Commission arrived at a similar conclusion to that of the Senate Report. It recommended the retention of this disqualification subject to a power in the Parliament to enact laws 'to disqualify members of the Parliament who hold interests which might constitute a material risk of conflict between their public duty and private interests'.\textsuperscript{76} The Final Report\textsuperscript{77} noted the

\textsuperscript{73} At para 7.27.
\textsuperscript{74} At para 7.40.
\textsuperscript{75} At 14.
\textsuperscript{77} At para 4.878.
uncertainty as to the application of this disqualification to short term agreements, indirect interests of a shareholder, and contracts which are often entered into between the Crown and the public on the same terms as those made with the public.

(iii) repeal s 44(v)

As noted earlier, the similar ground of disqualification for members of the House of Commons in the United Kingdom was repealed in 1957. The basis for this decision was the apparent lack of any abuse on the part of members.

Support in Australia for the outright repeal of this disqualification is found in the 1971 Report of the Western Australia Law Reform Committee (Project No 14). The Committee's main reason was the difficulty in drafting this ground of disqualification. Alternative mechanisms were cited which could be used to deal with members abusing their position, such as contempt and the Criminal Code. Similar views were expressed by the Attorney-General of Victoria, Mr B L Murray, in his submission to the Victorian Joint Select Committee on Qualifications.

Conclusion on the Commonwealth position

Despite the attractiveness of repealing this ground of disqualification to avoid the difficulties of defining its precise scope, it is needed. The capacity of the executive to influence members of parliament and the temptation to do so should never be underestimated. To repeal this ground would remove a safeguard of parliamentary independence which is already sorely tested by the executive's stranglehold on the House of Representatives. The fact that few controversies have emerged under this paragraph at the Commonwealth level may have been due in part to the very existence of s 44(v) — it is difficult to know what the position would have been if this ground were never included. Nevertheless, given the potential for quite serious conflicts of interest to arise from agreements with the executive, disqualification is clearly warranted.

So, in choosing between the remaining two options of amending or replacing s 44(v), the latter provides a flexibility which in theory at least allows the House concerned to deliver the most appropriate response. The risk is that political considerations might distort that process.

States and Territories

Only in four States (NSW, Queensland, Tasmania and Victoria) are government contractors disqualified from parliament. Western Australia repealed this ground of disqualification in 1984. South Australia replaced a similar ground of

79 See Appendix A at 4-5 of the Interim Report from the Qualifications Committee upon the Law relating to Parliamentary Disqualification in respect of Conflicts of Interest, April 1973.
disqualification in 1994 with an obligation of disclosure. In both the Northern Territory and the ACT, members are disqualified only from sitting and voting as government contractors — their seats are not actually vacated.

Due to the complexity of the relevant State legislation, the position in each of the States is outlined separately.

**NSW**

Section 13 of the *Constitution Act 1902* (NSW) closely follows the 1782 Act. The first four subsections prescribe this disqualification in the following manner: subs (1) only applies to candidates for election and not sitting members; subs (2) applies to members who enter into contracts while a member (their seat only becomes vacant when declared so by the House); subs (3) exempts from the operation of subss (1) and (2) contracts with corporations comprised of more than 20 members; and subs (4) paras (a) to (f) exempt a range of contracts from subss (1) and (2).

The first three subsections of s 13 provide as follows:

(1) Any person who directly, or indirectly, himself, or by any person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part any contract or agreement for or on account of the Public Service of NSW shall be incapable of being elected or of sitting or voting as a Member of the Legislative Council or Legislative Assembly during the time he executes, holds or enjoys any such contract or any part or share thereof or any benefit or emolument arising from the same.

(2) If any person being a Member of such Council or Assembly enters into any such contract or agreement, or, having entered into it, continues to hold it, his seat shall be declared by the said Legislative Council or Legislative Assembly, as the case may require, to be vacant, and thereupon the same shall become and be vacant accordingly.

(3) Provided that nothing in subsection (1) or (2) contained shall extend to any contract or agreement made, entered into, or accepted by any incorporated company, or any trading company consisting of more than twenty persons, where such contract or agreement is made, entered into, or accepted, for the general benefit of such incorporated or trading company.

**Queensland**

The position in Queensland was very similar to that in NSW until amendments in 1959 restricted the nature of the government contracts to those for the supply of 'wares and merchandise' for the service of the public.

The principal provision is s 6 of the *Constitution Act 1867* (Qld), which is equivalent to s 13 (1) to (3) of the NSW Constitution:

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80 Section 7A inserted into the *Constitution Act 1867* (Qld).
Disqualifying contractors and persons interested in contracts

(1) Any person who shall directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit or on his account undertake execute hold or enjoy in the whole or in part any contract or agreement for or on account of the public service shall be incapable of being elected or of sitting or voting as a member of the Legislative Assembly during the time he shall execute hold or enjoy any such contract or any part or share thereof or any benefit or emolument arising from the same.

(2) And if any person being a member of such Assembly shall enter into any such contract or agreement or having entered into it shall continue to hold it his seat shall be declared by the said Legislative Assembly to be void and thereupon the same shall become and be void accordingly.

Proviso exempting from disqualification members of companies exceeding twenty in number

(3) Provided always that nothing herein contained shall extend to any contract or agreement made entered into or accepted by any incorporated company or any trading company consisting of more than twenty persons where such contract or agreement shall be made entered into or accepted for the general benefit of such incorporated or trading company.

Section 7 concerns the re-election of disqualified members and provision for a common informer action:

Election of disqualified persons void

(1) If any person by this Act disabled or declared to be incapable to sit or vote in the Legislative Assembly shall nevertheless be elected and returned as a member to serve in the said Assembly for any electoral district such election and return shall and may be declared by the said Assembly to be void and thereupon the same shall become and be void to all intents and purposes whatsoever.

Penalty for sitting or voting

(2) And if any person under any of the disqualifications mentioned in the last preceding section shall whilst so disqualified presume to sit or vote as a member of the said Assembly such person shall forfeit the sum of one thousand dollars to be recovered by any person who shall sue for the same in the Supreme Court of Queensland.

Finally, §7A was inserted into the Constitution Act 1867 (Qld) in 1959 to restrict the types of contracts within the scope of the disqualification after the Queensland Supreme Court decision in *Hobler v Jones*81 (discussed further below). Most

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81 [1959] Qld R 609.
importantly, subs (1) confines the disqualification to 'contracts or agreements for the furnishing or providing of wares and merchandise to be used or employed in the service of the public'. Subsection (2) expressly excludes from the disqualification four types of contracts within paras (a) to (d). These exclusions appear to have little effect in view of the narrow scope given to the disqualification by subs (1).

Section 7A of the *Constitution Act 1867 (Qld)* provides as follows:

*Scope of ss 6 and 7*

(1) Sections six and seven of this Act and the provisions relating to a public contractor of section seven of 'The Legislative Assembly Acts, 1867 to 1946' extend, and it is hereby declared have always extended, only to contracts or agreements for the furnishing or providing of wares and merchandise to be used or employed in the service of the public.

(2) Without limit to the generality of subsection one of this section, sections six and seven of this Act and the provisions relating to a public contractor of section seven of 'The Legislative Assembly Acts, 1867 to 1946' do not extend, and it is hereby declared never have extended, —

(a) To any lease, license to occupy, or other contract or agreement whereby any estate or interest in land is held under the Crown pursuant to 'The Land Acts, 1910 to 1958', or pursuant to those Acts and any other Act relating to the alienation of Crown land within Queensland, or pursuant to any other Act or Acts relating to the alienation of Crown land within Queensland, or whereby the right to hold under the Crown any such estate or interest is acquired, or agreed to be acquired, from any other person;

(b) To any lease, license, authority, permit or other contract or agreement relating to mining, dredging, searching, or prospecting for, or the obtaining of, petroleum, coal, gold or any other mineral in or on any Crown land in Queensland;

(c) To any contract or agreement with the Insurance Commissioner under and within the meaning of 'The Workers' Compensation Acts, 1916 to 1959', and 'The Insurance Acts, 1916 to 1940', in relation to any class of insurance business carried on by the said Commissioner as representing the Crown;

(d) To any contract or agreement securing the repayment of the principal, or the payment of interest on, or both the repayment of principal and the payment of interest on, moneys lent to the Crown or to any Crown corporation or instrumentality or corporation or instrumentality representing the Crown.

Reference also needs to be made to ss 7 and 7B of the *Legislative Assembly Act 1867* (Qld). Section 7 vacates the seat of any member who 'become[s] a public contractor or defaulter ...'. The nature of a 'public defaulter' was briefly raised in Chapter 2 in relation to the ground of bankruptcy. 82 As for 'public contractor', in:

82 This may mean someone who has absconded or defaulted in payment of tax or on a government contract.
the absence of clear authority, it appears to mean a person who has contracted with the government. Section 7B restricts members from transacting any business or performing any duty or service for the Crown by denying them any fees, and empowers the Legislative Assembly by resolution to decide whether he or she should remain a member. Subsection (3) of s 7B prescribes various exemptions. Section 7A of the Constitution Act 1867 also restricts s 7 of the Legislative Assembly Act in relation to a public contractor in the same manner that it restricts s 6 of the Constitution Act. But as s 7B of the Legislative Assembly Act 1867 is not affected, being enacted later in 1978, members are prevented from receiving any fees for performing any service for the Crown and risk being expelled from the House.

Reform is proposed to this ground of disqualification by cl 70 and 71 of LCARC’s draft Parliament of Queensland Bill. The key provision is cl 71(1), which provides:

A member must not transact business, directly or indirectly, with an entity of the State.

‘Transact business’ is defined by cl 70 to mean (a) has a direct or indirect interest in a contract with an entity of the State or (b) performs a duty or service for reward for an entity of the State. Exceptions are prescribed. The consequences of so transacting are to render the contract invalid to the extent of the contravention and to preclude the member from receiving any reward or expenses in relation to the contract or the duty or service provided (cl 71(2) and (3)). In addition, the member’s seat becomes vacant under cl 72(1)(g) if the Legislative Assembly decides by resolution that the member has contravened cl 71(1) and decides not to excuse the contravention under cl 73. An elected candidate is not disqualified from being elected if, within six months of the election, the member disposes of the interest in the contract or discharges any obligation arising from the service or duty. For the avoidance of doubt, the Bill expressly exempts insurance contracts with Workcover Queensland, loans to the State, and contracts for legal aid (cl 71(7)).

Tasmania

Section 33 (1) of the Constitution Act 1934 (Tas) follows the 1782 Act but contains only the first of the NSW and Queensland provisions in the expectation that it is sufficient to deal with both newly elected and sitting members. In other words, there is no separate provision which deals only with sitting members.

s 33 (1) Subject to this section, any person who shall directly or indirectly himself or by any person whatsoever in trust for him or for his use or benefit or on his account, undertake, execute, hold, or enjoy in the whole or in part, any contract or agreement

83 This expression is used in Lord Campion and T G B Cocks (eds), Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament (15th ed) Butterworths London 1950, p 214 to describe the effect of s 2 of the House of Commons (Disqualification) Acts 1782 and 1801 where a member enters into a government contract.
with the Government of the State shall be incapable of being elected or of sitting or
voting as a Member of either House during the time he shall execute, hold, or enjoy
any such contract or any part or share thereof or any benefit or emolument arising
from the same, and if any Member shall enter into any such contract or agreement or
having entered into it shall continue to hold it, his seat shall be vacant.

While subs (3) lists the common exemptions, subs (2) and (4) prescribe
exemptions notably different from those in the other States.

The exemption in relation to contracts with corporations in subs (2) differs in that the
number of members needs to be more than 30, and the extent of the member's interest
(including that of his or her family) must be no more than one-fifth of either the
issued shares or the voting rights in that corporation or in a related corporation.

Subsection (4) exempts from disqualification a member who enters into a
government contract prior to nomination for election, and the contract is 'effectually
terminated or rescinded' within six months of the date of the election.

Victoria

Sections 54 and 55 of the Constitution Act 1975 (Vic) differentiate in the same way
as the NSW and Queensland provisions between a candidate for election (s 54) and
a sitting member (s 55). The circumstances which incur disqualification under these
provisions appear broader in scope and are more simply and clearly expressed than
the equivalent NSW and Queensland provisions. The exemptions are little
different from those in NSW and Queensland.

54 Contractors not to be elected

A person who is either directly or indirectly concerned or interested in any
bargain or contract entered into by or on behalf of Her Majesty in right of the
State of Victoria, or who participates or claims or is entitled to participate either
directly or indirectly in the profit thereof or in any benefit or emolument arising
from the same, shall not sit or vote in the Council or the Assembly; and the
election of any such person to be a member of either the Council or the
Assembly shall be void.

84 Clause 70(2) exempts, inter alia, contracts for the supply to the member of goods or services
on usual public terms; lawful compensation payments; contracts with listed or non-aligned
corporations — the latter is defined as a corporation with more than 20 shareholders where
the member does not control the Board or possess more than 5 per cent of the shares.

85 This power to excuse the grounds of disqualification only arises if the Assembly considers
that the ground no longer is effective, was trifling and arose without the knowledge or
consent of the member or was inadvertent or accidental: cl 73(3).

86 ‘Family’ is defined to mean spouse and children including stepchildren: s 33(2B).

87 Subsections (2A) and (2B).

88 Section 56(2) paras (a)-(d) and s 57.
chapter 4: further disqualifications; consequences of disqualification

55 Seats to become vacant in certain cases

If any member of the Council or the Assembly —

(a) either directly or indirectly becomes concerned or interested in any bargain or contract entered into by or on behalf of Her Majesty in right of the State of Victoria;
(b) participates or claims or is entitled to participate either directly or indirectly in the profit of any such bargain or contract or in any benefit or emolument arising therefrom; ...

his seat shall thereupon become vacant.

South Australia

Provisions corresponding with those of NSW were repealed in 1994. Instead, members are now required to disclose pursuant to s 4(2)(a) of the Members of Parliament (Register of Interests) Act 1983 (SA) particulars of contracts made by them (or a related person) with the Crown where the monetary consideration is $7500 or more. It is sufficient if only the class of contract is disclosed in the case of an ordinary commercial or arm’s length contract.

Western Australia

Section 35 of the Constitution Acts Amendment Act 1899 (WA) which closely followed the NSW provisions, was repealed in 1984.

Notably, the State’s sparse population was reflected in a unique exemption — exempted were contracts for the supply of goods and services to the Crown by candidates or members from an area where no other person carries on the same kind of business and where it was necessary for the Crown to contract with that person in order to avoid delay and inconvenience.

Northern Territory

Significantly different from the grounds prescribed in the States is that provided by s 21(3) of the Northern Territory (Self Government) Act 1978 (Cth). Disqualification is limited to not discussing or voting on matters directly or indirectly related to contracts which are for the supply of goods or services to the Territory. The member must be either a party to or directly or indirectly interested in the contract.

89 Section 6 Statutes Amendment (Constitution and Members’ Register of Interests) Act 1994 (SA) repealed ss 49 to 54 of the Constitution Act 1934 (SA).
90 Section 4(4a) Members of Parliament (Register of Interests) Act 1983 (SA).
ACT

A similar but wider provision to that in the Northern Territory is prescribed by s 15(1) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). It is wider in that the disqualification from discussing and voting applies to any type of contract made with the Territory or one of its authorities.

**Analysis of State (NSW, Qld, Vic, Tas) and Territory provisions**

The NSW and Queensland provisions are poorly drafted and difficult to interpret. They urgently require re-writing in plain English. In both those States, several problems emerge in relation to the effect and timing of this ground, the nature of the contract required and the requisite connection of the member and candidate with the contract. Each of these issues is considered in turn.

(1) *Do sitting members lose their seats immediately upon entering into a government contract?*

Section 13(2) of the *Constitution Act 1902* (NSW) provides:

> [H]is seat shall be declared by the said Legislative Council or Legislative Assembly ... to be vacant, and thereupon the same shall become and be vacant accordingly

The second paragraph of s 6 of the *Constitution Act 1867* (Qld) is to the same effect. These provisions appear to require a declaration from the House before the member loses his or her seat. Further, it seems to oblige the House to make such a declaration. If none is made, judicial relief seems unlikely, lest the Court interferes impermissibly with parliamentary affairs. However, Innes J in *Proudfoot v Proctor* seemed to assume in obiter that s 28 of the *Constitution Act* (18 and 19 Vic, cap 54) (the predecessor in the same terms to s 13(2) of the NSW Constitution) rendered the member's seat 'void immediately'.

In contrast, s 11 of the 1782 Act actually declared the member's seat to be void. Similar provision is made in Victoria and Tasmania. In Tasmania, however, this

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91 LCARC's draft Parliament of Queensland Bill generally overcomes these difficulties in Queensland.

92 The Queensland provision is essentially identical except it refers to the seat being 'void'. The same difficulty of interpretation arises with s 14(1) *Constitution Act 1902* (NSW) and s 7 *Constitution Act 1867* (Qld).

93 A similar phrase was omitted from cl 48 of the draft Commonwealth Constitution at the 1891: Sydney Convention Official Record of the Debates of the Australasian Federal Convention Sydney 1891 at 655-660.

94 (1887) 8 NSW 459 at 464.

95 At 464.

96 Section 55 *Constitution Act 1975* (Vic).

97 Section 33(1) *Constitution Act 1934* (Tas).
automatic effect may be avoided if the contract is entered into prior to nomination for election and is terminated or rescinded within six months of being elected. 98

Another puzzling reference in the NSW, Queensland and Tasmanian Constitutions is to the member being liable to disqualification if 'having entered into [the agreement], continues to hold it'. This was probably a transitional measure to apply to those members at the time of the provision's enactment who had previously entered into such a contract and now were required to terminate their contractual relationship or else be liable to disqualification. Section II of the 1782 Act used a similar phrase as a transitional provision but expressly allowed sitting members until the next session of the Parliament to terminate their contractual relationships.

(2) Do s 13(1) of the NSW Constitution and the first paragraph of s 6 of the Qld Constitution concern only candidates for election or do they also apply to sitting members?

Both provisions render 'any person ... incapable of being elected or of sitting or voting as a Member'. If they solely apply to candidates, then the only basis for disqualification of sitting members is found in the provisions referred to above, which depend on a declaration of the House. Innes J (with whom Deffell and Owen JJ concurred) in Proudfoot v Proctor 99 regarded the two limbs of s 28 of the Constitution Act (18 and 19 Vic, cap 54) (the predecessor to s 13(1) and (2) of the Constitution Act 1902 (NSW)), as dealing distinctly with two classes of persons: candidates and members. 100 This was clearly the case with the 1782 Act. Section I (the first limb of which was in the same form as s 13(1) of the NSW Constitution and s 6(1) of the Queensland Constitution) applied to candidates, rendering them incapable of being elected or of voting or sitting in Parliament. Section II, which was in substantially similar terms to s I, actually vacated the seat of any member who engaged in a government contract.

The position in Tasmania with s 33(1) of the Constitution Act 1934 follows more closely the 1782 Act in that the seats of members are automatically vacated rather than being dependent upon any declaration of the House. Victoria provides similarly in s 55 of the Constitution Act 1975.

On the other hand, if the proscription against 'sitting or voting' applies also to sitting members, they are effectively hampered in performing their parliamentary duties but are not removed from their seat unless declared vacant. Consequently, a common informer action may be available under s 14(2) of the NSW Constitution for sitting or voting 'while disqualified'.

The problem may not be so acute for Queensland because s 7 of the Legislative Assembly Act 1867 (Qld) renders vacant the seat of a member who becomes a 'public contractor'.

So far as candidates are concerned, there remains the issue: at what point in time is this ground judged? The similarity between the phrase used in the State Constitutions, 'incapable of being elected', and that used in s 44 of the

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98 Section 33(4) Constitution Act 1934 (Tas).
99 (1887) 8 NSWR 459 at 462-3.
100 Proudfoot v Proctor (1887) 8 NSWR 459 at 462-3.
Commonwealth Constitution, ‘incapable of being chosen’, points to the same time for both which, according to *Sykes v Cleary*,\(^{101}\) is the date of nomination. This issue was discussed in Chapter 2.

(3) What connection must the member or candidate have with the government contract to fall within the disqualification?

In NSW, Queensland and Tasmania, the difficulties discussed above with their respective provisions continue to hamper the formulation of a clear response to this issue. In each State, the connection required of a candidate for election and that required of a member for vacating his or her seat is differently described. Whether this difference in wording is significant is debatable.

A member is only liable to lose his or her seat if he or she ‘enters into’ a contract, whereas a candidate is disqualified if the candidate ‘directly or indirectly himself, or by any other person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part, any contract ...’,\(^{102}\)

This discrepancy in the description of the connection may have been a drafting error — it arose from transcribing s II of the 1782 Act which dealt with two situations. First, it applied the same test as that prescribed by s I for candidates to members who engage in government contracts after their election. Second, it addressed those members who at the enactment of the section ‘had already entered into’ a government contract and disqualified those who ‘continue to hold, execute, or enjoy’ that contract after the commencement of the next session of Parliament.

In the transcription, the same two situations are covered but the test for the first situation has been rewritten as simply ‘enter into’ a government contract, instead of repeating the longer test applied to candidates.

The better view should be that, except in one respect, there is little difference between these two connections. The candidate or member must be a party to the contract either by directly contracting on one’s behalf or through an agent. The exception is that a candidate is also disqualified if he or she ‘enjoys’ the benefit of the contract as a *cestui que trust*.\(^{103}\) There is no reason why candidates and members should be discriminated in this respect.

Brett J in *Royse v Birley*\(^{104}\) interpreted the phrase ‘undertake, execute, hold, or enjoy’ as follows:

To undertake a contract would seem to be to enter into it; the word ‘execute’ would seem to refer to the case of a person who takes on himself the execution of a contract not originally made with him; the word ‘hold’ to the case of a possible transfer of a contract which had been made already with some other person; and

\(^{101}\) (1992) 176 CLR 77.

\(^{102}\) Section 13(1) *Constitution Act 1902* (NSW).

\(^{103}\) See *Royse v Birley* (1869) LR 4 CP 296 per Brett J at 320.

\(^{104}\) At 320.
the word ‘enjoy’ to the case of a person with whom the contract was not made, but who as cestui que trust is to enjoy the benefit of it.\textsuperscript{105}

It could be argued that in order to enter into a contract it is insufficient to ‘hold’ a contract by way of an assignment, yet there is judicial support from NSW and Queensland as well as from Canada for the view that there is little difference between the two connections.

In \textit{Proudfoot v Proctor},\textsuperscript{106} Innes J (with whom Defell and Owen JJ concurred) read the predecessor of the current NSW provision, s 28 of the \textit{Constitution Act} (18 and 19 Vic, cap 54), as dealing with two classes of persons: candidates for election and members.\textsuperscript{107} While acknowledging that the words describing the necessary connection in each case were not the same, his Honour interpreted them to have the same meaning:

even persons in the first branch of the section must be persons who, either personally or by someone on their behalf, have entered into a contract and who are really contractors — and that it is not enough that they are ... persons who were indirectly interested in a contract, the interest being so remote and so indirect that it really would include a creditor of a contractor with the government.\textsuperscript{108}

That case concerned a railway contract between the NSW Government and a partnership of Logan and Proudfoot. Proudfoot became insolvent and, in order to maintain the contract, Logan obtained three guarantors. One of these guarantors was Proctor, a member of the NSW Legislative Assembly. As security for his guarantee, Proctor took an assignment of the railway contract from Logan. Proudfoot then commenced this action as a common informer against Proctor claiming a penalty of £500 on the basis that Proctor fell within the first branch of s 28. The argument seemed to be that Proctor had an interest in the railway contract by virtue of the assignment and had therefore become disqualified. This argument was rejected by Innes J on the basis outlined above: there was no privity of contract between the Government and Proctor and therefore it could not be said that he had \textit{entered into} the railway contract as required by the second\textsuperscript{109} branch of s 28 which applies to the disqualification of sitting members. Further, the Government’s consent was required for any assignment of the railway contract and this had not been obtained. Innes J summed up the position as follows:

\begin{center}
\textsuperscript{105} At 320.  \\
\textsuperscript{106} (1887) 8 NSWR 459.  \\
\textsuperscript{107} At 462-3.  \\
\textsuperscript{108} At 463.  \\
\textsuperscript{109} Innes J at 464 noted that the claim was based upon the first branch when it should have been based on the second branch of s 28.
\end{center}
In one sense, no doubt, as I have already said, the defendant has become interested in this contract, but for the reasons which I have given I do not think that he can be looked upon as having become either directly or indirectly, either by himself or by any other person whatsoever, in trust for him or for his use or benefit or on his account, a contractor with the Government for or on account of the public service, and still less can it be contended that originally he, being a member of the Assembly, entered into the contract.  

In so far as Proctor did enter into a contract by providing the guarantee, this was held not to be one ‘for or on account of the public service’ since the Government was not party to that contract.

In *Miles v Mcllwraith* 111 the Privy Council affirmed the decision of the Queensland Supreme Court that no disqualification arose as a result of a charterparty between the Queensland Government and a member’s agents in respect of a ship partly owned by the member. The member had given strict instructions to his agents that no contracts were to be negotiated on his behalf with the Government. Since there was no privity of contract between the Government and the member, no disqualification was incurred. But Lord Blackburn, 112 delivering the opinion of the Privy Council, considered that had the Government known of the general authority of the agents to act for the member, the member would have been under a duty to notify anyone dealing with the agents of the restriction imposed upon their authority. The Privy Council made no reference to any difference between candidates and members in terms of the connection with the contract.

Finally, in *Hackett v Perry*, 113 the Supreme Court of Canada held that a member of the House of Assembly of Prince Edward Island was disqualified from that House under 39 Vic ch 3 s 8 (PEI) for ‘becoming a party’ to a government contract on the basis of having purchased a quarter share in a ferry contract from the original contractor from the Crown. While the language of s 8 (which applied to members) differed from that in s 4 (which applied to candidates), a majority of the the Court refused to draw any substantive distinction between the effect of both provisions. 114 Section 4 was in the same wide terms as the 1782 Act in referring to any person who ‘holds, enjoys, undertakes or executes, directly or indirectly any contract ...’. This case involved an interesting twist because the member argued in favour of his own disqualification as a government contractor. He did this to avoid being disqualified as a recently elected member of the Canadian House of Commons on the basis of his membership of a provincial legislature. 115 As his resignation from that legislature was held ineffective, he was fortunate to be able to rely on the government contractor ground in order to

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110 At 467. This passage may be of relevance to s 44(v) of the Commonwealth Constitution as regards what is a pecuniary interest in a government contract.
111 (1883) 8 AC 120.
112 At 133-4.
113 (1887) 14 SCR 265.
114 See for example Ritchie CJ at 275, Strong J at 282; contrast Taschereau J at 287.
115 Then under the Canada Revised Statutes ch 13 s 1.
avoid his disqualification from the House of Commons.

In Victoria, the two basic forms of connection are applied to both candidates and members, but they are expressed in quite different and potentially wider terms to those just discussed in the other States:

... directly or indirectly concerned or interested in any bargain or contract ... participates or claims or is entitled to participate either directly or indirectly in the profit thereof or in any benefit or emolument arising from the same [emphasis added]...

Similarly, the connection in both the Northern Territory and the ACT is being a party to the contract or being directly or indirectly interested in the contract.

These connections are similar to the requirement of a ‘pecuniary interest’ in s 44(v) of the Commonwealth Constitution.

(4) With whom must the contract be formed?

In all four States, the disqualification arises in respect of a contract with the executive government of the State. Whether disqualification extends to contracts with other manifestations of the Crown or even other entities depends on the precise wording of the statutory provision. Only in Tasmania and Victoria are State instrumentalities expressly included and defined, while statutory authorities are expressly included in the ACT.

In Tasmania, the ground is generally confined to ‘the Government of the State’, whereas in Victoria it extends to contracts ‘entered into by or on behalf of Her Majesty in right of the State of Victoria’. More problematic is the position in the other two States: in NSW, the contract must be ‘for or on account of the Public Service of New South Wales’; and in Queensland, a slightly different expression is used — ‘for or on account of the public service’.

The ‘Public Service of New South Wales’ must bear a similar meaning to that given to the ‘Public Service of the Commonwealth’ in s 44(v). Essentially, it refers to all the government departments of that State and their officers. It is unlikely that it includes all those entities, including statutory authorities, within the shield of the Crown in right of NSW.

The Queensland formulation — ‘for or on account of the public service’ — follows that used in the 1782 Act. As noted earlier, that expression was interpreted in In re Samuel to mean ‘for or on account of any service of the Crown anywhere’

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116 Section 33(5) and (6) Constitution Act 1934 (Tas).
117 Section 56 Constitution Act 1975 (Vic).
119 Section 33(1) Constitution Act 1934 (Tas).
120 Section 13(1) Constitution Act 1902 (NSW).
121 Section 6 Constitution Act 1867 (Qld).
122 [1913] AC 515.
members of parliament: law and ethics

(emphasis added) and that the money need not be voted for by Parliament.123 In that case, the Judicial Committee of the Privy Council gave an advisory opinion (as a command paper)124 that Sir Stuart Samuel125 was disqualified from sitting and voting in the House of Commons by virtue of contracts entered into between his firm and the Secretary of State for India in Council. These contracts were described as ‘for borrowing money upon short loans, for purchasing Indian Council bills and Indian Treasury bills, for subscribing to Indian Government loans, and for purchasing silver for the purposes of the Indian currency’.126

Following this decision, it could be argued in Queensland that a contract between a candidate or member with the government of the Commonwealth, another State or a Territory is within the disqualification as one ‘for or on account of the public service’. No such point could be taken in the other three States. On the other hand, the more appropriate interpretation is to confine the expression as it appears in the Queensland Constitution to the public service of Queensland. This accords with the presumption, in the absence of a clear indication to the contrary, that a legislature refers only to the Crown in right of that State.127 The same presumption should logically apply to references to the public service.128 Moreover, this approach accords with the chief objective of the disqualification: — to prevent members being influenced by the Queensland Executive.

An alternative interpretation of this Queensland expression, ‘for or on account of the public service’, is that it refers to contracts made with all entities which provide a public service — in other words, there is no need to contract with the Crown. Sheehy J in Hobler v Jones 129 focused not on the parties to the contract but on the nature of the contract, that is, whether it provided some public service. His Honour appears to have agreed with this statement of the argument:

[The other contracting party need not be a public servant at all. It may happen that the other party has nothing whatever to do with the Crown but if the subject matter relates to service to the public, such contract falls within the section.130

Such contracts might include, for example, the contract between a local council and a waste disposal operator, or between a private railway operator and its customers.

123 Per Viscount Haldane LC at 525.
124 Cd 6748.
125 Subsequent common informer actions were brought: Forbes v Samuel [1913] 3 KB 706; Burnett v Samuel [1913] 3 KB 742; Bird v Samuel (1914) 30 TLR 323.
126 [1913] AC 514 at 524.
128 It also accords with the limited extraterritorial competence of the States: s 2(1) Australia Acts 1986 (Cth & UK).
129 [1959] Qd R 609. The judgment of Sheehy J was affirmed by the Full Court of Queensland at 616-620.
130 At 613-4.
Compared with 'the Public Service' as used in s 44(v), the expression used in the 1782 Act and the Queensland provision might be wider in at least two respects: first, by extending to contracts with all entities of the Crown engaged in its service and second, by extending to any non-government entity engaged in the service of the public. Both avoid a conflict of interest but the latter can hardly be concerned with the risk of Queensland executive influence.

(S) What is the nature of the contract to which the candidate or member must be a party?

Probably the most significant issue in relation to this ground of disqualification is whether any contract with the government gives rise to disqualification or whether this occurs only with contracts of a particular nature.

This issue has already been discussed in relation to s 44(v) of the Commonwealth Constitution where it was noted that English authority on the 1782 Act supports a restrictive approach here. For instance, Low J in *Tranton v Astor* expressly adopted the reasoning of the Court in *Royse v Birley* in holding that the acceptance by a newspaper of a government advertisement:

is not a contract or agreement within the meaning of this legislation at all, and such casual or transient transactions are not the kind of contracts covered by these statutes, but that what are meant to be covered are contracts of a more permanent or continuing and lasting character, the holding and enjoying of which might improperly influence the action both of legislators and the Government [emphasis added].

In the absence of judicial authority (other than in Queensland), the approach of Low J would hopefully be followed at the State and Territory level to avoid quite innocent transactions incurring disqualification. Reliance on the purpose of disqualifying government contractors facilitates the implication drawn by Low J that the contract be one which might enable the executive to influence members in the performance of their parliamentary duties.

Such an implication was drawn by the House of Assembly in South Australia in 1872 when the House rejected an opinion of that State's Crown Solicitor that three members of the House were disqualified for accepting government advertising in their newspapers. The resolution of the House regarded the advertisements as not 'agreements or contracts within the spirit' of the predecessor of s 49 of the *Constitution Act 1934*. In Tasmania, special legislative protection was afforded to Francis Madill by the *Constitution (Doubts Removal) Act 1988* (Tas) to prevent his disqualification under s 33(1) of the

131 (1917) 33 TLR 383 at 386.
132 (1917) 33 TLR 383 at 386.
Constitution Act 1934. Prior to his election to the House of Assembly, he had, in partnership, leased premises from the Crown for a surgery.

So long as uncertainty remains as to the nature of the government contract which incurs disqualification, special legislative protection from disqualification may at times be necessary. This is most likely to arise, in the absence of an express exemption, where a government benefit or service is received on the same terms and conditions as other members of the public. For example, in Western Australia in the 1940s, before the repeal of the government contractor disqualification, concern arose over the position of members of the Western Australian Parliament who as doctors and chemists received payments pursuant to the Pharmaceutical Benefits Act 1947 (Cth) by way of reimbursement for the provision of free medicines. These concerns were resolved in 1948 by retrospectively exempting these payments from the government contractor disqualification in ss 37 and 38 of the Constitution Acts Amendment Act 1899 (WA).136

Queensland: provision of a public service

The Queensland formulation in s 6 of the Constitution Act 1867 (Qld) requires the provision of a public service. It has already been suggested that such a service might be provided by the Government or one of its entities, or else it might be provided by a non-government entity or individual. Hence, a candidate or member who is a party to such a contract may be receiving or providing the public service. If this is so, the Queensland formulation still catches a whole range of innocent transactions, such as the purchase of a railway ticket. In fact, it will tend to catch a wider category of contracts since the government need not be privy to them provided they deliver a public service. In Hobler v Jones,137 Sheehy J interpreted the phrase ‘for or on account of the public service’ to require that the subject matter of the contract ‘[deal] with some service to the public’138 and later said that ‘the subject matter of the contract is to do or supply something in relation to the service of the public’139 — for example, the supply of food to a state institution, or a charter of a ship to the government (no doubt a reference to Miles v Mcllwraith).140 In his view, it was not sufficient simply to establish a contract with the Government. Excluded were contracts which did not provide a public service, such as a member arranging personal insurance with the SGIO, or using the services of the public curator’s office.141 Accordingly, in that case Jones was not disqualified as a member for holding two prickly pear leases from the Queensland Government.142

136 Constitution Acts Amendment Act (No 1) 1948 (WA); see above note 135 at 307-8.
137 [1959] Qd R 609.
138 At 614.
139 At 615.
140 (1883) 8 AC 120.
142 Reliance was placed on a decision of a committee of the House of Commons, City of Londonderry [1866] Wolferstan & Bristow Election Cases at 206, which accepted without discussion that holding a Crown lease did not incur disqualification.
On appeal this judgment was affirmed, although no reasoning in support was offered by the Full Court. However, two interesting points were raised in counsels' argument. The first was the appellant's argument that as the leases in question contained obligations on the part of the lessee (for example to clear and preserve the land) which would improve the land for the national benefit, they were for the public service. Indeed, the argument went so far as to say that any immediate contract with the Government was one for the public service. The second was the argument put by the respondent's counsel that as the leases were regulated by the Land Court no Crown influence was possible. Each of these arguments raised issues which unfortunately were not considered in the Full Court's judgment.

The circumstances which gave rise to the proceedings in Hobler v Jones led to the insertion of s 7A into the Constitution Act 1867 (Qld) although the case was decided solely on the basis of s 6. Section 7A limits the operation of the disqualification to contracts for the supply of 'wares and merchandise to be used or employed in the service of the public'. This amendment was intended to ensure that s 6 could not be used to challenge members on the basis of contracts which they enter as ordinary members of the public. It resembles the interpretation of s 6 given in Hobler v Jones, although it is narrower, confining the ground to the supply of 'wares and merchandise'. That outdated expression refers to commodities such as raw materials and office equipment. At common law, it does not include fixtures (like heavy equipment) or the provision of services or intangibles. Accordingly, s 7A narrows the ground of disqualification in Queensland too far and thereby undermines the protection of this disqualification — nor does it resolve the issue as to whether the contract must be with the government itself.

The Hobler v Jones problem had previously arisen in the United Kingdom in 1931 over the assignment of the lease of the Hatfield Post Office by Lord Salisbury to his son, Viscount Cranbourne, then the member for Dorset in the House of Commons. Amid conflicting opinions as to whether such a contract with the Postmasters General's Department fell within the first limb of s 11 of the 1782 Act, both the 1782 and 1801 Acts were amended by the House of Commons Disqualification (Declaration of Law) Act 1931 to confine their scope to 'contracts, agreements or commissions for the furnishing or providing of money to be remitted abroad or wares and merchandise to be used or employed in the service of the public' (s 1). Apparently, this legislation was designed to overcome other fears such that members with telephone contracts would be disqualified. Hence, it confined the ground to its original intent, namely, to prevent those supplying goods to the Crown from becoming members while susceptible to Crown influence.

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143 [1959] Qd R 609; Stanley J delivered the judgment with whom Mack and Wanstall JJ agreed.
144 At 619.
145 At 620.
146 See for example Chanter v Dickenson 12 LJCP 147; Humble v Mitchell 9 LJQB 29.
147 21 Geo V c 13.
148 Lord Campion and TG® Cocks (eds), above note 83 p 212 citing H C Deb (1930-31) 250, c 364.
This legislation also allayed concerns which were originally raised in the 19th century over the provision of loans from members to the government. Despite a select committee of the House of Commons holding in 1855 that Baron Rothschild was not disqualified as a member for making a loan to the government, Erskine May cites a range of statutes enacted to safeguard from disqualification members who provided loans to the United Kingdom Government.

Express exemption of certain contracts

All of the four States exempt various contracts, no doubt on the basis that they involve minimal risk of government influence over members or minimal risk to the integrity of members. Many are contracts which are entered into by the public on a regular basis and for which the member ought not to have received any preferential treatment. If some preference were given, this is more appropriately addressed by some other integrity mechanism, such as a code of conduct.

These exemptions indicate that a general ground of disqualification of government contractors is incapable of precise operation. The difficulty in both curtailing the ground and prescribing its exemptions does cast doubt on the efficacy of the ground and its justification.

The most extensive list of exemptions is found in NSW. Included are the following:

- (a) investment in government bonds;
- (b) contractual interests arising under a deceased estate or trust: for one or three years;
- (c) compensation agreements (to be notified in Gazette);
- (d) real property contracts, including leases;
- (e) contracts for the sale to or from the Crown of goods, merchandise or services if supplied on ordinary public terms;
- (f) secured loans by the Crown to members on ordinary terms.

A similar list of exemptions is found in Tasmania (s 33(3)(a)-(f) of the Constitution Act 1934 (Tas)), notable among which is the exemption of educational contracts in para (cb).

In Victoria, s 56(2)(a)-(d) and s 57(b)-(d) of the Constitution Act 1975 (Vic) limit the exemption in respect of contracts for goods and services to isolated or casual contracts of sale to the Crown which the member did not know nor could reasonably have known were sales to the Crown (s 56(2)(c)).

In Queensland, s 7A(2)(a)-(d) of the Constitution Act 1867 (Qld) exempts leases over Crown leasehold land, conferral of mining rights, insurance contracts and securities in respect of Crown loans. Of course, these exemptions are unnecessary

149 See CJ (1854-5) 325; HC 401 (1854-5) quoted in Lord Campion and T G B Cocks (eds) above note 83, p 215.
150 Lord Campion and T G B Cocks (eds), above note 83, cites, for example, s 14(2) Finance Act 1914 (Session 2) and s 1(2) War Loan Act 1915.
151 Section 13(4) Constitution Act 1902 (NSW).
since s 7A(1) deems the disqualification provisions only to apply to contracts or agreements for the supply of 'wares and merchandise to be used or employed in the service of the public'.

Shareholder exemption

An exemption is provided in the four States but not in the Territories for contracts entered into by a corporation consisting of more than a certain number of members. It will be remembered that s 44(v) of the Commonwealth Constitution provides for a similar exemption in respect of agreements with an incorporated company of more than 25 members.

Nature of the corporation

In Tasmania, the exemption is simply limited to 'a corporation'. However in NSW and Queensland two types of corporation are referred to: 'an incorporated company, or any trading company consisting of more than twenty members, ...'. The Queensland provision is identical but for the omission of the two commas. Consequently, the Queensland provision, more clearly than its NSW counterpart, requires both types of corporation to comprise more than 20 members. This would appear not to be so under the NSW provision. Furthermore, there is no practical difference today between these two types of corporation. It follows that a shareholding in any corporation in NSW is exempted irrespective of the size of the membership, whereas in Queensland membership must exceed 20 persons.

In Victoria, the exemption refers broadly to 'any company partnership or association'.

Size of the corporation

The requirement in Queensland and Victoria is that the corporation must be comprised of more than 20 members. In Tasmania, this is increased to more than 30 members and, most significantly, the member and his family cannot hold more than one-fifth of either the issued shares or voting rights in that or a related corporation. Reference has already been made to the position in NSW, where it appears any incorporated company — whatever its size — is exempted.

Privity of contract

It will be remembered that in NSW, Queensland and Tasmania, no disqualification

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152 Section 33(2) Constitution Act 1934 (Tas).
153 Section 13(3) Constitution Act 1902 (NSW); s 6(3) Constitution Act 1867 (Qld).
154 Section 57(a) Constitution Act 1975 (Vic).
155 Sections 33(2B) and (6) Constitution Act 1934 (Tas).
arises on this ground unless a member 'enters' into the contract or a candidate 'directly or indirectly himself, or by any other person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part, any contract ...'. It is difficult to imagine a case where a shareholder could satisfy these tests simply because his or her company has contracted with the Crown.

In contrast, in Victoria and under the Commonwealth Constitution, the connection with the government contract need only be one of being 'interested' in or of having a 'pecuniary interest' in the contract. With these broader connections, this exemption for shareholders may have some operative effect. Of course, if privity of contract is not essential in those other States, there may well be scope for this exemption.

This exemption ought to be retained, but only if disqualification arises for having a pecuniary interest in a government contract. A requirement of privity of contract renders this exemption otiose. Ideally, the exemption should be limited to those who lack the capacity to exercise any control over the activities of the company. Hence, the exemption should prescribe not only the size of the company but also the degree of control which the candidate or member has over the company's affairs. The Tasmanian provision is a useful model to follow. Supplementary to this exemption would be an obligation to disclose shareholdings in any company to a register of interests and/or to the House on an ad hoc basis.

An alternative approach is not to disqualify those shareholders with a pecuniary interest in a government contract, but to require them to declare their interest whenever it arises in the performance of their parliamentary duties. After various concerns over the efficacy of disqualifying local councillors on a similar ground, this mechanism of ad hoc disclosure was recommended for them in 1929 by the United Kingdom Royal Commission on Local Government and subsequently implemented.

Conclusion on government contractor disqualification

If this ground of disqualification were to be repealed, stringent requirements for disclosure of pecuniary interests would be necessary. The Salmon Report in 1976 recommended against the prescription of this ground of disqualification in any new fields of public life, including local government, approving instead the disclosure of pecuniary interests.

156 This was also the view of the Attorney-General of Victoria, Mr B L Murray, in his submission to the Qualifications Committee (a Victorian Joint Select Committee). See Appendix A at 4-5 of the Interim Report from the Qualifications Committee upon the Law relating to Parliamentary Disqualification in respect of Conflicts of Interest April 1973. Note that the AG's view assumed the disqualification would be retained (which the AG opposed).

157 See the 1974 Report of the Committee on Local Government Rules of Conduct Cmnd 5636 (Redcliffe-Maud Committee); Report of the Royal Commission on Standards of Conduct in Public Life 1976 (the Salmon Report), Cmnd 6524, ch 6 para 115-123.

158 Cmnd 3436.

159 See s 94 Local Government Act 1972 (UK).

160 Report of the Royal Commission on Standards of Conduct in Public Life Cmnd 6524, ch 6 para 122-123.
Receipt of fees and honoraria

This section examines those situations in which a member of parliament is disqualified for receiving benefits over and above those received by way of parliamentary salary and reimbursement of expenses. Section 45(iii) of the Commonwealth Constitution disqualifies members who receive pecuniary benefits in two distinct situations: for services rendered to the Commonwealth and for services rendered in Parliament for anyone. Only in Victoria and the Territories is there a comparable ground of disqualification, but none impose both limbs of s 45(iii).

Despite the absence of this ground of disqualification in the other States, members of parliament who accept payments in return for parliamentary services nevertheless engage in unethical conduct and are liable to be sanctioned by their own House (see Chapter 11). Such conduct undermines the integrity of the House and hence falls within the privilege of each House to regulate the conduct of its members. Interessingly, known instances of that conduct have been less prevalent in Australia than in the UK House of Commons. Nonetheless, the various responses of the House of Commons to the problems which have arisen there may provide useful models for Australian parliaments.

The first limb of s 45(iii) has a wider impact, applying to the receipt of pecuniary benefits from the Commonwealth for any service whatsoever, even if unconnected with parliamentary duties. There is obviously a close relationship between this first limb and the previous two grounds of disqualification: holding an office of profit under the Crown and being a government contractor. All three grounds involve the receipt of a benefit from the Crown, but the first limb of s 45(iii) catches benefits which fall outside the other two grounds.

Commonwealth

Section 45(iii) [vacates the seat of a Member who] 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.

This paragraph deals with two separate situations: (i) services rendered by a member to the Commonwealth; and (ii) services rendered by a member in the Commonwealth Parliament for any person or State. These are referred to respectively as the first and second limbs.

161 Reliance could be made on the various resolutions of the House of Commons which apply at the State level as part of the privileges of that House. In particular, see the resolution of 22 June 1858 which declares: ‘It is contrary to the usage and derogatory to the dignity of this House, that any of its Members should bring forward, promote or advocate, in this House, any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward.’
The purpose of the first limb of this paragraph was to prevent members who were barristers and other professionals, such as valuers, engineers and arbitrators, from being engaged by the Commonwealth.\footnote{Introduced by Mr Carruthers at the 1897 Adelaide Constitutional Convention: fn 82 Ch 2.} The drafters considered that their engagement was not covered by the disqualification of government contractors but clearly ought to be.\footnote{As above at 1034 and following.} Reliance was placed on a similar provision in Victoria.\footnote{Section 19 Constitution Amendment Act 1890 (Vic).}

The second limb was added later at the Melbourne Convention in 1898 to prevent the abuses which had emerged in the United States and in some colonies, of members lobbying on behalf of others, especially for the passage of legislation.\footnote{Introduced by Mr Reid: Official Record of the Debates of the Australasian Federal Convention, Melbourne, 1898 at 1945.} By deterring members from being lobbyists at the federal level, this limb has proved to be a significant mechanism in maintaining the integrity of the parliamentary process. The drafters of the Commonwealth Constitution were indeed wise to rely on an express ground of disqualification in the Constitution rather than rely on the new federal Parliament adopting, as and when required, the various resolutions of the House of Commons which concerned the receipt of benefits by members.\footnote{See Official Record of the Debates of the Australasian Federal Convention, Melbourne, 1898 at 1945-1947 during which extensive reference is made by Edmund Barton to the resolutions of the House of Commons as covered by Erskine May's (10th ed) at 81 and following.}

Prior to Federation, the House of Commons had adopted two principal resolutions of this kind: members were prevented from receiving any benefit for promoting any matter within Parliament (Resolution of 2 May 1695) and they were also prevented from advocating any matter in the Parliament for which they had previously acted for reward (Resolution of 22 June 1858). This second resolution particularly affected barristers who as members were unable to appear before the House or its committees in matters on which they had previously been engaged in a professional capacity.\footnote{Resolution of the House of Commons 22 June 1858. This was criticised as too narrow by the Strauss Report, above note 6, at para 25.} These resolutions have proved insufficient to prevent or deter the undesirable practices which emerged in that House, especially members lobbying on behalf of foreign and other interests. While the House of Commons has recently adopted a comprehensive code of conduct to regulate lobbying,\footnote{See The Code of Conduct together with The Guide to the Rules relating to the Conduct of Members, HC 688 (1995-96).} fortunately the Commonwealth Parliament has not suffered from these difficulties due in large measure to the presence of s 45(iii).\footnote{See the Bowen Report at para 7.13 and the 1981 Senate Report at para 7.20. Recent problems in the UK can be gathered from the various reports in 1997 from the House of Commons Committee on Standards and Privileges on Complaints from Mr Mohamed Al Fayed, The Guardian and Others against 25 Members and former Members.}
First limb: services rendered to the Commonwealth

The first limb encompasses services performed by a member both inside and outside Parliament. The services must be rendered to the 'Commonwealth' which primarily refers to the executive branch including the plethora of statutory authorities and other entities under the Crown. It is capable of also referring to the judiciary, although obviously not to the Parliament. Consequently, 'Commonwealth' is wider than the 'Public Service of the Commonwealth' in s 44(v). As mentioned above, there is an obvious overlap between this first limb and the previous two grounds of disqualification in s 44. However, this limb catches situations which escape the other two grounds — for instance, a contract with a government entity other than a department of state is not caught by s 44(v), and a member appointed to a position which is not an ‘office’ as such would fall outside s 44(iv). Both of these cases are likely to be caught by this limb.

Like s 44(v), the first limb of this paragraph has the potential to cast a wide net over arrangements of an innocent nature, especially outside the Parliament. While it clearly precludes members from acting as legal advisers to the Commonwealth or receiving fees for sitting on government boards, there are certain services outside Parliament which may be unnecessarily precluded:

- member doctors and pharmacists who receive payments under Commonwealth legislation;
- members who receive payment for interviews with, for example, ABC Television;
- member solicitors who accept State and Territory legal aid commission work.

To preclude the paragraph’s application to these situations, Gareth Evans suggested it may need to be restricted to payments ‘such as could conceivably 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 employee-payee, on the other’. 

Services rendered inside Parliament on behalf of the Commonwealth would include members appearing as counsel for the Executive either before the House or one of its committees. Such a situation is, however, only precluded under the first limb of the paragraph where the member receives a fee from the Commonwealth for the service. Consequently, members can serve on parliamentary committees and on government boards without fear of disqualification provided no fee or honorarium is received. However, it appears that they may receive out of pocket expenses because these payments are not regarded as ‘fees’.

170 G Evans, above note 8 at 470 is of similar opinion, except he limits it to the Crown.
172 G Evans, above note 8 at 470.
Second Limb: services rendered in Parliament for others

The second limb of the paragraph prevents members from accepting any fee or honorarium 'for services rendered in the Parliament to any person or State'. Although the range of conduct on the part of a member within the scope of this limb is very wide so as to include bribery\textsuperscript{174} and lobbying activities, disqualification is only incurred in such cases where this conduct is in return for a fee or honorarium. Acting as counsel for a fee before a parliamentary committee, as well as before a House, would seem to be precluded. It is a matter of concern, though, that other benefits may be received with impunity.

The services must, however, be rendered to 'any person or State'. The former, according to the 1981 Senate Report\textsuperscript{175} includes corporations, while the latter is confined to the States of Australia. Foreign states might come within 'any person' along with corporations.

Timing

Both limbs of s 45(iii) involve two events: taking or agreeing to take a fee or honorarium; and rendering a service. The issue arises as to whether both events must occur while one is a member.

It seems clear from the very nature of para (iii) as a ground of disqualification that under both limbs the taking or agreeing to take a fee or honorarium must occur while a member. This is the critical event which incurs disqualification. The inclusion of 'agreeing to take' closes a potential loophole where the fee or honorarium is received after leaving Parliament.

As to when the service must be provided, the second limb (service in the Parliament) clearly requires this to occur while a member. However, the position is not so clear under the first limb where the service is rendered to the Commonwealth. It becomes a critical issue in two distinct situations: when a service is performed for the Commonwealth before being elected to Parliament and payment is received after assuming the seat, and when a member agrees to undertake paid work for the Commonwealth to be performed after leaving Parliament. If it is irrelevant when the service is rendered, then disqualification occurs in both situations. If the service must be rendered while a member, neither situation incurs disqualification. In each case, both situations must be subject to the same rule.

The first limb is most likely to be read as requiring the service to be provided while a member. This ensures that no penalty is imposed on a member who is paid for services provided before being elected. It is consistent with the requirement that the fee or honorarium be taken or agreed to while a member. Also, it reflects the draft at the Sydney session in 1897 which contained only a version of the first limb: 'Directly or indirectly accepts or receives any fee or honorarium for work done or services rendered by him for

\textsuperscript{174} 1981 Senate Report at para 7.23.

\textsuperscript{175} 1981 Senate Report at para 7.23.
or on behalf of the Commonwealth whilst sitting as such member' (emphasis added). Unfortunately, that view allows members to arrange profitable contracts with the Commonwealth for services to be provided after leaving Parliament. This hardly promotes the avoidance of a conflict of interest as the member prepares to leave Parliament. To deter that conduct, the paragraph would need to be construed to apply to services rendered while a member or thereafter. It is difficult to justify such a pragmatic interpretation.

'Any fee or honorarium'

The reference to 'any fee' covers monetary payments made pursuant to a contract or arrangement although Professor Sawer suggested that an agreement to take a fee may not require the formation of a binding contractual arrangement. An 'honorarium' is a voluntary payment not made pursuant to any contractual obligation, for example, barrister's fees and retainers. Given that these are both forms of monetary payment, rewards for services rendered in the form of gifts and sponsored travel have been identified as outside the scope of this disqualification. The Constitutional Commission considered these forms of rewards to be more serious than the payment of fees or honoraria.

A further exception to this limb appears to be a monetary tribute awarded to a member of Parliament for past services to the nation. In November 1920, over £25,000 was raised by public subscription as a tribute for Prime Minister Hughes in recognition of his wartime leadership. Acceptance of this tribute was later queried under s 45(iii) by a member of the House of Representatives, Mr Frank Brennan. Mr Hughes rejected any suggestion that he was disqualified under that paragraph on the ground that the

176 See the Official Record of the Debates of the Australasian Federal Convention (Second Session) Sydney 1897 at 1028.
177 Senator Gair's appointment as Ambassador to Ireland in 1974 generated opinions from the Solicitor-General and the General Counsel to the Commonwealth Attorney-General that by accepting the appointment he was disqualified as from 14 March even though he did not take up his appointment until after leaving Parliament: see P J Hanks, in G Evans (ed) above note 43, p 193.
178 However, this view was given by the General Counsel to the Attorney-General and by the Solicitor-General over the Gair appointment to ensure that the paragraph could not be easily avoided by an agreement to provide future services: see G Evans, above note 8 at 470.
181 G Evans, above note 8 at 470.
182 See Bowen Committee Report para 7.13; 1981 Senate Report para 7.23: need 'a direct cash advantage'.
184 HR Debates 1921 vol 95 at 7698-7710; G Sawer, above note 73, p 215; G Sawer, above note 79, p 215; 1981 Senate Report at 90 fn 42.
service had to be rendered to the Commonwealth Government or to the Commonwealth as a constitutional entity, not as in this case, for services to the people of Australia.\textsuperscript{185}

There followed in the parliamentary debate a discussion of the propriety of accepting honorariums with concern expressed by Mr Ryan for the apparent conflict of interest which their acceptance by ministers engenders:

There is an impression abroad that the money came from those who have large financial interests, and had big business transactions, possibly with the Commonwealth, during the period of war. After all, most people think that gratitude is a lively sense of favours to come, and that, whether or not a presentation comes within the embargo imposed by the Constitution, it is not desirable that responsible Ministers, while still in charge of the affairs of the country, should accept large gifts from persons who may subsequently have business dealings with the Government. I do not suggest that the Prime Minister would be influenced by the presentation; I would be sorry, indeed, to suggest that he would do anything corrupt, but I do suggest that there is a possibility that he might have a kindly feeling — he could not help it — towards those who were good enough to make the presentation.\textsuperscript{186}

Although Mr Hughes remarked proudly in the course of the debate, with no hint of embarrassment, that he had accepted numerous ‘articles of value’ as tributes on account of his parliamentary service over the years,\textsuperscript{187} valuable gifts to ministers are no longer tolerated. The ethical climate has clearly changed since the 1920s.

\textit{Reform proposals}

Both the 1981 Senate Report\textsuperscript{188} and the Constitutional Commission\textsuperscript{189} recommended that Parliament be given power to prescribe the interests, ‘pecuniary or otherwise’, which disqualify members. The former, however, recommended that s 44(v) and s 45(iii) be replaced with the general power, whereas the Commission recommended they be retained and supplemented by the general power.

\textit{States and Territories}

Only in Victoria and the Territories is there a ground of disqualification comparable to that in s 45(iii) of the Commonwealth Constitution.

In Victoria, there is incorporated in the government contractor ground of

\textsuperscript{185} Professor Sawer agreed with this narrow interpretation: above note 73, p 215.
\textsuperscript{186} HR Debates 1921 vol 95 at 7709.
\textsuperscript{187} HR Debates 1921 vol 95 at 7706.
\textsuperscript{188} At para 7.37.
\textsuperscript{189} Final Report of the Constitutional Commission 1988 at para 4.564. See Bill No 8 in Appendix K.
disqualification, disqualification of a member who ‘in any character or capacity for or in expectation of any fee gain or reward performs any duty or transacts any business whatsoever for or on behalf of the Crown’. Under this provision it is clear that the service must be provided when a member and may be given both inside and outside Parliament. However, as it must be ‘for or on behalf of the Crown’, it is confined to the member acting as an agent for the Crown in some matter.

The Northern Territory and the ACT have adopted in part the Commonwealth’s formulation of this ground by disqualifying a member who ‘takes or agrees to take, directly or indirectly, any remuneration, allowance or honorarium [or reward, in the ACT] for services rendered in the Legislative Assembly’. Unlike s 45(iii) of the Commonwealth Constitution, services rendered outside the Legislative Assembly are not covered by this ground. The Northern Territory provision might also be narrower in not expressly referring to the receipt of any fee or reward, which is covered by the Commonwealth and ACT provisions.

A different approach is taken in Queensland where s 7B of the Legislative Assembly Act 1867 (Qld) deters members from performing any duty or service or transacting any business for the Crown by denying them any fee, reward or expenses for that service. In addition, the Assembly determines whether they should remain a member. Excluded from this provision are services as a court witness, those expressly allowed by statute, and services provided by ministers and parliamentary secretaries. Also excluded since 1999 are appointments to Crown positions to which there is no right to a fee or where that right has been waived by the member.

In South Australia, only an exemption is provided to ensure no disqualification arises (presumably under s 45 for holding an office of profit under the Crown) where a member is appointed to a parliamentary committee by a House or the Parliament, or is appointed to a Royal commission and receives a salary, fees or other emoluments.

Until 1984, a similar exemption was provided in Western Australia by s 41A of the Constitution Acts Amendment Act 1899 (WA) for receiving reasonable expenses for sitting on a select committee, Royal commission or when acting as a representative of the Parliament or of the Commonwealth Parliamentary Association. That provision was repealed along with the government contractor ground of disqualification and the re-arrangement of the office of profit ground into specific lists of offices.

190 Section 55 Constitution Act 1975 (Vic).
192 Section 7B(3) Legislative Assembly Act 1867 (Qld).
193 Section 3 of the Officials in Parliament Act 1896 (Qld).
194 Parliamentary Members (Office of Profit) Amendment Act 1999 (Qld). This ground is covered by cl 70(1)(b) LCARC’s draft Parliament of Queensland Bill which disqualifies a member who performs a duty or service for reward for an entity of the State but exempts those situations covered by the 1999 Amendment (that is, where no right to a reward, or the reward is waived). Reasonable expenses may be given. An entity of the State is defined in the dictionary of the Act to mean any body established for a government purpose.
195 Section 54A Constitution Act 1934 (SA).
Conclusion on the fees and honoraria disqualification

This ground of disqualification plays a significant role in assisting members to avoid conflicts of interest. Yet serious infringements of this ground may constitute bribery, while those of a minor nature may amount to no more than unethical conduct. This suggests that the penalty of disqualification may be disproportionate in certain cases. One approach is to dispense with this ground in s 45(iii) and substitute rules, reinforced by appropriate penalties, which regulate the circumstances in which members can receive pecuniary benefits in connection with their parliamentary services. These rules would need to be contained in a code of conduct or in the standing orders or resolutions of the House. They would also need to be enforced by each House.

Absence from Parliament

A failure by a member to attend the sittings of his or her House is a standard ground of disqualification. The basis for this ground is simply the dereliction of duty on the part of members in not adequately representing the interests of their constituents. That dereliction of duty is measured by a prescribed period of absence. Although provision is usually made for the House to permit the absence of a member, it is unclear whether this must be granted before the period of absence commences or whether it may be granted later. As will be seen, the period of absence varies markedly between the Commonwealth, the States and the Territories. This suggests that a review of their fairness is required.

Commonwealth

In respect of both Houses of the Commonwealth Parliament, ss 20 and 38 of the Constitution respectively provide that a failure to attend for two consecutive months in the same session without the permission of the House renders the member's seat vacant.

The absence must be for two consecutive months in the same session. Presumably this refers to two consecutive calendar months, although it is unclear whether it must be for the whole of each month. The decision of the Privy Council in Attorney-General of Queensland v Gibbon supports the view that this need not be so and that absence across parts of two consecutive months will suffice. This absence must also

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196 Both of these aspects are considered separately in Chapters 8 and 11.
197 Sections 20 and 38 Commonwealth Constitution. Senator Ferguson (Qld) is the only senator to have lost a seat under s 20 (on 6 October 1903); Harry Evans (ed), O'gier's Australian Senate Practice (9th ed) Department of Senate Canberra 1999 at 157.
198 During the life of the Sixth Parliament 1914-1917, all members of the Commonwealth Parliament were given formal leave of absence during adjournments because there was one long session extending beyond two and a half years (HR Debates 75:1566): G Sawer, above note 73, p 150.
199 (1886) 12 App Cas 442.
occur in the same session.\textsuperscript{200}

By which date must the House grant its permission? A literal reading of the relevant provisions suggests that this may be granted at any time prior to the expiration of the prescribed period of absence. Often permission is granted in advance. If not granted, disqualification takes effect once that period has expired.

**States and Territories**

Similar provisions operate in all the States and the Territories, differing only in respect of the period of absence which incurs disqualification. This period ranges from three consecutive sitting days to one whole session of the House.

One whole session of the House is prescribed in NSW,\textsuperscript{201} Queensland,\textsuperscript{202} Tasmania,\textsuperscript{203} Victoria\textsuperscript{204} and Western Australia.\textsuperscript{205} In South Australia, the period is twelve consecutive sitting days.\textsuperscript{206} Three consecutive sitting days is prescribed in the Northern Territory\textsuperscript{207} and four consecutive ‘meetings’ in the ACT.\textsuperscript{208}

Where permission is given for a particular period of absence, it is necessary to ensure that the period specified is sufficient to avoid disqualification. In *Attorney-General of Queensland v Gibbon*\textsuperscript{209} permission was given by the former Legislative Council for a period of 12 months which expired during a session. However, the subsequent absence during the remainder of that session and the whole of the following session incurred disqualification under s 23 of the *Constitution Act 1867* (Qld). The Privy Council interpreted absence for ‘two successive sessions’ as meaning absence for parts of two sessions — a view which seems open to challenge.

It is evident that the present formulation of this ground of disqualification is in need of clarification, especially the precise period of absence required. Further, the time by which permission for any absence must be granted should be expressly stated.

**Mental illness**

According to *Erskine May*, mental illness in the form of ‘lunacy and idiocy’ is a

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{200} A ‘session’ of parliament is the period between parliament assembling and being prorogued or dissolved.
\item \textsuperscript{201} Section 13A(a) *Constitution Act 1902* (NSW).
\item \textsuperscript{202} Section 7(1)(a) *Legislative Assembly Act 1867* (Qld). Clause 72(1)(m) LCARC’s draft Parliament of Queensland Bill specifies a period of 21 consecutive sitting days over one or more sessions.
\item \textsuperscript{203} Section 34(a) *Constitution Act 1934* (Tas).
\item \textsuperscript{204} Section 46(a) *Constitution Act 1975* (Vic).
\item \textsuperscript{205} Section 38(g) *Constitution Acts Amendment Act 1899* (WA).
\item \textsuperscript{206} Sections 17(1)(a) and 31(1)(a) *Constitution Act 1934* (SA).
\item \textsuperscript{207} Section 21(2)(c) *Northern Territory (Self-Government) Act 1978*.
\item \textsuperscript{208} Section 14(1)(b) *Australian Capital Territory (Self-Government) Act 1988*.
\item \textsuperscript{209} (1886) 12 App Cas 442.
\end{itemize}
\end{flushleft}
disqualification for members of the House of Commons at common law. It is clearly based on the incapacity of the candidate or member to discharge the duties of a member of Parliament. As such this ground, once certified, needs to operate as a disqualification for both candidates and members. However, this is not the case for all Australian parliaments.

Commonwealth

The Commonwealth Constitution does not expressly include mental illness as a ground of disqualification, although it is a common ground for members of State Parliaments. Nevertheless, it has effectively been prescribed as a disqualifying ground for members of the Commonwealth Parliament by s 163 of the Commonwealth Electoral Act 1918 (Cth).

Section 163 requires for nomination that a candidate be an elector or qualified to be one. Section 93(8)(a) disqualifies an elector if of unsound mind or incapable of understanding the nature and significance of enrolment and voting. These provisions therefore disqualify candidates on the basis of insanity. However, they do not disqualify a sitting member so afflicted — at least not until the member nominates for the next election.

To disqualify a sitting member as soon as he or she is afflicted would require a constitutional amendment. On the other hand, candidates are disqualified on the basis of insanity. However, they do not disqualify a sitting member so afflicted — at least not until the member nominates for the next election.

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There is clearly a need to amend the Constitution to add mental illness or insanity as a further ground of disqualification for sitting members as well as candidates. Such an amendment would protect the interests of constituents to ensure that any member who is mentally incapable of continuing to represent their interests is replaced with a capable member. The Constitutional Commission in recommending such an amendment stipulated that disqualification should only arise once the 'unsoundness of mind' was certified according to a procedure prescribed by Parliament.

States and Territories

In South Australia, Tasmania, Victoria, Western Australia and the

210 Cj Bolton, Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (21st ed) Butterworths London 1989, p 41. See for example Mr Peme's Case 1566, C J (1547-1628) 75; Mr Alcock's Case 1811, C J (1810-11) 226, 265, 687. A statutory procedure for verifying this ground is now provided in the Mental Health Act 1983 (UK).
212 Sections 14(2) and 34(f) Constitution Act 1934 (Tas).
214 Sections 7, 20 and 38(e) Constitution Acts Amendment Act 1899 (WA) as a legal incapacity: s 18(a) Electoral Act 1907 (WA) disqualifies any person of 'unsound mind' to be enrolled as an elector or to vote.
ACT, both candidates and sitting members are disqualified if they are 'of unsound mind'.

In contrast, candidates but not sitting members are disqualified in NSW and Queensland — in NSW, a person who is a patient under the Mental Health Act 1958 (NSW) is incapable of being elected, while Queensland adopts the Commonwealth position under s 93(8)(a) of the Commonwealth Electoral Act 1918 which affects only candidates.

It is not a ground of disqualification in the Northern Territory.

Consequences and enforcement of disqualification

This section examines the consequences of disqualification and the procedures by which the grounds of disqualification are enforced. For a successful candidate, the consequence of disqualification is that his or her election is void. This is also the case where the candidate fails to comply with the basic qualifications for nomination as outlined in Chapter 2. For a sitting member who incurs disqualification after taking his or her seat, the seat becomes vacant. In addition, the conduct of a disqualified candidate or member may be the subject of a common informer action or even a penalty. In only a few instances in Australia is the member's House empowered to override the disqualification and save the member's seat.

In relation to the enforcement of the grounds of disqualification, two principal procedures are available: (i) by way of a challenge to an election result, normally brought by an election petition to a court of disputed returns; or (ii) later by the issue being raised in the member's House. A common informer action might also be available.

It will be evident from the following analysis of these various procedures that improvements are needed to ensure that the grounds of disqualification are sufficiently enforced. Any reform must occur along with a rationalisation of all the grounds of disqualification to ensure that candidates and members are only challenged on grounds which serve to protect the integrity of Parliament and for which disqualification is the proportionate response.

Commonwealth

The respective positions of candidates and of sitting members need to be considered separately.

216 Sections 17(1)(i) 'insane mind' and 31(1)(i) 'unsound mind' Constitution Act 1934 (SA) and ss 29(1)(d) and 52(1) Electoral Act 1985 (SA).
217 Sections 21(a), 79(1), 81B(1) Parliamentary Electorates and Elections Act 1912 (NSW).
218 Sections 64(1) and 83(1) Electoral Act 1992 (Qld).
220 This is considered below under 'Provision for relief'.
Candidates

Where an elected candidate is disqualified on any of the grounds in ss 43 or 44 of the Constitution, the election of that person is void. Where this is determined by the High Court sitting as the Court of Disputed Returns on an election petition (see below on this jurisdiction), the relief granted depends on whether the candidate stood for a seat in the House of Representatives or the Senate. In the case of a seat in the House, the relief is likely to be a by-election, at least where the electorate was unaware of the candidate's disability. For a Senate seat, the relief is likely to be a recount of the votes cast for that seat as if the disqualified candidate had died. This difference arises from the different voting systems used for each House. But the same test is applied to both situations: which relief gives effect to 'the voters' true legal intent'? After referring to *In re Wood* and *Sykes v Cleary*, Brennan CJ in *Free v Kelly* summed up the position as follows:

The principle to be derived from both cases is that an election in which a person who is incapable of being chosen is purportedly returned as a member of the Senate or as a member of the House of Representatives will not warrant an order for a special count unless a special count would reflect the voters' true legal intent or, conversely, would not result in a distortion of the voters' real intentions.

Hence, in relation to the Senate, a recount of votes disregarding the preferences for the disqualified candidate will usually reveal the voters' real intention given the nature of the Senate's proportional system of voting. On the other hand, the single member preferential voting system for House of Representatives seats will not usually reveal the voters' real intentions on a recount. In such cases, a by-election will be necessary. However, *Free v Kelly* suggests the position may be different where there are only two candidates and the voters were aware of the facts which establish the disqualification. In such a case, the votes cast for the disqualified candidate may be thrown away, resulting in the election of the other candidate.

Note that where a successful Senate candidate is disqualified on an election petition, whether for failing the qualifications prescribed by the *Commonwealth Electoral Act 1918* (Cth) or under ss 43 or 44 of the Constitution, this does not create a Senate casual vacancy within s 15 of the Constitution pursuant to which the Senate may appoint a replacement. This is because, in each case, no place is filled which is later made vacant by a supervening event. On the other hand, a Senate vacancy does arise where a Senator only incurs disqualification after taking his or her seat as the result of a subsequent event.

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221 See *Sykes v Cleary* (1992) 176 CLR 77.
222 No recount was ordered in *Sykes v Cleary* (1992) 176 CLR 77 (see at 101-102), nor in *Free v Kelly* (1996) 185 CLR 296. In each, the election was held void and a by-election occurred.
227 See *In re Parliamentary Election for Brisol South East* [1964] 2 QB 257 at 291-301.
sit for then the place has become ‘vacant’. 228

As for candidates who are not elected, whether they were qualified or disqualified appears to be irrelevant to the outcome of the election. This is so even when their preferences are distributed to determine the successful candidate. 229 A different view was adopted in Hickey v Tuexworth 230 where the disqualification of an unsuccessful candidate in a Northern Territory election (for lacking Australian citizenship) was held to invalidate the election of the successful candidate who had won only after distribution of preferences. Nader J, sitting as the Election Tribunal for the Northern Territory, declared the election void since it was unclear how the distribution of preferences would have gone if the disqualified candidate had not stood. Fortunately, this conclusion was disapproved of by the High Court in In re Wood 231 for it ‘would play havoc with the electoral process’ if disqualified candidates were deliberately nominated to void an election. 232

Where a nominated candidate is discovered to be disqualified before the election poll is held, clear statutory authority is required to authorise the removal of that candidate’s name from the ballot paper. 233 Where this authority is lacking, notice may be given of the candidate’s disqualification to the electorate.

Sitting members

Where a sitting member incurs a ground of disqualification within s 45 of the Constitution subsequent to being elected, the member’s seat becomes vacant immediately, as s 45 provides that the ‘place shall thereupon become vacant’. The primary responsibility for monitoring the qualifications of members is each member’s House. But if a House decides not to act on a member for political reasons, provision is made for any person to sue a disqualified member by way of a common informer action. Both of these procedures are provided for in ss 46 and 47 of the Constitution.

Section 46 allows a common informer action to be brought against a member for sitting in Parliament while disqualified. Section 47 enables each House to determine three issues: any question respecting the qualifications of its members; a vacancy in the House; and a disputed election. Each section empowers the Parliament to otherwise provide, which it has done.

Common informer actions

Section 46 of the Constitution prescribes:

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228 In re Wood (1988) 167 CLR 145 at 168. The Court at 168 noted that the phrase ‘becomes vacant’ appears in ss 19, 20, 37, 38 and 45 of the Constitution. This point was left open in R v Governor of South Australia (1907) 4 CLR 1497.
232 At 167.
233 Ex parte Craswell (1985) 2 Qd R 259.
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.

Pursuant to this section, the Commonwealth Informers (Parliamentary Disqualifications) Act 1975 (Cth) was enacted to reduce the penalty to $200 for sitting prior to the instigation of any proceedings under that Act. The Act also imposes a further penalty of $200 for each day the member continues to sit after receipt of the originating process. As well, a limitation period of 12 months applies with only one action permitted in respect of sitting while disqualified during the relevant period.

The High Court is vested with exclusive jurisdiction to deal with these common informer actions. It is unclear whether a common informer action can proceed against a member where the relevant House is already investigating the member's disqualification or has referred the matter to the Court of Disputed Returns. A successful common informer action will confirm that the election of a disqualified candidate is void under s 44 or that the seat of a disqualified sitting member is vacant under s 45. It is prudent for a member against whom a common informer action is brought not to sit or vote in the House until resolution of the matter to avoid the possibility of the daily penalty of $200. However, until such an action is initiated, a member whose qualification is in doubt only runs the risk of a $200 penalty if he or she continues to sit. This is also the case even when the member's qualifications are challenged in the Court of Disputed Returns. The daily penalty only applies from the date a common informer action is instigated.

The issue today is whether a common informer action is an appropriate enforcement mechanism. Few actions have ever been brought. In the United Kingdom, the penalty for sitting or voting in Parliament when disqualified was repealed by the House of Commons Disqualification Act 1957 (UK). One criticism of this form of action is that it attracts the accusation of the 'greedy informer'. On the other hand, its rationale is to overcome any refusal on the part of a House to act.

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234 This Act was enacted in one evening in response to the Webster case: I M Banin (ed), House of Representatives Practice (3rd ed) AGPS Canberra 1997 at 157; HR Debates 22 April 1975 at 1978-1986, Senate Debates 22 April 1975 at 1236-1239.
235 Section 3(2) Commonwealth Informers (Parliamentary Disqualifications) Act 1975 (Cth).
236 Section 3(3).
237 Section 5.
238 See G Evans, above note 8 at 473 where he suggests that concurrent proceedings are not excluded given that ss 46 and 47 provide two entirely distinct procedures.
239 Evans, above note 8 at 473 suggests that a successful common informer action does not vacate the seat; but this occurs simply by virtue of s 45.
240 Apparently, Senator Webster absented himself from the Senate while his matter was before Barwick CJ, whereas Senator Wood did not: H Evans (ed), above note 197, p 152.
241 G Evans, above note 8 at 472. Note fn 65 which refers to a warrant issued against Dr Cairns in respect of occupancy of a government flat in Canberra; report in The Age (Melbourne) 24 May 1975.
242 G Evans, above note 8 at 473.
against one of its members where this is necessary. The paucity of actions suggests that a House is rarely seen to be dilatory in this respect.

An alternative mechanism to a common informer action is to permit any person to initiate proceedings for a declaration of disqualification without the inducement of a monetary benefit. The Western Australian Law Reform Committee's report Disqualification for Membership of Parliament: Offices of Profit under the Crown and Government Contracts (Project 14, 1971) recommended replacing the common informer action with a right to seek a declaration as to disqualification, subject to providing security for costs. This appears to be an eminently appropriate measure which has been implemented in Western Australia. In that State, any elector has the right to apply to the Supreme Court to decide whether the election of a person is void, or the seat has become vacant, or an office or place under the Crown is vacated. This provides a model enforcement regime for the other Australian parliaments.

**Determination of qualifications**

Section 47 of the Constitution provides:

> 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.

This section initially vests in each House — until the Parliament otherwise provides — the power to determine three distinct matters: the qualification of a member; a vacancy; and any challenge to an election. The Parliament has otherwise provided pursuant to ss 47 and 51(xxxvi) in respect of all three matters in Pt XXII of the Commonwealth Electoral Act 1918 (Cth).

**Qualification and vacancy**

The first two matters are covered by Div 2 of Pt XXII. Section 376 provides that either House ‘may’ by resolution refer to the Court of Disputed Returns any question respecting the qualification of one of its members or a vacancy. The Court of
Disputed Returns is the High Court.\textsuperscript{251} Since Federation, relatively few matters have been referred to the Court.\textsuperscript{252} Whether each House retains its power to deal with these two matters under s 47 concurrent with that of the Court of Disputed Returns has been the subject of debate.\textsuperscript{253} However, it seems fairly clear that the Houses retain their jurisdiction under s 47 in respect of those matters — but, it is submitted, that this can only be so until they refer a matter to the Court of Disputed Returns. Once referred, the jurisdiction should lie with the Court for final determination. This minimises the risk of any conflict arising between the Court and a House. Where a House decides not to refer an issue of disqualification to the Court of Disputed Returns, it appears to have the power to determine the matter itself, as it did with Mr Warren Entsch MP in 1999.\textsuperscript{254} In such a case, however, a common informer action remains available in the High Court. The potential for conflicting decisions between a House and the High Court is obvious in such a situation.

\textit{Election challenge}

The third matter referred to in s 47, an election challenge, is covered by Div 1 of Pt XXII. Section 353(1) provides that the validity of any election or return can only be challenged by petition to the Court of Disputed Returns. The petition must be lodged by another candidate or an elector within 40 days of the return of the writ. No extension of this mandatory period can be granted by the Court of Disputed Returns.\textsuperscript{255} By s 355 it must include:

\begin{quote}
\textit{jurisdiction to decide whether a casual Senate vacancy had been validly filled, this being a vacancy to be determined by the Senate under s 47. Thereafter the Disputed Elections and Qualifications Act 1907 (Cth) was enacted to allow referral of such issues by a House to the High Court as the Court of Disputed Returns; see also Blundell v Vardon (1907) 4 CLR 1463. 254 Section 354 Commonwealth Electoral Act 1918 (Cth). 252 References from the Senate were made: in April 1975 in \textit{In re Webster} (1975) 132 CLR 270; on 16 February 1988 in \textit{In re Wood} (1988) 167 CLR 145. 253 Senator Murphy's opinion was that the power of each House under s 47 was ousted (Senate Debates 4 April 1974 at 681). The Senate disagreed, as did the 1981 Senate Report (para 8.10 and see fn 17) relying upon 'may refer' and that s 203 does not unequivocally prohibit the House. 254 See HR Debates 10 June 1999 when a motion in the House of Representatives to refer the issue whether Mr Entsch was disqualified under s 44(v) to the Court of Disputed Returns was amended to determine that 'the member for Leichhardt does not have any direct or indirect pecuniary interest with the Public Service of the Commonwealth within the meaning of section 44(v) of the Constitution by reason of any contract entered into by Cape York Concrete Pty Ltd since 3 October 1998, and the member for Leichhardt is therefore not incapable of sitting as a member of this House.' 255 Rudolphy v Lightfoot (1999) 197 CLR 500. The joint judgment of the High Court held that the 40 day period for lodgment of the petition is an essential condition to the jurisdiction of the Court of Disputed Returns. In that case the petitioner failed to lodge the petition pursuant to s 355(e) against the filling of a casual Senate vacancy by the Western Australian Houses within 40 days of the State Governor's certification to the Governor-General under s 15 of the Constitution.}
\end{quote}
(a) the facts relied on to invalidate the petition or return;

(aa) stated with ‘sufficient particularity’ to identify the specific matters to justify relief;

(b) a prayer for relief.

Unless the requirements for a petition are rigidly complied with, s 358 prohibits any proceedings on the petition. The Court is given by that section only a limited power to relieve compliance with para (aa). It has no power to allow an amendment of the petition in order to comply with the other requirements of s 355 — at least once the time for lodgment of the petition has expired.256 For instance, in Nile v Wood the petition was dismissed for omitting to include a prayer for relief.257 In order for para (aa) to be complied with, the specific grounds of disqualification must be clearly formulated in accordance with the terms of ss 43, 44 or 45 of the Constitution to enable the facts to be pleaded with sufficient particularity.258

So unless a petition is carefully drafted there is the risk that it will be dismissed and, as this usually occurs outside the 40 day period for lodgment, the opportunity for another candidate or an elector to challenge the election of the member will be lost.259

In the absence of a valid petition, any challenge to a member’s election on the basis of a disqualification can only be raised by the member’s own House or by way of a common informer action. The House can either deal with the matter itself or may refer it to the Court of Disputed Returns under s 376 of the Commonwealth Electoral Act 1918 (Cth). Any person may institute a common informer action in the High Court pursuant to the Common Informers (Parliamentary Disqualifications) Act 1975 (Cth). It is clear that the referral of a matter to the Court of Disputed Returns by a House as to the qualification of a member allows the Court to determine whether the member was validly elected despite the fact that the time has expired for filing an election petition.260

This has implications for the Commonwealth Electoral Commissioner’s power under s 393A of the Commonwealth Electoral Act 1918 (Cth) to order the destruction of electoral documents. The Commissioner may order their destruction six months after the declaration of the poll provided they are no longer needed for the performance of the Commission’s functions. Given the potential for the qualifications of members to be raised at anytime during their parliamentary term, the Commissioner would appear to be unable to destroy those documents until the end of that term.

There is some potential for conflicting determinations arising from the various procedures which occur pursuant to ss 46 and 47 of the Constitution. For instance, the High Court might arrive at a different conclusion in a common informer action to that reached by a House as to the qualification of a member. This would be

256 Nile v Wood (1988) 167 CLR 133 at 137.

257 At 137.


259 Section 355 Commonwealth Electoral Act 1918 (Cth).

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particularly awkward if the House determined the issue first. There is support for the view that the determinations of the High Court or of the Court of Disputed Returns prevail over those of a House.261

A related issue is whether the jurisdiction of the High Court as the Court of Disputed Returns conforms with Ch III of the Constitution.262 A challenge to this jurisdiction on the basis that it impermissibly conferred on the High Court a non-judicial power was rejected by a slim majority in Sue v Hill.263

Finally, it should be noted that the High Court has held that the presence of a disqualified member in the Senate does not affect the validity of the Senate's proceedings.264 No doubt the same principle applies to the House of Representatives.

States and Territories

Procedures similar to those available at the Commonwealth level are found at the State and Territory level. One exception is that in only two States is there similar provision for a common informer action.

Common informer actions

At the State level, a common informer action is available in NSW and Queensland, essentially in relation to one ground of disqualification, that of a government contractor.265 Under their respective Constitutions, any person may bring an action in the relevant State Supreme Court to recover from a member a penalty of $1000 for sitting or voting in Parliament when disqualified on that ground.266

South Australia provides for a similar common informer action in respect of any ground of disqualification in relation to a newly elected member267 and also for sitting members who incur disqualification as a government contractor.268

Of the other States which do not provide for a common informer action, only Victoria prescribes offences for certain infringements. Section 58 of the Constitution

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261 See 1981 Senate Report, para 8.15 citing Bradlaugh v Gossett (1884) 12 QBD 271 at 281-2.
262 See K Walker, ‘Disputed Returns and Parliamentary Qualifications: Is the High Court’s Jurisdiction Constitutional?’ (1997) 20 UNSWLR 251. This article concludes that the High Court’s jurisdiction as the Court of Disputed Returns is not invalid as an exercise of non-judicial power but is more of an indeterminate nature, that is, capable of being judicial if vested in a court and non-judicial if left with the Parliament or some other body. Early High Court authority suggesting that it is non-judicial ought to be overruled: see Holmes v Angwin (1906) 4 CLR 297; Webb v Hanlan (1939) 61 CLR 3 23.
263 (1999) 163 ALR 648 per Gleeson CJ, Gummow and Hayne JJ and Gaudron J; contra McHugh, Kirby and Callinan JJ.
265 See s 13 Constitution Act 1902 (NSW); s 6 Constitution Act 1867 (Qld).
266 Section 14(2) Constitution Act 1902 (NSW); s 7(2) Constitution Act 1867 (Qld).
267 Section 46(2) Constitution Act 1934 (SA).
268 Section 53.
**Validity of election**

There is a remarkable degree of uniformity between the States and Territories on the procedure for challenging the election or return of a member. Basically a petition or application is filed in the State Supreme Court, usually designated as the Court of Disputed Returns. This court is vested with exclusive jurisdiction to determine the validity of the election or return, from which there is no right of appeal. A petition must be filed usually within 40 days of the return of the writ. After the expiration of that period, any challenge to a member's qualification must be brought by the member's House or by a common informer or equivalent action (if available).

The denial of a right of appeal from the Court of Disputed Returns is to avoid protracted legislation which leaves constituents unrepresented. Although suggestions are made at times to confer a right of appeal, the preferable approach seems to be to enable the Court of Disputed Returns to seek clarification on questions of law by case stated to an appellate court. Since Courts of Disputed Returns are usually constituted by one or more State Supreme Court judges, the issue arises of whether there is a right of appeal to the High Court pursuant to s 73 of the Commonwealth Constitution. The High Court in two early decisions rejected this possibility on the ground that the jurisdiction of the Courts of Disputed Returns was vested in State Supreme Courts persona designata.

**Jurisdiction to challenge qualification of sitting members**

Where a question arises as to the qualification of a sitting member of a State Parliament or Territory Assembly (or a vacancy), the issue is one initially for the relevant
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House. In four States — NSW, Queensland, Tasmania and Victoria — and in the Northern Territory and the ACT each House may by resolution refer the question to the Court of Disputed Returns which may declare that the member is not qualified or is incapable of sitting. No provision for referral to a court is made in South Australia where s 43 of the Constitution Act 1934 (SA) leaves any question respecting a possible vacancy to the relevant House.

A potential difficulty with the referral process where a member's qualifications are doubtful is that there is no guarantee this will be authoritatively determined either by the House or by a court. The referral depends entirely on the wishes of the House. As already seen, this is not the case in Western Australia where any elector has the right to apply to the Supreme Court to decide whether the election of a person is void, or the seat has become vacant, or an office or place under the Crown is vacated. If grounds of disqualification are to remain justified, they must be enforced. It is clearly unsatisfactory for this responsibility to be vested entirely in each House. While the approach adopted in Western Australia runs the risk of political manipulation and interference with members, the benefits of judicial enforcement outweigh that risk.

Alternatives to disqualification

In assessing the various grounds of disqualification, consideration ought to be given to what, if any, alternatives exist which achieve the same objectives of disqualification. Those objectives are twofold: the prevention of an appearance of a conflict of interest and maintenance of the moral standing of members. Both of those objectives serve to protect the integrity and authority of the Parliament. The prescription of grounds of disqualification produces an immediate impact of devastating effect: the loss of one's seat or a void election. Virtually no flexibility is permitted on those occasions when their impact seems unnecessarily harsh, and this problem is exacerbated by the difficulties in drafting these grounds with sufficient precision. Are there other mechanisms, then, which equally achieve these objectives by more proportionate means?

The obvious alternative is to confer on the House a discretionary power to decide in each case whether the circumstances warrant the disqualification of one of its members. The penalty is no longer immediate. Grounds may be interpreted more

272 Sections 175B and 175H Parliamentary Electorates and Elections Act 1912 (NSW).
273 Sections 143 and 146 Electoral Act 1992 (Qld).
274 Section 234 Electoral Act 1985 (Tas).
275 Section 300 The Constitution Act Amendment Act 1958 (Vic).
276 Section 124 Northern Territory Electoral Act 1995 (NT).
277 Section 252 Electoral Act 1992 (ACT).
278 Section 41 Constitution Acts Amendment Act 1899 (WA).
279 Section 35.
280 Sections 36 or 38.
281 Section 37.
flexibly so that precision of drafting is not as critical. Particularly suited to this alternative mechanism are those grounds which purport to protect the moral standing of members: conviction of a criminal offence and bankruptcy. In such cases, the responsibility could be left with the House to decide what action is necessary to preserve the integrity of the parliamentary process.

Such a parliamentary jurisdiction is not novel. Each House (except in NSW) has at common law the power to punish its members and has done so for criminal convictions in the United Kingdom and Canada. Even so, a member may be disciplined by his or her House without a criminal conviction by being expelled or suspended. While the immediate impact of expulsion and disqualification of a sitting member is the same (the seat becomes vacant), their consequential effects differ. Expulsion allows the former member to be re-elected subject to the judgment of the electorate, whereas disqualification usually precludes a re-election.

Of course, the radical option is to dispense with all the grounds of disqualification and rely on the electoral process, together with a code of conduct and other mechanisms designed to deal with conflicts of interest.

**Provision for relief**

At various times, legislation has been specifically enacted to protect sitting members from disqualification and/or common informer actions. That legislation has either been solely directed to the members concerned, or has amended the law generally. This form of relief is clearly dependent on the level of political support for the member. An alternative and possibly no less partisan form of relief is to vest in each House the power to relieve its members from disqualification. In this case, the approval of both Houses is not required.

At present, only in two States is there provision for a House to relieve a member of disqualification in appropriate circumstances. The Victorian provision is wider in scope than that found in Western Australia. Each House of the Victorian Parliament can exempt their members from disqualification if three prerequisites are satisfied:

282 For example the expulsion of Wilkes in 1764 by the House of Commons for uttering a seditious libel (see Bourinot, *Parliamentary Procedure & Practice* (2nd ed) London 1892, p 197); other expulsions were of O'Donovan Rossa in 1870 and of John Mitchell in 1875 (see Bourinot at 194-5).

283 See for example *Constitution (Disqualification Removal) Act 1980* (Tas) to save the Legislative Council seat of Mr R T Hope on account of becoming a member of the Fire Service Advisory Council in Tasmania; and *Constitution (Doubts Removal) Act 1988* (Tas) to remove doubts over the election of Dr F L Madill whose medical partnership leased premises from the Crown.

284 For example *Constitution (Disqualification Removal) Act 1980* (Cth).

285 See for example *Constitution (Disqualification Removal) Act 1980* (Tas) to save the Legislative Council seat of Mr R T Hope on account of becoming a member of the Fire Service Advisory Council in Tasmania; and *Constitution (Doubts Removal) Act 1988* (Tas) to remove doubts over the election of Dr F L Madill whose medical partnership leased premises from the Crown.

286 In Queensland, several changes occurred in 1977-8 on account of at least four members whose seats became doubtful by accepting certain appointments: see fn 166 of ch 3 of this work.
(a) the disqualifying event has ceased to have effect;
(b) it was of a trifling nature; and
(c) it occurred without the actual knowledge or consent of the member, or was accidental or inadvertent.287

In Western Australia, relief can only be given by a resolution passed by both Houses of Parliament if 'it is otherwise proper so to do' and then only in relation to the public office ground of disqualification. A member who has accepted one of the specified offices under the Crown may avoid disqualification by relinquishing the office and obtaining a resolution from both Houses.288 The UK House of Commons is similarly empowered by resolution to direct that disqualification for holding a prescribed public office be ignored if the ground of disqualification under that Act no longer exists and it is proper so order.289

In Queensland, LCARC's draft Parliament of Queensland Bill permits the Legislative Assembly to declare by resolution that a disqualifying ground has no effect provided the same three prerequisites noted above for Victoria are satisfied.290

Role of the Electoral Commissions

It is evident from cases such as Sykes v Cleary291 and Free v Kelly292 that candidates require guidance to avoid inadvertently incurring a ground of disqualification. This need becomes more pronounced as the number of 'independents' who stand for election increases, as they may lack the experience and guidance available to candidates from the established political parties.

Limited guidance on the grounds of disqualification is available from the electoral commissions and offices at the Commonwealth, State and Territory level. In addition to a Candidates Handbook, the Australian Electoral Commission has published an Electoral backgrounder293 which provides an outline of the various grounds of disqualification under s 44 of the Constitution.294 Electoral Commissions, obviously, are unable to provide detailed legal advice to candidates.295

To assist candidates avoid disqualification under s 44(1) by virtue of some foreign allegiance, the Department of Immigration and Multicultural Affairs maintains a database on the procedure for renouncing foreign citizenship in those 10 countries

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287 Section 61A Constitution Act 1975 (Vic).
288 Section 39 Constitution Acts Amendment Act 1899 (WA).
289 Section 6(2) House of Commons Disqualification Act 1975 (UK).
290 Clause 73.
294 The 1997 House of Representatives Report recommended (rec 8) that the Australian Electoral Commission improve the level of guidance provided potential candidates and to do so earlier. The Electoral backgrounder No 4 does this.
295 See the Australian Electoral Commission submission to the House of Representatives Committee which is referred to in the Committee's report at paras 4.8-4.11.
most likely to concern Australian parliamentary candidates. Brief details of those procedures are included in the AEC’s Electoral backgrounder.

Conclusion

The critical inquiry is: how effective are these grounds of disqualification in preventing actual and apparent conflicts of interest or more generally in preserving the integrity of members of Parliament? It is clear that they alone are insufficient to avoid all conflicts of interest. This was one of the important conclusions of the Bowen Report which recommended the adoption of a code of conduct for members of Parliament. But is there a bolder response called for? Might the preferable course be to dispense with all the grounds of disqualification and substitute a range of integrity mechanisms instead?

Those mechanisms are explored in Pt III of this work. Their weakness is, however, that in the absence of judicial review they generally depend in large measure on self-regulation whereas, with the constitutionally entrenched grounds of disqualification in the Commonwealth Constitution, minimum standards are guaranteed. Nonetheless, this Part has indicated that those grounds require rebalancing with care taken to retain those which prevent the resurrection of ‘old’ problems while jettisoning those which respond to circumstances never to arise again. Only the disqualification of those who hold pensions payable at the pleasure of the Crown appears to fall within this latter category.

Part II

Parliamentary privilege
Parliamentary privilege

Introduction

The foundations of parliamentary privilege lie in the rich chronicles of English constitutional history; in particular, that of the House of Commons. For centuries, jurisdictional conflicts were waged in England as the institutions of state evolved into their modern form of parliament, the executive and the courts. The reconciliation of those conflicts bore some fruit, significant among which was parliamentary privilege. In adopting the Westminster system, the Australian legislatures also embraced this privilege. Generally speaking, the privileges of each House of an Australian legislature are based on or derived from those of the UK House of Commons. Hence, any discussion of the nature and extent of these privileges draws substantially on the English position which is to be gathered ‘out of the ancient rolls of Parliament and other records, and by precedents and continual experience’. Erskine May defines parliamentary privilege as:

[i]tself the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

These ‘rights’ or privileges are either collective (possessed by each House) or individual (enjoyed by each member). They are essentially either powers or immunities. Those collective in nature are generally powers, while those enjoyed

1 Except in NSW and, to a lesser extent, Tasmania.
by individual members are generally immunities. Although an extensive list of privileges (compiled originally by Quick and Garran)\(^5\) is provided in Appendix 4, those privileges can be categorised into the following powers and immunities.

**Powers**

Each House possesses the power to:

- determine qualifications of its members;
- regulate and discipline members;
- control its own proceedings;
- conduct inquiries; and
- punish contempts.

**Immunities**

The most important of the immunities, the freedom of speech, debates and proceedings in Parliament, is both a collective and individual privilege formally recognised in art 9 of the *Bill of Rights 1689*:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

This immunity is enjoyed by the members and officers of each House as well as by any person who becomes involved in parliamentary proceedings, such as a witness. They enjoy immunity from the law in respect of anything they say or do within the scope of the proceedings of Parliament.

Three further individual immunities are enjoyed by the members and officers of a House and those called to appear before it or its committees:

- immunity from arrest in civil causes;
- exemption from jury service; and
- exemption from compulsory attendance in a court or tribunal.

These are discussed below under the general rubric of 'immunity from legal proceedings'.

One other privilege listed by Quick and Garran is '[t]he right of each House as a body to freedom of access to the sovereign for the purpose of presenting and defending its views'. This collective right of each House is usually exercised by presenting an Address to the Sovereign, the Governor-General or Governor, or members of the Royal Family. Addresses have been made on significant events in the

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life of the Sovereign, although few have been made since the 1970s. Apart from Addresses, resolutions may also be presented and even messages when the House is not sitting. No right of access is conferred, however, on individual members.6

Essentially, the purpose of these powers and immunities is to enable each House to perform its legislative role. In particular, they:

- allow a House to determine the procedures for the conduct of its business;
- facilitate investigations by a House to assist in the formulation of an appropriate legislative response;
- protect each House from conduct which disrupts its proceedings or prevents its members from attending or participating fully in those proceedings, or which otherwise impedes the performance of its functions; and
- assist each House to scrutinise the executive.

The last of these benefits points to the main reason for the development of parliamentary privilege as described by Blackstone:

Privilege of Parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown.7

Their classification as 'privileges' indicates that these powers and immunities are enjoyed only by a House, its members, its officers and those called upon to appear before it or its committees. It also serves to emphasise the role they perform in defining the legal relationship between parliament and the executive, as well as between parliament and the judiciary. Surprisingly, these relationships are still not entirely clarified, especially in relation to the scope of judicial review of parliamentary privilege which is considered further below. Finally, it should be noted that as privileges 'they exist not for the benefit of the members of Parliament but for the protection of the public interest'.8

Before examining each of these privileges, it is necessary to begin with an outline of the historical development of parliamentary privilege in England and subsequently in Australia.

Historical origins of parliamentary privilege

The powers, rights and immunities known as parliamentary privileges took centuries to evolve and were won incrementally by the English Parliament, in

6 See House of Representatives SO 393-398, Barlin, above note 5, pp 328-331; Senate SO 171-172; H Evans (ed), Odgers’ Australian Senate Practice (9th ed) Department of Senate Canberra 1999, pp 454-455. See also D Limon and W R McKay, above note 3, p 78.
8 Arena v Nader (unreported, High Court, Brennan CJ, 13 October 1997 at 12), extending an injunction until the application for special leave was determined.
particular by the House of Commons, after numerous power struggles with the Crown and the courts. Their purpose was then and still is the protection of Parliament from outside interference by the Crown and the courts. And, given the intense struggles from which these privileges emerged, they have been jealously guarded ever since.

It was interference by the Crown at the end of the 14th century which first aroused the concern of Parliament to protect itself. The House of Commons struggled against the Crown to assert its right to debate any matter, to initiate legislation even if contrary to the interests of the Crown, and to control its own elections. It also asserted the right to determine exclusively the exercise of its privileges which were derived from the common law and custom of Parliament, in particular, the freedom of speech in Parliament. According to Erskine May, the Members of the House of Commons enjoyed a traditional right of freedom of speech within the House by the end of the 15th century. That freedom was, however, a matter of contention throughout the reigns of Elizabeth I and James I, culminating in the Protestantation of 1621 when the House of Commons declared, inter alia, the freedom of speech of its members. But it was not until the House of Lords decision in Eliot's Case in 1629 that freedom of speech was recognised as a legal right. In that case, Sir John Eliot and two other members of the House of Commons were arrested at the instigation of the Crown for uttering allegedly seditious language during debate in the House, and for assaulting the Speaker. The House of Lords declared their arrest for the seditious statements to be invalid as against the law and privilege of Parliament. It has been said that the actions of the Crown in this case helped ignite the Civil War. Further problems arose after the Restoration in Jay v Topham in 1682 and Williams' Case in

9 M L Gwyer (ed), Anson's Law and Custom of the Constitution: Vol 1 Parliament (5th ed) Oxford University Press London 1922, pp 166-167 cites Haxey's Case in 1397 where Haxey had been condemned as a traitor for introducing certain Bills in Parliament. This judgment was later reversed by Henry IV and the House of Lords. According to F W Maitland, The Constitutional History of England (originally published 1909, 1963 reprint edited by H A L Fisher) Cambridge University Press Cambridge, p 241, Haxey may not have been a member of the House of Commons but a clerical proctor. In 1512 in Strode's Case, the Court of Staunton fined Richard Strode for introducing legislation to control the tin mines in Cornwall. An Act (4 Hen VIII, c 8) was later passed declaring void the proceedings taken against Strode and having a general operation.

10 D Limon and W R McKay, above note 3, p 69.

11 This accords with the view in G R Elton (ed), The Tudor Constitution — Documents and Commentary Cambridge University Press Cambridge 1960, p 254 that freedom of speech within Parliament appears not to have been raised as a privilege before the reign of Henry VIII. F W Maitland, above note 9, p 242 states that the first time the freedom was claimed of the King by the Speaker at the beginning of a session was in 1541.

12 F W Maitland, above note 9, pp 242-243.

13 CJ (1667-87) 29, 25; LJ (1666-75) 166, 223.

14 F W Maitland, above note 9, p 322.

15 (1682) 12 St Tr 822.
1684, in both of which the proceedings of Parliament were questioned. These decisions provided the immediate reason\textsuperscript{16} for the inclusion of the privilege of freedom of speech as art 9 of the Bill of Rights 1689 in relation to the speeches, debates and proceedings of Parliament.\textsuperscript{17}

In the end, the power struggle between the Parliament and the Crown was resolved by the subjection of the royal prerogative to parliamentary control. The Bill of Rights 1689 confirmed the paramountcy of Parliament over the Crown, yet measures were still required to curtail Crown attempts to influence the House of Commons through its members. Accordingly, at around this time, the first limitations were introduced on the holding of public office while a member of Parliament.\textsuperscript{18} This measure — along with s III of the Act of Settlement 1701, which secured the tenure of judges from Crown dismissal — were designed to curtail the influence of the Crown and thereby promote the independence of the Parliament and the judiciary.

On the other hand, the power struggle between Parliament, particularly the House of Commons, and the courts was prolonged into the 19th century.\textsuperscript{19} Essential to an understanding of this conflict is the notion of Parliament as a judicial body, often described as the 'High Court of Parliament'. This character derives from its earliest origins as a court of justice in the 13th century, hearing private petitions for the redress of grievances in special judicial decisions of the Curia Regis.\textsuperscript{20} Only at the end of the 14th century did those who attended Parliament, originally at the invitation of the sovereign, attain the right to do so. The greater barons and churchmen became the Lords in Parliament, while the representatives of the counties and boroughs formed the Commons. The former continued to exercise judicial power, but the Commons became increasingly concerned with political matters.\textsuperscript{21}

In order to assert its dominance over the Crown and the other courts, Parliament asserted and relied upon its judicial character as the High Court of Parliament, although it appears not to have acted as a court as such since the 16th century.\textsuperscript{22} Nevertheless, Parliament developed certain powers, rights and immunities similar to those acquired by other courts.

First, there evolved the law of Parliament, \textit{lex et consuetudo parliamenti}, comprising the privileges of Parliament. Secondly, the need to ensure the independence of Parliament free from outside interference resulted in the

\begin{thebibliography}{9}
\bibitem{16} See the opinion of Lord Denning on the \textit{Strauss Case} in G F Lock, 'Parliamentary Privilege and the Courts: The Avoidance of Conflict' [1985] \textit{Public Law} 64 at 88.
\bibitem{17} F W Maitland, above note 9, pp 321 asserts that no member of the House of Commons since the Restoration has been punished for words spoken in the House.
\bibitem{18} The first such measure was prescribed by the \textit{Act of Settlement 1701} but this was repealed before it took effect and was replaced in 1707 by s 24 of the Statute 6 of Anne, c 7.
\bibitem{21} E Campbell, above note 20, p 3.
\bibitem{22} G R Elton, above note 11, p 225.
\end{thebibliography}
adoption of privileges enjoyed by the other courts: immunity from prosecution for what is said in Parliament, and power to punish for contempt. Thirdly, during that period of history when different courts possessed different jurisdictions so that the administration of the law was marked by different bodies and different bodies of law, Parliament claimed immunity from the other courts, relying upon its status as the highest Court of the land. Hence, it refused to subject itself to the common law. Finally, this immunity from the common law eventually was claimed by the House of Commons alone in order to ensure its independence from the House of Lords, all of whose members were eligible to participate when it convened as the highest Common Law Court.

Professor Campbell suggests that the Commons might have been prepared to allow the courts during the Tudor and Stuart periods to review the exercise of parliamentary privilege had they been independent of the Crown.23 (This independence was only achieved later through s III of the Act of Settlement 1701.) Meanwhile, Eliot's Case in 1629 convinced the Commons to continue to assert its exclusive role in reviewing the exercise of parliamentary privilege. Judges who transgressed into the area of privilege were liable to be brought before the House for contempt.24 Nevertheless, the securing of judicial independence by the Act of Settlement 1701 brought no change in the Commons' view. The courts did not challenge this, aware no doubt that their fate lay now with Parliament's power to address the Crown for their removal. Indeed, if parliamentary privilege were raised in court proceedings by way of defence, the court's ability to determine whether such a claim could be made was not recognised until the 19th century in *Stockdale v Hansard*.25

The struggle which ensued between the House of Commons and the courts gradually resolved itself in a similar manner to the resolution of the struggle between the Crown and the courts over the royal prerogative. The courts assumed the jurisdiction to decide only whether a particular parliamentary privilege existed at common law, and judicial review of the manner of its exercise was denied; *Stockdale v Hansard*26 and the *Case of the Sheriff of Middlesex*.27 Moreover, no new privileges could be asserted by one House — only Parliament could alter their privileges by legislation.28

The factors which contributed to this negotiated settlement were summed up by Carl Wittke:

23 E Campbell, above note 20, p 4-5.
24 See E Campbell, above note 20, p 5 where in fn 6 there is cited the case when Sir Francis Pemberton and Sir Thomas Jones as judges of the Court of King's Bench were held in contempt of the House of Commons in 1689 for their judgment in *Jay v Topham* (1684) 12 St Tr 822. See E Campbell, 'Judges at the Bar of Parliament' (1999) 18 Aust Bar Review 131.
25 (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112.
26 (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112.
27 (1840) 11 Ad & E 273; 113 ER 419.
28 Declared in 1704: 'neither House of Parliament hath any power, by any vote or declaration, to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament' CJ (1702-1704) 555, 560.
... this settlement of the relation between privilege and the law, could be brought about only after the idea of separate codes of law had disappeared, and the notion that les parliaments, like the rest, was part of the common law, had been evolved; after the nature of the English Supreme Court had been radically altered; and after the democratization of the lower house had made substantial progress.  

Hence, the establishment of the separate body of Law Lords to the House of Lords as a legislative chamber substantially removed the cause of rivalry between the two Houses of Parliament, while the electoral reforms of the 1830s made the House of Commons more representative of the people and somewhat more secure from outside interference by the Crown and the courts.

It is evident from this short history that parliamentary privileges were Parliament's response to threats posed by the Crown and the courts, often at the instigation of the Crown, to the capacity of Parliament to function as the sovereign legislature. Parliament used its privileges to secure this independence, and the dignity due its sovereignty. Although Maitland was of the view at the beginning of the 20th century that '[t]heir importance in the past has been great; their importance in the present we are apt, I think, to overrate', their justification today rests on the same basis on which they originally evolved: namely, the capacity of parliament to perform its various functions free from unnecessary interference. The dominance of the executive today demands the maintenance of parliamentary privilege to preserve in some measure the capacity of parliament to protect its members from executive assault and to ensure that responsible government is not petrified. The role of parliament as a check on the performance of the executive is as important, if not more so, in this age than in the past.

While the history of parliamentary privilege may portray at times a petulant obsession on the part of parliament with its dignity, this was the lesson of bitter experience at the hands of the Crown. Those lessons ought not to be forgotten or regarded as irrelevant. Fajgenbaum and Hanks rightly point out that the justification of parliamentary privilege must be found now in parliament's political supremacy rather than in its judicial origins. This fact necessitates a closer examination of the role of parliamentary privilege today and whether its present nature and scope can be justified in a political environment different to that from which it emerged. What were not directly considered in these historical power struggles between parliament, the Crown and the courts were the interests of the people. Since this is the overriding concern of modern systems of government, it should be an important factor in assessing the justification of parliamentary privilege today.

30 F W Maitland, above note 9, p 374.
Parliamentary privilege in Australia

Colonial and State position

Reliance on parliamentary privilege in the American colonies during the 18th century resulted in the development of principles which came to affect the position in colonial Australia. Indeed, there were constant battles between legislators who claimed privileges as of right and Governors who recognised only those privileges conferred by grace and favour. This latter view was also the view held in England, until an opinion was given in 1815 by British law officers on the privileges of the House of Assembly in Lower Canada. Their view was that the grant of legislative power conferred only ‘such privileges as are incidental to, and necessary to enable them to perform their functions in deliberating and advising upon, and consenting to laws for the peace, welfare and good government of the Province’.

Accordingly, by virtue of this principle of necessity, colonial legislatures were not immediately possessed of all the privileges of the House of Commons. The Judicial Committee of the Privy Council in Kielly v Carson endorsed this view by according a colonial legislature ‘such [privileges] as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute’. In that case it was held that it was not necessary for the exercise of the functions of the House of Assembly of Newfoundland as a local legislature to punish persons for contempt committed outside the Assembly. The power of the House of Commons to so commit was distinguished as one derived ‘by virtue of ancient usage and prescription’. Professor Campbell suggests that this decision, two years after the House of Commons had found the Sheriff of Middlesex guilty of contempt, may have been decided on the basis that the power of contempt ‘was unnecessary and too dangerous to be entrusted to inexperienced colonial politicians’.

The Judicial Committee of the Privy Council in Doyle v Falconer took Kielly v Carson one step further in holding that the Legislative Assembly of Dominica did not possess the power to punish for contempt committed within the House. It is important to note that while Kielly v Carson refused to acknowledge the power to punish for contempt, the Court accepted that a colonial legislature had the power to defend its functions by suspending or expelling a member for unworthy conduct.

33 (1842) 4 Moo P C 63. Compare Beaumont v Barrett (1836) 1 Moo P C 59 where the Judicial Committee of the Privy Council previously upheld the privilege of the Legislative Assembly of Jamaica to commit for contempt of the Assembly.
34 (1842) 4 Moo P C 63 at 88.
35 F I Fajgenbaum and P J Hanks, above note 31, dispute this view: pp 169 and following.
36 (1840) 11 Ad & E 273.
37 E Campbell, above note 20, p 20.
38 (1866) LR 1 FC 328.
without inflicting further punishment for contempt.\textsuperscript{39} Expulsion of a member for disorderly conduct or dishonest conduct, whether inside or outside the House, was upheld in \textit{Armstrong v Budd}\textsuperscript{40} as defensive rather than punitive on the basis that it protected the standing of Parliament, the capacity to perform its functions, and public confidence in relation to these matters.

Apart from denying the power to impose punitive measures, the principle of necessity also does not confer the immunity from arrest in civil causes\textsuperscript{41} nor the immunity from being subpoenaed during parliamentary sittings.\textsuperscript{42} However, other privileges have been recognised as conferred, namely, the immunity of freedom of speech\textsuperscript{43} and the power to order the production of documents.\textsuperscript{44}

Given the evident uncertainty experienced by colonial legislatures as to the scope of their powers, it became accepted during the 19th century that legislation enacted pursuant to the power to make laws for the peace, order and good government of the colony could confer the privileges of the House of Commons on each House.\textsuperscript{45} Hence the prescription of the power to punish for contempt was made by legislation and, as shown below, generally within fairly confined limits.\textsuperscript{46}

Accordingly, there were two sources of parliamentary privileges for the Australian colonies: those privileges which by the principle of necessity at common law were necessary for the exercise of their functions and for their self-protection and those conferred by local legislation. A third source has been cited, at least in relation to art 9 of the \textit{Bill of Rights 1689}: that of inherited law pursuant to s 24 of the \textit{Australian Courts Act 1828} (Imp).\textsuperscript{47} However, that Act only confirmed the application of imperial laws if they

\begin{footnotesize}
\begin{enumerate}
\item[39] See \textit{Doyle v Falconer} (1866) LR 1 PC 328 at 340; followed in \textit{Barton v Taylor} (1886) 11 App Cas 197 at 204 which confined the power to suspend for the period of the current sitting; \textit{Hamett v Crick} [1908] AC 470; \textit{Willis v Perry} (1912) 13 CLR 593 at 597; \textit{Armstrong v Budd} (1969) 89 WN (Pt 2) (NSW) 241 where Wallace P at 402 applied the doctrine of necessity to the conditions in 1969. Necessity is determined at the date of the exercise of the power: \textit{Egan v Willis & Cahill} (1966) 40 NSWLR 650 at 7 per Mahoney P and at 5 per Priestley JA.

\item[40] (1969) 89 WN (Pt 2) (NSW) 241 at 249-250 per Herron CJ; at 255 per Wallace P; at 260-261 per Sugerman JA.

\item[41] \textit{Norton v Crick} (1894) 15 NSWR 172.

\item[42] See the view expressed by Gibbi J as the Royal Commissioner appointed to inquire into and report on certain matters relating to members of the Police Force and the National Hotel, Petrie Bight, Brisbane (10 April 1964) at 185.


\item[44] \textit{Egan v Willis} (1998) 195 CLR 424 dismissing the appeal from the NSW Court of Appeal (1996) 40 NSWLE 650.

\item[45] \textit{Doyle v Falcone} (1866) Lk 1 PC 328 at 341.

\item[46] For example, ss 41-46 \textit{Constitution Act 1867} (Qld).

\item[47] For example, the Report of the Senate Standing Committee on Constitutional and Legal Affairs in 1985 on Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments (PP235/1985) at paras 2.8 to 2.12, citing Isaacs J in \textit{The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd} (Wooltops case) (1922) 31 CLR 421 at 463 and various law reform commission reports.
\end{enumerate}
\end{footnotesize}
were able to be applied to the conditions in NSW on 25 July 1828. As there was, at that date, only a Council of five persons to advise the Governor on the making of laws, it is unlikely that art 9 freedom of speech was capable of applying at that time. In any event, art 9 is accepted as applying under the common law principle of necessity and by virtue of specific adoption of the Bill of Rights 1689 (Imp) by State legislation.

The only certain basis for the incorporation of all the privileges of the House of Commons in colonial legislatures was by their wholesale adoption by statute. Apart from NSW and to a limited extent in Tasmania, this has been provided for in different ways in the other States of Queensland, South Australia, Victoria and Western Australia. In the ACT, the privileges and immunities of the House of Representatives are adopted until altered by ACT law. Similarly, in the Northern Territory, the powers, privileges and immunities of the House of Representatives apply except to the extent that the Legislative Assembly (Powers and Privileges) Act 1992 (NT) has altered them.

Notably, the House of Commons privileges are adopted either on an ambulatory basis or as they exist at a particular date. The former position, which now only remains in Western Australia and in Queensland, ties the development of parliamentary privileges to those changes occurring in relation to the House of Commons by statute. A similar approach is found in the ACT and the Northern Territory in so far as they...
adopt the privileges of the House of Representatives. The other approach of confining
the adoption of the House of Commons privileges as at a particular date operates at the
Commonwealth level (as 'at the establishment of the Commonwealth')\(^65\) and in South
Australia (as at 24 October 1856)\(^66\), Victoria (as at 21 July 1855)\(^67\) and proposed for
Queensland (as at 1 January 1901).\(^68\) This approach ensures local control of the privileges
while avoiding the automatic adoption of changes introduced for the House of
Commons which are not necessarily appropriate for an Australian parliament.

As noted earlier, there has been no wholesale adoption of the privileges of the
House of Commons in Tasmania and NSW. In Tasmania, the *Parliamentary Privilege
Act 1858* (Tas) confers on both Houses powers to summon witnesses and to punish
specified contempts.\(^69\) No adoption occurs by s 12 of that Act, which merely affirms
any pre-existing privileges. In NSW, the privileges of both Houses depend essentially
on the principle of necessity. The most significant limitation is their inability to
punish for contempt.\(^70\) However, statutory provision has been made for punishing
witnesses who fail to comply with the obligations imposed by the *Parliamentary
Evidence Act 1901* (NSW). That Act makes provision for summoning and examining
witnesses before a House or committee.

**Commonwealth position**

The source of parliamentary privileges for the Commonwealth Parliament is s 49
of the Constitution:

The powers, privileges, and immunities of the Senate and of the House of
Representatives, and of the members and the committees of each House, shall be
such as are declared by the Parliament, and until declared shall be those of the
Commons House of Parliament of the United Kingdom, and of its members and
committees, at the establishment of the Commonwealth.

The 'privileges'\(^71\) of the House of Commons as at 1901 continue to apply at the
Commonwealth level, since Parliament has not yet declared comprehensively its
privileges pursuant to s 49. However, to the extent it has declared certain
privileges, any corresponding privileges of the House of Commons no longer

\(^65\) Section 49 Commonwealth Constitution.
\(^66\) Sections 9 and 38 *Constitution Act 1934* (SA).
\(^67\) Section 19(1) *Constitution Act 1975* (Vic).
\(^68\) Proposed amendment to s 40A *Constitution Act 1867* (Qld) by the Constitution
Amendment Bill 1999 (Qld).
\(^69\) Three other *Parliamentary Privilege Acts* of 1885, 1898 and 1957 respectively deal with
the summoning of prisoners, the appointment of officers of Parliament and the powers
of joint committees.
\(^70\) Barton v Taylor *(1886)* 11 App Cas 197.
\(^71\) These are the powers and immunities referred to in the introduction to this chapter. The
inclusion of 'privileges' in s 49 was unnecessary: G S Reid and M Forrest, *Australia's
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apply. Such declarations have been made pursuant to s 51(xxxix) of the Commonwealth Constitution in the Parliamentary Papers Act 1908 (Cth) and the Parliamentary Proceedings Broadcasting Act 1946 (Cth) which extend immunity to the publication and broadcasting of parliamentary proceedings. The most important declaration occurs in the Parliamentary Privileges Act 1987 (Cth) which, inter alia, regulates the power to commit for contempt, abrogates the power to expel a member and removes doubts as to the scope of the freedom of speech in art 9 of the Bill of Rights.

By s 49 of the Constitution, parliamentary privileges are part of the ordinary law and therefore may only be altered by legislation. Neither House alone may alter its privileges, although by s 50 each may regulate the mode of their exercise by standing orders.

Judicial review of parliamentary privilege

The most difficult aspect of parliamentary privilege is defining the role of the courts in reviewing the activities of a House whether in exercise of its privileges or in performance of its legislative function. It was noted earlier that these privileges evolved through centuries of conflict between Parliament, the Crown and the courts. From the seminal cases of Stockdale v Hansard and the Case of the Sheriff of Middlesex, there emerged the principle that the courts have jurisdiction to decide only whether a particular parliamentary privilege exists at common law and its scope; they will not question or review the exercise of a privilege provided it occurred within its scope. While this principle appears simple enough, its application has proved to be otherwise. Further complicating the position is the fact that at times it has been seemingly overlooked or ignored by litigants and judges.

In Stockdale v Hansard, the plaintiff, a book publisher, sued Messrs Hansard for defamation in publishing a report from the Inspectors of Prisons which imputed that he had published an obscene libel. Hansard defended the action on the basis that the House of Commons had ordered the report to be published under protection of art 9. Not only had the House resolved that the publication of 'Reports, Votes and Proceedings' were protected, but that it had 'the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges'. The Court of Queen's Bench firmly rejected both these assertions of the House, holding the publication not privileged and assuming the jurisdiction to determine the existence and scope of its privileges.

The House of Commons response was to issue a warrant for the arrest of the Sheriff of Middlesex (a position held by two men) for executing the Stockdale judgment against Messrs Hansard. Because the warrant merely cited that the House had found

Other legislation has been enacted in relation to various parliamentary committees for example the Public Accounts and Audit Committee Act 1951 (Cth).

(1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112.

(1840) 11 Ad & E 273; 113 ER 419.

them guilty of contempt of the House, the Court of Queen’s Bench on this occasion held in the Case of the Sheriff of Middlesex\(^{76}\) that judicial review was effectively prevented and a writ of habeas corpus was denied. Once the Court was satisfied that the arrest was within the power to commit for contempt, the Stockdale v Hansard principle prevented any further inquiry as to the nature of the contempt or the facts of the case. Had the warrant cited the basis for the finding of contempt, the court would have had jurisdiction to decide whether it was sufficient to constitute contempt.

In Australia, the same position was adopted by the High Court in relation to the House of Representatives in R v Richards; Ex parte Fitzpatrick and Browne.\(^{77}\) The Chief Justice, Sir Owen Dixon, expressed the position established in those English decisions thus: ‘it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.’\(^{78}\)

Article 9 of the Bill of Rights 1689 is often overlooked in this context, in so far as it prohibits the impeachment or questioning of the ‘proceedings of parliament’ in any court or place outside Parliament. The principle developed in Stockdale v Hansard is implicit in art 9. However, ‘proceedings of parliament’ in art 9 encompasses a wider spectrum than the exercise of parliamentary privileges, covering most of the activities performed by a House as well as the activities of non-members closely linked to parliamentary proceedings. Yet the immunity enjoyed by a House under art 9 is itself a privilege, the scope of which is determined according to the Stockdale v Hansard principle. So in the end, the courts decide the extent of parliamentary privilege and the limits to their powers of judicial review.

It ought not to be forgotten that lurking behind this principle was the concern of the House of Commons to prevent its internal affairs being reviewed by the House of Lords, lest it become the ‘overlord’ of the House of Commons.\(^{79}\) Obviously, this concern is absent in Australia.

It is not possible to explore at this point the precise limits to the scope of judicial review in relation to parliamentary privilege. While this is more easily attempted in the context of each of the privileges, certain general propositions can be suggested at this stage.

Most cases in which judicial review has been sought involve a House making an order in relation to one of its members. By virtue of the Stockdale v Hansard principle, a court may only decide whether the House possesses the power to make that order, not the desirability or merits of it being given. The order might be to produce certain documents to the House, to apologise to the House, or to suspend the member from the

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\(^{76}\) (1840) 11 Ad & E 273; 113 ER 419.

\(^{77}\) (1955) 92 CLR 157. For recent criticism of this case for failing to comply with the doctrine of separation of powers, see A Twomey, ‘Reconciling Parliament’s Contempt Power with the Constitutional Separation of Powers’ (1997) 8 PLR 88. Kirby J in Egan v Willis (1998) 158 ALR 527 at para 136 indicated the decision needed reconsideration on this ground.

\(^{78}\) (1955) 92 CLR 157 at 162.

\(^{79}\) Bradlaugh v Gossett (1884) 12 QBD 271 at 286-7 per Stephen J.
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House. Provided these orders fall within the privileges or powers of the House, a court may not inquire further.

This may mean that a House becomes the exclusive interpreter of legislation in so far as it applies to events occurring within parliamentary proceedings. But where those events have consequences outside those proceedings, the courts will have jurisdiction to consider the extra-parliamentary effect of that legislation. These propositions are illustrated by Bradlaugh v Gossett in relation to the Parliamentary Oaths Act 1866 (UK) which conferred a right to take an oath as a newly elected member. The plaintiff, who had just been elected to the House of Commons, sought a declaration that a resolution of the House of Commons requiring the Sergeant-at-Arms to exclude him from the House was beyond the power and jurisdiction of the House. On a demurrer, the Court of Queen’s Bench held it lacked any jurisdiction to intervene in the internal processes of the Parliament. Lord Coleridge CJ declared in accordance with the Stockdale v Hansard principle:

What is said and done within the walls of Parliament cannot be inquired into in a court of law ... The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.

The plaintiff relied, however, on the Parliamentary Oaths Act 1866 (UK) as affording him a statutory right to take an oath as a member, which right was denied by the resolution of the House. While the Court accepted that Stockdale v Hansard established that a resolution of a House cannot change the law, it recognised even if the resolution were illegal the Court lacked jurisdiction to intervene in this case. The position was summed up by Stephen J, who was the only judge to give detailed consideration to this issue, as follows:

The legal question which this statement of the case appears to me to raise for our decision is this: Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? In my opinion, we have no such power. I think the House of Commons is not subject to the control of Her Majesty’s Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force

80 Bradlaugh v Gossett (1884) 12 QBD 271.
81 For an account of the extraordinary history of Mr Bradlaugh MP, see E Campbell, ‘Oaths and Affirmations of Public Office’ (1999) 25 Mon LR 132 at 137-139.
82 E Campbell, above note 81 at 275.
83 Lord Coleridge CJ agreed that the Court had no jurisdiction to decide whether the resolution violated the Act and even if it did there was no remedy which a Court could give.
as may be necessary to carry into effect such a resolution as the one before us is
justifiable.\textsuperscript{84}

It followed, according to his Honour, that the House had the exclusive power to
interpret the Parliamentary Oaths Act 1866 (UK) in so far as it affects the proceedings
of the House:

It seems to follow that the House of Commons has the exclusive power of
interpreting the statute, so far as the regulation of its own proceedings within its
own walls is concerned; and that, even if that interpretation should be erroneous,
this Court has no power to interfere with it directly or indirectly.\textsuperscript{85}

But this exclusive power to interpret the legislation extended only in relation to rights
exercised within its proceedings. A Court would have jurisdiction in relation to 'rights
to be exercised independently of the House', namely, rights arising outside
parliamentary proceedings:

We should have said that, for the purpose of determining on a right to be exercised
within the House itself, and in particular the right of sitting and voting, the House
and the House only could interpret the statute; but that, as regarded rights to be
exercised out of and independently of the House, such as the right of suing for a
penalty for having sat and voted, the statute must be interpreted by this Court
independently of the House.\textsuperscript{86}

In addition, jurisdiction was accorded to the Courts over ordinary crimes committed
in the House:

I know of no authority for the proposition that an ordinary crime committed in
the House of Commons would be withdrawn from the ordinary course of
criminal justice.\textsuperscript{87}

This distinction between the House having exclusive power over its own proceedings
and the courts assuming jurisdiction as soon as matters outside the House are affected
by the House's actions was clearly recognised by the Queensland Full Court in \textit{Barnes v
Purcell}\textsuperscript{88} where E A Douglas J accepted jurisdiction to review any punishment inflicted
on a member by a House even when pursuant to its standing orders.\textsuperscript{89}

In confining judicial review to the issue of whether action taken by a House falls
within the scope of its privileges or powers, an assumption is made that there is an

\textsuperscript{84} (1884) 12 QBD 271 at 278.
\textsuperscript{85} At 280-1.
\textsuperscript{86} At 282.
\textsuperscript{87} At 283; see also \textit{CJC v Nationwide News Pty Ltd} (1994) 74 A Crim R 569 at 579.
\textsuperscript{88} [1946] St R Qd 87.
\textsuperscript{89} At 103 per E A Douglas J.
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authoritative list of privileges or powers against which the conduct may be judged. The difficulty, however, is that these privileges and powers can be defined with varying degrees of precision or generality. The more specific their definition, the more intrusive judicial review becomes. This is well illustrated by the different approaches adopted by the High Court in *Egan v Willis*. 90

In that case, the Legislative Council of NSW ordered one of its members, Mr Egan, to produce executive documents in his possession as the State Treasurer. On refusing to comply, the House resolved that this constituted contempt and that he be suspended from the House for the remainder of that day's sittings. The plaintiff sought declarations that these orders and resolutions were invalid and that his subsequent removal from the House onto the footpath constituted a trespass. McHugh J in dissent confined the scope of judicial review narrowly, in accordance with *Bradlaugh v Gossett*, to the issue whether the Legislative Council had the power to suspend a member for obstructing the business of the House. Since on clear authority it had that power, the resolution to suspend was therefore beyond further judicial review, being simply an exercise of that power. 91

However, the majority in *Egan v Willis* (Gaudron, Gummow and Hayne JJ in a joint judgment; Kirby and Callinan JJ in separate judgments) went further by deciding that the House had the power to order from one of its members the production of those executive documents in his possession. On that basis, it was concluded that the member was liable to be suspended from the House for non-compliance with the order to produce. McHugh J in dissent regarded as impermissible this inquiry as to the power to require the production of the executive papers, for it questioned not the existence of the power to suspend but the propriety of its exercise. 92

These divergent approaches stem from describing the power to suspend differently. The power is defined more narrowly by the majority as the power to suspend for failure to comply with an order to produce state papers. On the other hand, McHugh J defined it broadly as the power to suspend for obstructing the business of the House. Consequently, the more narrowly the power is defined, the wider the potential scope of judicial review.

Nonetheless, the joint majority of Gaudron, Gummow and Hayne JJ acknowledged restrictions on the court's role and were prepared to review the validity of the resolutions only on the basis that they were elements in the issue of whether the plaintiff had suffered a trespass. Without that issue, they would have declined in the exercise of their discretion to make any declaration:

The Court of Appeal, in dismissing the claim for a declaration of the invalidity of paras 2 and 3 of the resolution, dealt with the merits of the matter rather than on the footing that a bare declaration with respect to the validity of proceedings in the Legislative Council should not be made. The Court of Appeal appears to have dealt

91 At 466 [78] and see at 479 [109].
92 At 467 [80]. This was even acknowledged in the joint judgment of Gaudron, Gummow and Hayne JJ at 441 [13]: 'the argument focused upon the occasion for suspension'.

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with the merits on the footing that the questions respecting the privileges of the Council required an answer as a necessary step to a determination of the private rights of the appellant for which he sought vindication through the tort of trespass to the person.

We emphasise that, even if an application for a bare declaration of the nature we have described would have been justiciable (as to which we express no concluded opinion), at least as a matter of discretion, a suit constituted solely to obtain such relief ordinarily ought not be entertained. Questions respecting the existence of the powers and privileges of a legislative chamber may present justiciable issues when they are elements in a controversy arising in the courts under the general law but they should not be entertained in the abstract and apart from a justiciable controversy.93

This accords with the approach taken by Stephen J in Bradlaugh v Gossett.94 Even though there was a justiciable issue of trespass in this case, the majority nevertheless ought to have confined their inquiry to the existence of the power to suspend for contempt. It was the exercise of that power which provided the defence to the action in trespass, and it is a well established power which is available whenever a member undermines the capacity of the House to perform its functions. With all due respect to the majority of the Court, the approach of McHugh J seems the preferable one.

Certainly, the narrow approach of McHugh J renders members more vulnerable at the hands of the House. All the protections of the common law are absent. Those called before a House or a committee to give evidence or produce documents would be similarly vulnerable to the punitive powers of the House (except in NSW). On the other hand, the consequence of the majority approach is to erode the privilege of the House to control its own proceedings, in particular, the power to suspend a member. However, it might be argued that the more intrusive approach of the majority is confined to NSW by virtue of the principle of necessity; that is, the Court was entitled to consider all the surrounding circumstances to ensure the suspension was non-punitive. This argument loses its appeal, though, in the light of the joint majority judgment's scepticism as to this distinction between punitive and non-punitive measures.

Significantly, Kirby J noted that the justiciability of the issues was never contested by the parties in the Court of Appeal.95 However, the issue was raised in the High Court by the submission of Mr Brad Selway QC, the Attorney-General for South Australia (Intervening for that State), that the Court could only decide on the power of suspension.96

Consideration also needs to be given to whether the availability of judicial review may depend on the extent to which the House cites grounds or reasons for

93 At 438-9 [4]-[5].
94 (1884) 12 QBD 271.
95 At 485-6 [121](4).
96 At 487-8 [24].
its action. It has already been noted that when a writ of committal is issued, a
court can review the grounds upon which the person was adjudged to be in
contempt if those grounds are included in the writ. The same position might be
taken in relation to a resolution which suspends or expels a member for certain
conduct which renders the member unfit for office.

Finally, it should be noted that actions of a House which fall outside its
‘proceedings’ remain liable to judicial review. Hence, they must comply with the
law. Similarly, events which occur within the precincts of Parliament are usually
not beyond judicial review unless they occur in the course of parliamentary
proceedings. While the preparation of draft bills or other documentation for
tabling in a House may fall within that exception, the same cannot be said of the
sale of liquor in the members’ refreshment bar, nor even the assault of a
member by another member either inside or outside the chamber.

General propositions

Although the scope of judicial review is further considered in relation to the
freedom of speech in Chapter 6, corruption and bribery of members in Chapter 8,
and the duty of confidentiality in Chapter 9, an attempt is made here to formulate
some general propositions as to the scope of judicial review. It is important to
remember that any restrictions on judicial review need to be justified on the ground
that they allow the Houses to perform their various functions unhindered by outside
interference from the executive and the courts.

1. A court can decide whether an event occurs within the scope of ‘parliamentary
proceedings’ or the other privileges of a House — but in the event it does, it
cannot question or impeach what occurred.

2. No legal proceedings can be instituted in relation to what occurs within the
scope of parliamentary proceedings, nor can any legal action rely for support,
either in its initiation or defence, on what occurs within those proceedings.

3. Any order or other action of a House may only be questioned for the purpose of
ascertaining whether it falls within the privileges of the House.

4. A House is the exclusive interpreter of its standing orders and any statutory

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97 See Case of the Sheriff of Middlesex (1840) 11 Ad & E 273; 113 ER 419.
98 See Armstrong v Budd (1969) 89 WN (Pt 2) NSW 241; E Campbell, above note 20, pp 103-5.
99 See R v Graham-Campbell; Ex parte Herbert [1935] 1 KB 594 which is criticised by Professor
Campbell, above note 20, p 78 for failing to decide that the sale of liquor occurred outside
the proceedings of parliament. The 1999 UK Report of the Joint Committee on
Parliamentary Privilege recommends overcoming this decision by statutory application of
general laws to parliamentary precincts.
100 Stockdale v Hansard (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112; Case of the Sheriff of
Middlesex (1840) 11 Ad & E 273; 113 ER 419.
101 Prebble v Television New Zealand Ltd [1993] AC 593.
102 Stockdale v Hansard (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112; Case of the Sheriff of
Middlesex (1840) 11 Ad & E 273; 113 ER 419.
provisions in so far as they regulate its proceedings, unless jurisdiction is conferred on the courts by statute.\textsuperscript{103}

5. No executive inquiry is permitted to question or impeach parliamentary proceedings except with statutory authorisation.

6. A court is unlikely to hear a matter which merely seeks a declaration in relation to the effect of any action on the part of a House.\textsuperscript{104}

7. Only in exceptional circumstances\textsuperscript{105} will a court intervene in legislative proceedings where a Bill has failed to comply with a mandatory manner and form procedure.\textsuperscript{106} Once enacted, a court will declare legislation invalid for non-compliance with that procedure.\textsuperscript{107}

8. Despite the previous propositions, reference to parliamentary proceedings is permissible:
   - to establish \textit{merely as a fact} that a speech was made or another event occurred in the course of those proceedings;\textsuperscript{108} and
   - for the purpose of ascertaining the intention of Parliament from the second reading speech to aid in the interpretation of legislation.\textsuperscript{109}

Powers and immunities

Each of the powers and immunities listed in the introduction to this chapter is now outlined (except for the privilege of freedom of speech, which is the topic of the next chapter). Reference is often made to the scope of the relevant privileges of the UK House of Commons since these have been generally adopted in Australia, with or without modification.

\textbf{Power to determine qualifications of its members}

The House of Commons originally possessed the exclusive power to determine the qualifications and disqualifications of members.\textsuperscript{110} This power is, however, no

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\item[103] Bradlaugh v Gossett (1884) 12 QBD 271.
\item[105] Rediffusion (Hong Kong) Ltd v Attorney-General (HK) [1970] AC 1136 (PC); Trethewan v Peden (1930) 31 SR(NSW) 183.
\item[107] Victoria v The Commonwealth (PMA Case) (1975) 134 CLR 81.
\item[108] This occurs, for example, to establish whether the requirements of a manner and form provision have been satisfied; whether delegated legislation has been laid before each House or been vetoed or not; in common informer actions where a member has sat when disqualified. See Church of Scientology of California v Johnson-Smith [1972] 1 QB 522 at 527; Sankey v Whitlam (1978) 142 CLR 1 at 35-37; Munsey v Askin [1982] 2 NSWLR 369 at 373 (CA); Rost v Edwards (1990) 2 WLR 1286; Prebble v New Zealand Television Ltd [1995] 1 AC 321 at 337.
\item[109] See, for example, Pepper v Hart [1993] AC 593 (HL); s 14B Acts Interpretation Act 1954 (Qld) and comparable legislation in other jurisdictions.
\item[110] See D Limon and W R McKay, above note 3, p 79.
\end{thebibliography}
longer exclusive to the House, as it now shares its role with the courts by virtue of statute. Similarly in Australia, the qualifications and disqualifications of members are regulated by statute. Generally, the Australian Houses possess the power to apply those statutory provisions or to refer their application to the courts. This shared jurisdiction of the Houses and the courts was considered earlier (in Chapter 4).

**Power to regulate and discipline members**

Each Australian House, apart from those in NSW, possesses the power of the House of Commons to regulate and discipline their members in relation to the performance of their parliamentary duties. Members of most Houses are liable to be disciplined by reprimand (admonition or censure), suspension or expulsion. Only non-punitive measures can be imposed in NSW.

Suspension and expulsion are imposed for serious breaches of privilege or contempt. A member is likely to be suspended for a breach of the standing orders and rules, for misleading the House, for disobeying an order of the House, or for abusing the freedom of speech under art 9. Expulsion is reserved for those members whose conduct renders them unfit to remain a member of parliament.

A number of expulsions have occurred at the State level. A recent example is that of Mr Armstrong, who was expelled from the NSW Legislative Council, having been adjudged 'guilty of conduct unworthy of a Member of the Legislative Council'. This finding was based on judicial comments in a case that he had been party to an arrangement to procure false evidence in divorce proceedings and had contemplated bribing a Supreme Court judge. His expulsion was upheld by the NSW Court of Appeal in *Armstrong v Budd* as a defensive measure within the principle of necessity, being to secure public confidence in the standing of the House and its capacity to function. The Court accepted that conduct unworthy of a member extended to dishonest conduct occurring both inside and outside the House. Wallace P noted that, in addition to physical incapacity to perform official duties, it was accepted that other grounds for expulsion of a member included 'lunacy, habitual drunkenness and persistent and sustained obstruction of the business of the Council'.

This power was very rarely exercised at the Commonwealth level — for instance, the only member to have been expelled from the House of Representatives was Mr Hugh Mahon (Labor member for Kalgoorlie, WA) in 1920 for uttering seditious and disloyal utterances in support of the Irish republican cause. Since 1987, both Commonwealth

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111 See the discussion of this shared jurisdiction in the dissenting judgment of McHugh J in *Sue v Hill* (1999) 163 ALR 648 at [272] and following.

112 Three early expulsions in NSW are mentioned in *Armstrong v Budd* (1969) 89 WN (Pt 2) (NSW) 241 at 250.

113 (1969) 89 WN (Pt 2) (NSW) 241 at 249-250 per Herron CJ; at 255 per Wallace P; at 260-261 per Sugarman JA.

114 See especially Herron J at 249-250.

115 At 255.
Houses have lost the power to expel a member. This followed the recommendation of the Final Report of the Joint Select Committee on Parliamentary Privilege which considered the circumstances warranting expulsion were adequately covered by the grounds of disqualification of members in ss 44 and 45 of the Constitution. Furthermore, the Committee was influenced by the Mahon expulsion in 1920 which had been regarded as improper. Since their privileges are essentially tied to those of the House of Representatives, the power to expel a member has similarly been lost in the ACT and the Northern Territory.

As for disciplining members by fine, it appears that no House possesses such a power unless conferred by statute. A circumscribed power to fine has been conferred on the Houses of the Commonwealth Parliament, as well as on those of Queensland, Western Australia and the Northern Territory. Further consideration of the power to fine occurs in relation to the power of contempt.

In NSW, although the Houses have no power to punish members, they may suspend or expel a member for non-punitive purposes.

The NSW Court of Appeal in *Egan v Willis* upheld the power of the NSW Legislative Council to order the suspension and removal of a member from the House — although not from the precincts of Parliament. The Court distinguished between measures which were merely enforcing in nature and those which were punitive. As the suspension of the member to enforce the order to produce documents was necessary in that case for the functioning of the House, it was within the inherent power of the House. On the other hand, suspension of a member solely as punishment for non-compliance was beyond that inherent power. On appeal, this distinction was not embraced by a majority of the High Court. While upholding the power to suspend the minister for non-compliance with its order, the joint judgment of Gaudron, Gummow and Hayne JJ acknowledged that there may be limits to the power of the House to enforce its orders, but considered that ‘to distinguish between punishing and merely inducing compliance may very well be difficult’. In any event, the House had acted within its powers by suspending the member ‘for a limited time’.

It is evident from *Egan v Willis* that suspension and presumably expulsion of a member is subject to judicial review. The difficulty in this area is how specific the

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116 Section 8 *Parliamentary Privileges Act* 1987 (Cth).
117 PP 219/1984 at 126, rec 25.
118 H Evans, above note 6, p 53 notes how this view was ‘opposed in the Senate’.
119 See E Campbell, above note 20, p 104-5.
120 *Barton v Taylor* (1886) 11 App Cas 197; *Armstrong v Budd* (1969) 89 WN (Pt 2) (NSW) 241.
121 (1996) 40 NSWLR 650.
122 (1996) 40 NSWLR 650 at 664-667 per Gleeson CJ; at 677-678 and 683 per Mahoney P; at 692-693 per Priestley JA.
125 At 455 [54]. See also Kirby J at 505 [159] and Callinan J at 514 [194] who both accepted the suspension as not punitive.
court will be in defining the power of suspension or expulsion. As noted earlier, the more specific approach of the majority in *Egan v Willis*, compared with the less specific approach of McHugh J, illustrates how critical the process of definition is to the scope of judicial review.

**Power to control own proceedings**

The power of each House to control its own proceedings is implicit in art 9 of the *Bill of Rights* in so far as it prohibits the impeachment or questioning of the 'proceedings of parliament' in any court or place outside Parliament. The exclusive nature of the power to control its own proceedings means that action taken by a House in the course of its 'proceedings' is generally beyond the scope of judicial review.

The following matters fall within the power of each House to control its own proceedings:

- regulating the conduct of the business of the House including the passage of Bills;
- the adoption of standing rules and orders;
- maintaining order in the House; and
- controlling publication of the proceedings of the House.

All of these matters are regulated by standing rules and orders.

**Standing rules and orders**

In Australia, there is a statutory basis to the power of each House to prescribe standing rules and orders in relation to its proceedings. Both Houses of the Commonwealth Parliament are invested with this power by s 50 of the Constitution:

> 50. Each House of the Parliament may make rules and orders with respect to —
> (i) The mode in which its powers, privileges, and immunities may be exercised and upheld;
> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

At the State level, respective State constitutions empower each House to prescribe 'standing rules and orders' for the 'orderly conduct' of each House as well as for other specific matters, such as the absence of a presiding officer, communications between the Houses, publication of the business of the House, the form of Bills and presentation for royal assent. In NSW, Queensland, South Australia and Tasmania, standing orders must receive the Governor's approval before coming into force. The Legislative Assemblies of both the ACT and the Northern Territory are also empowered to make standing rules.

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126 Section 15 Constitution Act 1902 (NSW); s 8 Constitution Act 1867 (Qld); s 43 Constitution Act 1975 (Vic); s 55 Constitution Act 1934 (SA); s 17 Constitution Act 1934 (Tas); s 34 Constitution Act 1889 (WA).
and orders ‘with respect to the order and conduct of its business or proceedings’ (ACT) and ‘with respect to the conduct of business’ (NT).

The statutory prescription that the standing rules and orders be for the ‘orderly conduct’ of each House means they are liable to judicial review to ensure they fall within the power of the House to prescribe. In *Harnett v Crick*, the Judicial Committee of the Privy Council considered:

Two things seem to be clear: (1) that the House itself is the sole judge whether an ‘occasion’ has arisen for the preparation and adoption of a standing order regulating the orderly conduct of the Assembly, and (2) that no Court of law can question the validity of a standing order duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all the circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.

As to the interpretation of standing orders, this is a matter within the exclusive authority of each House. Professor Campbell suggests, however, that judicial review may be available in relation to any punitive action taken by a House, at least where the privileges of the House depend on the principle of necessity. This arises from the view that the power to make standing orders for the orderly conduct of the House may not confer wide punitive powers to impose fines or expel members, although the power to suspend appears to be within power.

**Power to conduct inquiries**

Parliamentary investigations have always played a significant role in Australian political affairs. Indeed, that role has increased in recent times with the expansion in executive activity and government bureaucracy. Consequently, a range of other review mechanisms, such as freedom of information and administrative review, have been introduced in response to the perceived inadequacy of parliamentary review. Nonetheless, parliamentary review has been enhanced principally by the development of a more sophisticated committee structure and a greater appreciation of the scrutiny capacity of upper Houses.

Parliamentary inquiries may be conducted by a House itself or by one of its committees. Lord Denman CJ in *Stockdale v Hansard* described the House of
Commons as 'the grand inquest of the nation'. While a House may interrogate a member for information, as in Egan v Willis, committees are usually appointed to conduct formal investigations and to report to the House on their findings and recommendations. Whether a House can appoint someone who is not a member of the House to conduct an inquiry on its behalf or even appoint that person to one of its committees is unclear.

A glance at any parliamentary committee structure reveals a myriad of committees: standing committees, select committees, statutory committees, joint committees and so on. Many are appointed with scrutiny or investigatory functions and powers.

Both the House of Commons and the House of Lords possess the power to inquire into any matter, whether as a House or by establishing a committee. While each House possesses the coercive powers to summon witnesses, to call for the production of documents and to punish for non-compliance, their committees must be specifically conferred these powers by resolution of the House or by statute.

The Australian Houses also possess the power to conduct inquiries, whether by virtue of the adoption of the privileges of the House of Commons or by the principle of necessity. However, the federal division of powers has cast doubt on whether the Australian Houses possess the capacity to inquire into any matter. It has been suggested that their inquiries are confined to matters which pertain to the exercise of their respective legislative powers; in other words, the division of powers between the Commonwealth, States and Territories restricts the scope of inquiry of their respective Houses. Also, it has been suggested that an inquiry may only relate to the exercise of legislative power, on the basis that the Australian Houses never inherited the 'Grand Inquest' role of the House of Commons. The first of these grounds for a limited power of inquiry appears dubious, given the High Court's recognition that any political matter is necessarily a federal matter, nor is there any sound basis for concluding that the Australian Houses have not inherited an investigative role given the importance of that role in the principles of responsible government.
government and ministerial responsibility.\textsuperscript{139}

Another suggested restriction is that the coercive powers are confined, like those of a royal commission, to the legislative capacity of their parliaments.\textsuperscript{140} However, this may prove to be an elusive limitation, especially in relation to the Commonwealth Parliament, given the ease with which any public matter can become a matter of Commonwealth concern.\textsuperscript{141} The only difference occurs in NSW, where the Houses lack the inherent power to punish for non-compliance with their orders, by virtue of the principle of necessity.\textsuperscript{142}

As in the United Kingdom, Australian parliamentary committees only possess those coercive powers which are delegated to them by their House or Houses or conferred by statute. Indeed, most of the coercive powers have been conferred on Australian parliaments.\textsuperscript{143} They generally provide that the House and its duly authorised committees possess the power to summon persons to appear before them or to produce documents. The summons must specify the date, time and place for compliance. Witnesses are usually entitled to their reasonable expenses for appearing before the House or committee.\textsuperscript{144} As for members, a House or committee may order them to appear without a summons.\textsuperscript{145}

Protection is often afforded witnesses appearing before a House or a committee from intimidation or other threats or force.\textsuperscript{146} Evidence given or documents produced in camera may not be disclosed or published without the consent of the House or committee.\textsuperscript{147} The first of the Privilege Resolutions, adopted by the Senate


\textsuperscript{140} See Attorney-General for the Commonwealth v Colonial Sugar Refining Co Ltd [1914] AC 237, 17 CLR 644; High Court in (1913) 15 CLR 182; Lockwood v The Commonwealth (1954) 90 CLR 177 at 182 per Fullagar J. However, L M Barlin (ed), above note 5, p 584 regards this point as not without doubt in the light of a view expressed by Professor Dennis Pearce in his article, 'Inquiries by Senate Committees' (1971) 45 ALJ 652 at 659. Also see E Campbell, 'Commonwealth Powers and the Privileges of State Parliaments' (1999) 20 UQLJ 201 at 212-221 on a range of possible restrictions on the investigatory powers of Australian Houses.


\textsuperscript{142} See Fenton v Hampton (1858) 11 Moo PC 347: 14 ER 727 in relation to the Legislative Council of Van Dieman's Land.

\textsuperscript{143} Parliamentary Evidence Act 1901 (NSW); ss 41-42 Constitution Act 1867 (Qld); ss 1-2 Parliamentary Privilege Act 1885 (Tas); ss 4-5 Parliamentary Privileges Act 1891 (WA).

\textsuperscript{144} See for example s 6 Parliamentary Evidence Act 1901 (NSW).

\textsuperscript{145} Section 43 Constitution Act 1867 (Qld); s 6 Parliamentary Privileges Act 1891 (WA); s 5 Parliamentary Evidence Act 1901 (NSW).

\textsuperscript{146} Section 12 Parliamentary Privileges Act 1987 (Cth); s 20 Legislative Assembly (Powers and Privileges) Act 1992 (NT).

\textsuperscript{147} Section 13 Parliamentary Privileges Act 1987 (Cth); s 22 Legislative Assembly (Powers and Privileges) Act 1992 (NT).
in 1988, prescribes various procedures for the protection of witnesses appearing before Senate committees. The second of the Resolutions provides additional protection for witnesses appearing before the Privileges Committee.

Despite being conferred power to summon persons, papers and records, witnesses are usually simply invited to co-operate with the committee. If summoned, witnesses are obliged to answer all questions and requests for documentation put by the committee unless they fall outside the committee's terms of reference or the constitutional authority of the House. Failure to appear as a witness or to answer a relevant question or produce relevant documents constitutes contempt of the House under the general law and statute. Concern has been expressed at the vulnerability of witnesses appearing before parliamentary inquiries.

In Queensland and Western Australia, where a person objects to answering a question or producing a document on the ground that it is 'of a private nature and does not affect the subject inquiry', the House may excuse compliance as the case may require. In NSW, the only justification for refusing to answer a lawful question is where the information sought was given in a religious confession according to the rites of a Church. Also, a warrant for the arrest of a witness who fails to appear can be obtained from a Supreme Court judge.

These coercive powers of the House apply equally to the members of that House, even when ministers. This was recognised by the High Court in Egan v Willis which, as noted earlier, upheld the inherent power of the NSW Legislative Council to order one of its members, who was also the State Treasurer, to produce certain 'state papers'. These papers related to the Government's consideration of a report of a Royal Commission into the Lake Cowal goldmine. The power to order their production was accepted as necessary to enable the House to review the conduct of the Executive Government. The joint judgment of Gaudron, Gummow and Hayne JJ referred to 'the immediate interrelation between that superintendence and the law-making function in which the Legislative Council participates, together with the Legislative Assembly and the Crown'.

Although McHugh J disagreed with the majority on the scope of judicial review, his Honour nevertheless agreed that the House had, by virtue of the principle of responsible government, the power to order documents from its members who were

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149 Section 11 Parliamentary Evidence Act 1901 (NSW); s 21 Legislative Assembly (Powers and Privileges) Act 1992 (NT).
151 Section 44 Constitution Act 1867 (Qld); cl 30-32 LCARC's draft Parliament of Queensland Bill.
152 Section 7 Parliamentary Privileges Act 1891 (WA).
153 Section 127 of the Evidence Act 1995 (NSW).
154 Sections 7-8 Parliamentary Evidence Act 1901 (NSW).
156 At 453 [47].
ministers. Surprisingly, he described the principle of necessity in stricter terms by asking whether "it would be impossible, in the absence of the power asserted, to carry out the relevant function".

The next issue which arose in this matter was whether the Legislative Council had to observe the privileges which provided a lawful excuse for non-disclosure under the general law. Neither the NSW Court of Appeal nor the High Court in Egan v Willis were asked to rule on that issue. However, the issue was later decided by the NSW Court of Appeal in Egan v Chadwick which held that neither public interest immunity nor legal professional privilege could be relied on by a member of the Legislative Council in refusing to produce certain state papers. Presumably, the same position applies in relation to the privilege against self-incrimination.

Although the decision in Egan v Chadwick concerned the inherent powers of the NSW Legislative Council, the reasoning of the Court is equally applicable to the other Australian parliaments which have adopted the privileges of the House of Commons. The Court unanimously held that it was reasonably necessary for the performance of the function of the Legislative Council to hold the Executive to account that it possess the capacity to call for the production of all executive documents. However, the Court split on whether exceptions might arise to such claims. The majority of Spigelman CJ and Meagher JA held that the production of executive documents would be precluded if this were inconsistent with the principle of responsible government. The only instance of such inconsistency they mentioned was in the case of documents recording the deliberations of Cabinet under public interest immunity. Priestley JA dissented on this point, holding that 'no legal right to absolute secrecy is given to any group of men and women in government'. This view recognises the important role of parliament to scrutinise the executive.

This decision is of particular importance to upper Houses as chambers of review. In the latter half of 1999, there was an unprecedented number of public interest immunity claims by ministers in the Senate which attracted, apart from a censure motion, the novel response of an order extending question time for the remainder of the year.

If a House or committee wishes to question a member of the other House of a bicameral parliament or of another parliament, courtesy dictates that a request be sent to the presiding officer of the other House to ask the member to appear. The Standing Orders of the Senate require this when seeking the attendance of a member or officer of the House of Representatives. Usually the member is not asked. In the

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157 At 472 [93] and 475-476 [102]. But his Honour regarded the power as not extending to citizens.
158 At 467 [81].
159 [1999] NSWCA 176.
161 [1999] NSWCA 176 at [69-71] per Spigelman CJ; [154] per Meagher JA.
162 At [143].
164 Senate SO 178. Standing Order 179 allows the Senate to concede to a similar request from the House of Representatives.
light of this practice, it appears that a House could not summon such a member to appear. The power of a House to order the production of documents held by a non-government member might be viewed as a different situation.

Where a House seeks to examine a government official, guidelines have been formulated at least at the federal level to assist those officials. The general approach is to require the official to act on the instructions of the minister in responding to questions from a parliamentary committee.

**Power to punish contempt**

A 'contempt of parliament' is defined by *Erskine May* in these terms:

> Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as contempt even though there is no precedent of the offence.

It should be noted, however, that a contempt of parliament is to be distinguished from a 'breach of privilege'. The latter refers to an infringement of the powers or immunities of a House or of its members, such as when legal proceedings call into question parliamentary proceedings. While all breaches of privilege usually constitute contempts, not all contempts are a breach of privilege.

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165 See H Evans, above note 6, pp 55-56 which refers to the 1996 Report of the Senate Select Committee on the Victorian Casino Inquiry which concluded that it lacked the power to summon members of a State Parliament and other officials: PP359/1996. G Lindell refers to the probable immunity of members in this case: 'Parliamentary Inquiries and Government Witnesses' (1995) 20 MULR 383 at 395. Whether a House or committee can summon an officer of another House or an official of the executive government is unclear.

166 See Hon D Kerr MP, above note 159 at 87 who refers to an incident in the House of Representatives, where an order of the House was sought by a minister to require a non-government member to produce a document, as an unprecedented use of the power of the House to hold a member accountable to the executive.


168 D Limon and W R McKay, above note 3, p 108.

169 See D Limon and W R McKay, above note 3, p 65, which cites HC 34 (1967-68) 171. Contrast the warrant; issued against Fitzpatrick and Browne in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 which cited a breach of privilege rather than contempt. H Evans, above note 6, notes at 30-31 that the power to punish for contempt is a power to punish for offences against the House and it is not an offshoot of the immunities nor is it intended to protect those immunities — that role is for the courts.
An added dimension to the definition of contempt given by Erskine May is that it encompasses “offences against its ... dignity”. These offences include libels on parliament — statements which undermine public confidence and respect for the institution of parliament.

These tests apply also in Australia although they have been modified at the Commonwealth level. Section 4 of the Parliamentary Privileges Act 1987 (Cth) essentially adopts the first of the definitions in Erskine May by prescribing:

[c]onduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

However, s 6 abolishes as contempts, libels on parliament not committed in the presence of the House or committee:

(1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Subsection (1) does not apply to words spoken or acts done in the presence of a House or a committee.

This exclusion of libels on parliament was designed to put an end to the practice of members raising press criticisms as matters of contempt. The most infamous instance of this resulted in the only occasion when the House of Representatives committed to prison those found in contempt: R v Richards; Ex parte Fitzpatrick and Browne. Raymond Fitzpatrick and Frank Browne were respectively the owner and editor of the Bankstown Observer which published various articles claiming that Mr Charles Morgan, a member of the House of Representatives, had been involved in an immigration racket before entering Parliament. They were committed to prison for the duration of the parliamentary term by resolution of the House on the issue of a warrant which merely cited that they had been found guilty of ‘a serious breach of privilege’. As previously noted, the High Court denied writs of habeas corpus by following the House of Lords decision in the Case of the Sheriff of Middlesex and the later decision of the Judicial Committee of the Privy Council in Speaker of the

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170 D Limon and W R McKay, above note 3, p 65.
171 The same provision is made in s 5 Legislative Assembly (Powers and Privileges) Act 1992 (NT).
172 See for example the report of the House of Representatives Committee of Privileges (PP 202/1981) into criticism by journalist Laurie Oakes on 2 September 1981 of the working and drinking habits of backbenchers.
174 (1840) 11 Ad & E 273; 113 ER 419.
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Legislative Assembly of Victoria v Glass. Section 6 of the Parliamentary Privileges Act 1987 (Cth) was enacted in response to this case.

In certain States, categories of contempt are prescribed in order to limit the punitive powers of the House. However, these provisions do not necessarily preclude other conduct being found to constitute contempt to be dealt with in a non-punitive way. It is clear from the definition given in Erskine May that it is not possible to list all conduct which constitutes contempt. Nonetheless, Erskine May has compiled the following list of contempts adjudged so over the centuries. One needs to be careful not to assume that all these instances satisfy the test of contempt today; standards and perceptions clearly change over time. Note that for contempt, at least in the Senate, a culpable or wilful intent is required.

Erskine May’s categories of contempt are:

- misconduct in the presence of a House or committee;
- disobedience to the rules or orders of a House or committee;
- abuse of the right of petition;
- misconduct of members or officers —
  - members deliberately misleading the House;
  - corruption in the execution of a member’s duty;
  - providing professional services in parliamentary proceedings;
  - advocacy by members of matters for which they are professionally engaged;
- constructive contempts —
  - reflections on a House;
  - publication of false or perverted reports of debates;
  - premature publication or disclosure of committee proceedings;
- obstructing members in the discharge of their duties —
  - arrest;
  - molestation and intimidation;
  - improper influence;
  - wilful misrepresentation of members’ proceedings;
- obstructing officers of a House;
- obstructing witnesses; and
- obstructing petitioners.

Lists have been compiled of matters of privilege raised in the House of

175 (1871) LR 3 PC App 560.
176 Queensland, Tasmania and Western Australia.
178 H Evans, above note 6, p 61.
179 See the guidelines recommended by the Queensland Members’ Ethics and Parliamentary Privileges Committee Report No 25 at para 7 on the use of the crest and other official emblems by members of the Queensland Legislative Assembly.
Representatives from 1905 to 1996\(^{180}\) and in both Houses from 1901 to 1987.\(^{181}\) The latter includes, in addition to those matters listed by Erskine May, the use of parliamentary proceedings in court and allegations of bribery of members. As well, the actual or threatened initiation of legal proceedings against a member for something said under privilege is contempt. Similar action taken against someone who has provided information to a member may also constitute contempt.\(^{182}\)

In recent times the number of contempts adjudged by a House has declined.\(^{183}\) This is probably due to the improved robustness of politicians and the need to confine contempts to conduct which clearly obstructs the functioning of parliament. This has been recognised by various parliamentary reports which have cautioned restraint.\(^{184}\) The sixth of the Senate’s Privileges Resolutions lists by way of guidance a range of conduct which may constitute contempts. The third of those Resolutions requires the Senate to take into account several factors before referring a matter to the Committee of Privileges, in particular, not to exercise the power in trivial or unworthy cases. The 1984 Final Report of the Commonwealth Joint Select Committee on Parliamentary Privilege\(^{185}\) recommended the following policy of restraint which it adopted from a resolution of the House of Commons:

That the House should exercise its penal jurisdiction in any event as sparingly as possible and only when satisfied that to do so is essential in order to provide reasonable protection for the House, its Members, its Committees or its officers from improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with their respective functions. Consequently, the penal jurisdiction should never be exercised in respect of complaints which appear to be of a trivial character or unworthy of the attention of the House; such complaints should be summarily dismissed without the

\(^{180}\) L M Barlin, above note 5, Appendix 25 pp 819 and following. See also the list of contempts in rec 1 in the Final Report of the Joint Select Committee on Parliamentary Privilege (Cth PP 219/1984) at 1-5.


\(^{182}\) See 67th Report of the Senate Committee of Privileges (PP141/1997), ‘Possible threats of legal proceedings against a Senator and other persons’ which concerned threats of legal proceedings made against Senator O’Chee and certain informants.

\(^{183}\) A recent case, however, is that of Mr Easton who was held in custody for seven days pursuant to a warrant issued by the Western Australian Legislative Council for failing to comply with an order of the House to apologise for misleading particulars in his petition to the House: see E Campbell, ‘Royal Commissions, Parliamentary Privilege and Cabinet Confidentiality’ (1999) 28 WALR 239 at 242.


\(^{185}\) Recommendation 14 in PP 219/1984 at 33.
benefit of investigation by the House or its committees.186

Consequences of contempt

A House faced with a contempt may respond in a punitive or non-punitive manner. A punitive response will be a fine or imprisonment and additionally, in the case of members, expulsion. On the other hand, a non-punitive response may be any of the following:

(i) the House ordering the offender to be removed from the House, or in the case of a member, suspension for a definite period;187
(ii) issuing a reprimand in the absence of the offender; or
(iii) issuing a censure or admonition to the offender who has been summoned to appear at the bar of the House.

The House of Commons has the power to impose all these forms of punitive and non-punitive measures except, it would seem, that of a fine. As no fine has been imposed since 1666,188 the view is that the power has been abandoned.189 Committal to prison is confined to the remainder of the current session of the House. However, the 1999 UK Report of the Joint Committee on Parliamentary Privilege has recommended statutory reform, including conferment of a power to fine members where suspension is inadequate or undesirable and the abrogation of the power to imprison. Alleged contempts by non-members would be decided by the courts at the instigation of the Attorney-General, with the power to impose an unlimited fine. This would also be the case with any wilful failure by members or non-members to comply with the requirements of any committee — otherwise the House could admonish non-members for contempt and order their removal for disturbing the proceedings of the House. The House would also be unable to increase any penalty recommended by a privileges committee.190 The Report also recommended the prescription of minimal requirements of procedural fairness, whereby members are given:

• a prompt and clear statement of the precise allegations against the member;
• adequate opportunity to take legal advice and have legal assistance throughout;
• the opportunity to be heard in person;
• the opportunity to call relevant witnesses at the appropriate time;
• the opportunity to examine other witnesses; and

186 As above.
187 Suspension from the House of Commons may include suspension of pay: SO 45A (adopted 4 June 1998).
188 See D Limon and W R McKay, above note 3, p 138; note R v Pitt and R v Mead (1762) 3 Burr 1335 at 1336; 97 ER 861 at 861 where Lord Mansfield observed that a fine could not have been imposed by the House of Commons for contempt but by the Star Chamber.
190 See the list of recommendations in relation to penal powers in the Report of the Joint Committee on Parliamentary Privilege (UK, 1999) at para 324.
the opportunity to attend meetings at which evidence is given, and to receive transcripts of evidence.\footnote{As above at para 281.}

In Australia, only South Australia and Victoria possess all the powers of the House of Commons in relation to contempt.

The punitive powers have been modified and restricted by statute for the Commonwealth Parliament, Queensland, Tasmania, Western Australia and both Territories. Significantly, the power to fine has been conferred on both Commonwealth Houses and the Northern Territory, as well as in limited circumstances in Queensland and Western Australia. All Houses possess, however, the power to impose a range of non-punitive sentences: reprimand,\footnote{Note in L M Barlin above note 5, pp 712-3 the reprimand given by the Senate in the BMC case in 1965 (J 1970-72/612).} admonition and suspension. And, as noted earlier, each House, other than those of the Commonwealth\footnote{Power to expel members abrogated by s 8 \textit{Parliamentary Privileges Act 1987} (Cth).} and possibly NSW,\footnote{Contrast \textit{Armstrong v Budd} (1969) 89 WN (Pt 2) NSW 241.} also possesses the power to expel a member who is adjudged unfit to remain a member.

Pursuant to the \textit{Parliamentary Privileges Act 1987}, the Commonwealth Houses may impose either a fine or imprisonment for 'an offence against the House'.\footnote{Section 7 \textit{Parliamentary Privileges Act 1987} (Cth).} The period of imprisonment cannot exceed six months and the fine cannot exceed $5000 (or $25,000 for a corporation). A fine cannot be imposed in addition to imprisonment,\footnote{Section 7(7).} although failure to pay a fine could be adjudged as another offence against the House for which imprisonment might be imposed. Further, the power to expel a member from a House is abolished.\footnote{Section 8.} The committal of Fitzpatrick and Browne to three months' imprisonment was the only time that power was exercised by the House of Representatives.\footnote{L M Barlin, above note 5, pp 711.} Despite the High Court finding in that case that the contempt power was an exception to the doctrine of separation of powers under the Commonwealth Constitution, arguments are still raised that this finding was erroneous.\footnote{See A Twomey, above note 77.} In Queensland\footnote{Section 45 \textit{Constitution Act 1867} (Qld). See \textit{Barnes v Purcell} [1946] St R Qd 87 at 108-110 per Philp J.} and Western Australia\footnote{Section 8 \textit{Parliamentary Privileges Act 1891} (WA). See Goodwin, Stewart and Thomas, 'Imprisonment for Contempt of the Western Australian Parliament' (1995) 25 UWA LR 187.} each House can only punish prescribed contempts, first by a fine payable immediately and, if unpaid, by imprisonment until the fine is paid or for the remainder of the parliamentary session or a portion thereof. In Tasmania, only imprisonment (not a fine) can be imposed by each House for the
same prescribed contempts. The Legislative Assembly of the Northern Territory is subject to the same restrictions as those of the Commonwealth Houses. In contrast, the Legislative Assembly of the ACT is denied the powers to fine and imprison.

The prescription of specific contempts and the restrictions imposed on their punishment in Queensland, Western Australia and Tasmania raise the issue of whether this regime exhaustively defines the contempt power of those Houses. Do they retain the capacity to respond in a non-punitive way to other conduct which on general principles constitutes contempt? It can be argued that the regime is exhaustive only in relation to the punishment of contempts by fine and imprisonment. The Houses retain their power to respond in non-punitive ways to any conduct which they adjudge to be in contempt. The fact that Queensland adopted the privileges of the House of Commons after the enactment of this regime should not alter this conclusion.

The position is, of course, different in NSW where the principle of necessity confers no power to punish contempts. Hence, the classification of measures as punitive and non-punitive is important. The principal non-punitive measures available in NSW are removal from the House and, in the case of members, suspension, at least for a definite period. An admonition or reprimand may also be imposed. Expulsion may also be available, as in Armstrong v Budd, where it was held to be defensive and not punitive. Not only are fines and imprisonment precluded but a member's exclusion from parliamentary accommodation or the withdrawal of other financial benefits have also been precluded as punitive measures.

**Procedure for contempt**

The procedure of the House of Commons is to formally resolve that a person is adjudged guilty of contempt and to impose either a sanction or sentence. For committal, the resolution will order the Speaker to issue a warrant to the Sergeant-
at-Arms to take that person into custody and deliver them to a prison. The warrant may cite only that the person has been found guilty of contempt of the House, without specifying the nature of that contempt — otherwise the details of the contempt will be reviewable by a court as to whether they constitute contempt at law.213 Even in such a case, it appears that any findings of fact are not reviewable.214

This process has been regulated by statute at the Commonwealth level and in Queensland, Tasmania and Western Australia. The Commonwealth Houses are required to cite in both their resolution and warrant the particulars of the conduct which they have adjudged to constitute an offence against their House.215 Whether or not those particulars constitute contempt can therefore be reviewed by a court. Where a fine is imposed the availability of judicial review is not so clear, although it has been argued that it may still be available.216 However, in either case, it is unlikely that judicial review can be brought in relation to the findings of fact made by a House. While the same requirements apply in the Northern Territory, the jurisdiction of the Full Court of the Supreme Court is expressly confined to the determination of whether the particulars cited are capable of constituting a breach of privilege or contempt.217

In Queensland218 and Western Australia,219 it would seem that the House must first give notice of the alleged contempt to the person accused who has a right to be heard by the House.220 The House may then pass a resolution first imposing a fine according to the standing orders and then directing that in default of immediate payment the Speaker issue a warrant for the arrest and detention of the person concerned. The other significant change is that the warrant must specify of which of the prescribed contempts the House has found the person guilty.221 Similar requirements apply in Tasmania for committal for contempt (the only punitive measure available).222

There is also the option for the House to direct the Attorney-General to prosecute a contempt in the courts where it is also punishable under the general law.223 Such a direction may be given whether or not the House takes punitive or non-punitive action itself. Although specific statutory provision is made for this direction in

213 See Burdett v Abbot (1811) 14 East 1 at 128 per Lord Ellenborough; Stockdale v Hume (1839) 9 A & E 1; 3 St Tr NS 736; 112 ER 1112, 3 St Tr NS at 856 per Lord De la Beche; Case of the Sheriff of Middlesex (1840) 11 A & E 273; 113 ER 419.
214 See E Campbell, above note 20, p 118.
215 Section 9 Parliamentary Privileges Act 1987 (Cth).
216 See E Campbell, above note 139 at 219.
217 Section 26(2) Legislative Assembly (Powers and Privileges) Act 1992 (NT).
218 Sections 46 and 48 Constitution Act 1867 (Qld).
219 Sections 9 and 11 Parliamentary Privileges Act 1891 (WA).
220 Standing Orders 317-318 Queensland Legislative Assembly; SO 122 WA Legislative Council.
221 Clause 43 LCARC’s draft Parliament of Queensland Bill unfortunately dispenses with the requirement to specify the nature of the contempt.
222 Sections 5 and 6 Parliamentary Privilege Act 1888 (Tas).
223 See for example the offences in ss 55-60 Criminal Code (Qld).
Queensland, Tasmania and Western Australia, it is clearly able to be given by all Houses which enjoy the privileges of the House of Commons and even in NSW, where it derives from the principle of necessity.\textsuperscript{224}

Only in South Australia, Victoria and the Northern Territory do the Houses retain the power to punish libels on Parliament without specific restrictions. However, consideration is given below to the extent this power, as part of the general power of contempt, is restricted by the implied freedom of political communication.\textsuperscript{225}

\textbf{Reform}

The power to cite persons for contempt is necessary for the functioning of Parliament. The same cannot be said of the power of committal. A House must possess the capacity to protect itself but this can generally be achieved without a power of committal. This is clearly borne out by its non-exercise in recent times.\textsuperscript{226}

\begin{itemize}
  \item A power to fine is more easily justified, at least as a threat to discourage contempt behaviour.
  \item Given political partisanship, there is a case for prosecuting in the courts all serious conduct warranting punitive measures. Historically, as the House of Commons distrusted the courts, it sought to retain exclusive control of contempt. Since that struggle has now largely ended, there can be little objection to an expanded judicial role assuming the penal jurisdiction of the Houses.\textsuperscript{227}
  \item Although their jurisdiction has been justified\textsuperscript{228} on the ground that it allows for speedy resolution of a contempt, this is a more appropriate observation in relation to the non-punitive measures, such as removing persons who create a disturbance in the House or suspending a member in appropriate circumstances. Serious cases of contempt are usually incapable of being resolved satisfactorily, so that resort to the judicial process should not disadvantage the proceedings of the House.\textsuperscript{229}
\end{itemize}

\textsuperscript{224} See L M Barlin, above note 5, p 710; E Campbell, above note 20, p 120 saw this as assumed by \textit{Kielley v Carson} (1842) 4 Moo P C 63.

\textsuperscript{225} See E Campbell, 'Contempt of Parliament and the Implied Freedom of Political Communication' (1999) 10 PLR 196 at 201. In Queensland, the repeal of s 51 of the \textit{Constitution Act 1867} (Qld) means that no direction may be possible in the case of false or scandalous libels given that s 52 only refers to a direction for 'other contempts'.

\textsuperscript{226} It has been exercised only once in the Commonwealth Parliament — by the House of Representatives committing to prison Messrs Fitzpatrick and Browne: \textit{R v Richards; Ex parte Fitzpatrick and Browne} (1955) 92 CLR 157.

\textsuperscript{227} See E Campbell, above note 20, p 123.

\textsuperscript{228} See D Limon and W R McKay, above note 3, p 131 fn 2. See also Harry Evans, above note 6 pp 63-65.

\textsuperscript{229} At the Commonwealth level, the power to punish for contempt is recognised as an exception to the doctrine of separation of powers: \textit{R v Richards, Ex parte Fitzpatrick and Browne} (1955) 92 CLR 157. It has been suggested that the contempt power be confined to what is necessary for the legislative function of the Houses: A Twomey, above note 77 at 95-101. E Campbell, above note 224 at 193 considers it arguable that s 4 of the \textit{Parliamentary Privileges Act 1987} (Cth) has that effect.
Transferring the penal jurisdiction of a House to the courts would also avoid a challenge to any punishment imposed by a House on the ground that it infringed Australia's international obligations under the International Covenant on Civil and Political Rights (ICCPR). In such cases, it has been suggested that art 14 of the ICCPR is breached because, as a criminal charge, the alleged contempt must be heard by an independent and impartial tribunal.  

Immunity from legal proceedings

There are three immunities or exemptions in relation to legal proceedings enjoyed by members, as well as by parliamentary officers and witnesses appearing before a House or a committee:

- immunity from arrest in civil causes;
- exemption from service as a juror; and
- exemption from compulsory attendance in a court or tribunal.

It is important to note that these immunities are not enjoyed for the term of membership of a House. They only arise during the period the House is actually sitting or a committee is meeting, and for a short period before and after that time to enable the various services to be performed. This reflects their rationale, which is to ensure that parliamentary proceedings are not hindered by the absence of its members, its officers and those ordered to attend a House or a committee. The further period was, for members of the House of Commons, a period of 40 days to allow sufficient time for them to travel to Westminster and to return to their homes.

Most importantly, the immunity from arrest is confined and has always been confined to civil proceedings. No immunity has ever been recognised in relation to criminal proceedings. Determining whether particular proceedings are civil or criminal can be difficult at times. In any event, the circumstances in which one is liable to arrest or detention in civil proceedings are very limited, arising mainly in relation to a failure to comply with court orders or statutory obligations. However, problems have arisen in matrimonial proceedings and in the failure to pay costs awarded against a member in a civil case.

One test which has been suggested is to decide whether the arrest is to coerce the defendant (civil) or to inflict punishment on the defendant (criminal).

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230 See A Twomey, above note 77 at 102-103.
231 The House of Commons declared so in 1429 in *Larke's Case* 4 Rot Parl 357, cited in E Campbell, above note 20, p 60 fn 5. See L M Barlin, above note 5, p 694.
232 This usually constitutes contempt of court for which the individual is liable to be detained.
233 See for example *Stourton v Stourton* [1963] 3 All ER 606.
235 E Campbell, above note 20, p 63.
This difficult distinction was relied on by Lord Brougham in Wellesley v The Duke of Beaufort\(^\text{236}\) in contrasting the situation where a member is held in contempt of court for failing to comply with an award which is 'in substance not criminal but civil' and where a member disrupts court proceedings which is conduct of a criminal nature.

As noted above, the exemption from appearing before a court or tribunal only operates when the House is sitting or a committee is meeting\(^\text{237}\). To serve a subpoena on a member during this time constitutes contempt of the House. The proper approach is to seek the leave of the House to serve the subpoena but even if leave is granted, it appears that the member is still entitled to refuse to appear so long as the House is sitting or the committee is meeting\(^\text{238}\). Even when the House is not sitting, courtesy dictates that the presiding officer of the House be notified of an intention to serve a subpoena on a member within the precincts of the Parliament\(^\text{239}\).

**Commonwealth**

These immunities are codified in s 14 of the Parliamentary Privileges Act 1987 (Cth). A member of a House is not required to attend before a court or a tribunal and shall not be arrested or detained in a civil cause on any day the House or a committee (on which the member sits) meets. These immunities also extend to a further period of five days each side of that period. The same immunities are enjoyed by the officers of each House to the extent that they are required to attend those meetings of the House or of its committees. Other persons required to attend a House or a committee also enjoy those immunities but only for the days they are required to so attend.

Although these immunities are confined to 'civil causes', whenever a senator is detained, even in criminal proceedings, the Senate expects to be notified of that detention and the reasons for it, either by the court which made the order or by the police.\(^\text{240}\) A similar requirement appears to apply in relation to the detention of members of the House of Representatives.\(^\text{241}\)

**States and Territories**

By virtue of the adoption of the privileges of the House of Commons, the members of the Queensland, Victorian and Western Australian Parliaments\(^\text{242}\) enjoy the same immunities as the members of the House of Commons. In South Australia, despite these immunities being abrogated, members are not liable to any penalty for non-attendance

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236 (1831) 2 Russ & M 639 at 665-666; 39 ER 538 at 548-9.
237 This is expressly prescribed in South Australia: s 39 Constitution Act 1934 (SA).
238 E Campbell, above note 20, p 70.
239 E Campbell, above note 20, p 70.
240 See Resolutions of 26 February 1980 (J 1153) and of 18 March 1987 (J 1693-4).
241 L M Barlin, above note 5, p 695.
242 Section 40A Constitution Act 1867 (Qld); s 19(1) Constitution Act 1975 (Vic); s 1 Parliamentary Privileges Act 1891 (WA).
as a witness in court where this occurs because of their attendance in Parliament. Moreover, a specific immunity is conferred to prevent a member from being arrested or imprisoned under a writ of *capias ad satisfaciendum* (a writ to enforce a judgment debt) while Parliament is in session or for 10 days before it meets.243

In NSW, to what extent the principle of necessity appears to confer on members similar immunities is unclear due to the lack of authority. However, in *Norton v Crick*244 the Court easily found that no immunity arose from being served with a writ of *capias ad satisfaciendum* which is granted only if the defendant is about to leave or abscond to a remote part of the colony without satisfying a judgment debt. Establishment of that ground clearly precluded any view that the immunity was necessary for the member to give service to the House.

Members of both Territory legislatures enjoy the same immunities as those of the Commonwealth Parliament.245

Finally, it should be noted that the position becomes more complicated where a member of one parliament is required to give evidence in a court or even a House of another Australian jurisdiction. For example, is a member of a State Parliament entitled to rely on this immunity from appearing in a federal court or even before a federal parliamentary committee?246 Section 15(2) of the *Evidence Act 1995* (Cth) addresses this issue in relation to attendance before federal and ACT courts by providing that a member of any Australian House cannot be compelled to give evidence in those courts if sitting in the House or on a committee. Comparable legislation is provided in NSW.247

Impact of the implied freedom of political communication

The implied freedom of political communication248 operates as a restriction on the legislative and executive powers of the Commonwealth and the States.249 Whether the implied freedom also restricts the scope and exercise of parliamentary privilege is unclear. In determining this issue, it may be necessary to distinguish between those privileges derived from the principle of necessity or adopted from the House of Commons and those which are now statutorily based. Only the latter has been the subject of judicial scrutiny.

243 Section 39 Constitution Act 1934 (SA).
244 (1894) 15 LR (NSW) 172.
246 See E Campbell, above note 139 at 212.
In *Laurence v Katter*, a majority of the Queensland Court of Appeal (Pincus and Davies JJA) construed s 16 of the *Parliamentary Privileges Act 1987* (Cth) so as to avoid any infringement of the implied freedom. However, Fitzgerald P in dissent rejected the assumption of the majority that a declaration of privileges made by the Commonwealth Parliament pursuant to s 49 and s 51(xxxvi) of the Constitution was restricted by the implied freedom. His Honour pondered how s 49 could be subject to such an implied freedom when the unqualified adoption of the privileges of the House of Commons as at 1901 could not have been intended to be subject to that freedom. He relied on the fact that as s 49 is not subject to the implied doctrine of the separation of judicial power, it is similarly immune from the implied freedom of political discussion.

However, in deciding whether parliamentary privilege is subject to the implied freedom of political discussion, the inquiry is likely to be of a different nature depending on whether one focuses on the existence and scope of a privilege or on its exercise. Fitzgerald P is correct in concluding that the incorporation of the House of Commons privileges by s 49 is not affected by the implied freedom. The express intention in s 49 in this regard cannot be cut down by reference to such an implication. However, the position is different when there is an exercise of a privilege (obviously this arises only with those privileges which are powers as distinct from immunities), for there is no reason why such an exercise of power should not be subject to the implied freedom in the same way that any exercise of Commonwealth and State power is also subject to that restriction. For instance, it could not be argued that the Commonwealth Houses no longer enjoy those powers of the House of Commons, such as the power to punish for contempt, because they are inconsistent with the implied freedom. However, an *exercise* of this power would be reviewable on that ground. In other words, each exercise of a power by a House will need to be assessed on an ad hoc basis to determine whether it complies with the implied freedom.

The implied freedom will also need to be accommodated where Parliament expands the scope of these privileges by an exercise of the power conferred by s 49. These are no reason for suggesting that such an exercise of power is not restricted. The difficulty which arises is where the statutory provisions incorporate the House of Commons privileges as well as extensions to those privileges: to what extent are these statutory provisions subject to the implied freedom?

At the State level, the only case so far to have raised the applicability of the implied freedom to State parliamentary privilege is the decision of the NSW Court of Appeal in *Arena v Nader*. However, as the Court saw no impairment in that case even if the freedom applied, the issue was left open as to whether the implied freedom operated as a restriction on the power of the NSW Parliament to enact laws with respect to parliamentary privilege. The unsuccessful challenge in that case to the *Special Commissions of Inquiry Amendment Act 1997* (NSW) is considered in Chapter 6 (under freedom of speech).

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250 *(1996) 141 ALR 447.*
251 At 486 and 490.
252 At 453.
253 *(1997) 42 NSWLR 427.*
254 At 434.
There seems no basis to argue that the Houses of the NSW Parliament are not subject to the implied freedom of political discussion in the exercise of their powers derived from the principle of necessity — nor is the position any different in the other states which have adopted the privileges of the House of Commons.

It is important to remember that in deciding whether a violation of the implied freedom has occurred, it is necessary to determine whether the exercise of a privilege has burdened the freedom of political communication and whether this can be justified as a proportionate response to protect some other public interest. Hence, punishment inflicted by a House for contempt may well be justified in order to protect the capacity of the House to perform its functions, but the punishment must be proportionate to the likely impact on the House. As for the availability of judicial review, this may prove not to be a significant obstacle given that a court may review whether conduct punished by a House is contempt at law and whether the nature of the punishment imposed is within the scope of the privilege.

A significant benefit which flows from the implied freedom is that it probably prevents any statutory erosion of the freedom of speech, debates or proceedings in art 9 of the Bill of Rights 1689 unless this can be justified as a proportionate measure in furtherance of another legitimate public interest.

**Abrogation of parliamentary privilege**

Despite the sanctity which surrounds parliamentary privilege, especially the freedom of speech in art 9 of the Bill of Rights 1689, it is vulnerable to abrogation or amendment by statute.

A recent example of statutory abrogation occurred when an inquiry was held into allegations made under privilege by a member of the NSW Legislative Council, the Hon Mrs Franca Arena MLC, that the Premier, the Leader of the Opposition and a judge appointed as a royal commissioner had conspired to suppress the names of alleged paedophiles. To facilitate this inquiry, the NSW Parliament enacted legislation which empowered each House by resolution to authorise the Governor to establish a commission of inquiry into any ‘matter relating to [its] parliamentary proceedings’. Each House was also empowered by the legislation to waive parliamentary privilege except for that enjoyed by the member individually. Mrs Arena challenged the constitutional validity of the relevant legislation on several grounds, none of which was successful. Special leave to appeal to the High Court

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255 Special Commissions of Inquiry Amendment Act 1997 (NSW).
256 Arena v Nader (1997) 42 NSWLR 427. The first ground, drawing an analogy from Kable v Director of Public Prosecution (1997) 189 CLR 51, was that it undermined the institutional integrity of each House. The NSW Court of Appeal, while doubting the analogy, saw no such impairment. Nor did the Court accept the other arguments based on the implied freedom of political discussion, an incapacity to enact retrospective laws, and the manner and form requirement in s 7A of the Constitution Act 1902 (NSW). See E Campbell, 'Investigating the Truth of Statements made in Parliament' [1998] Public Law 125; G Griffith, 'The Power and Privileges of the New South Wales Legislative Council: Arena v Nader' (1998) 4 PLR 227.
was denied on the basis that it is well established that the plenary legislative power of the NSW Parliament extends to laws which affect the privileges of its Houses and that the legislation did not exceed any limits which may apply to that power.\textsuperscript{257} It should be noted that the Court of Appeal\textsuperscript{258} and, it would appear, also the High Court\textsuperscript{259} rejected the argument that any alteration to the privileges of the Legislative Council required a referendum pursuant to s 7A of the \textit{Constitution Act 1902} (NSW) as an alteration of its 'powers'. Both judgments confined this manner and form provision to an alteration of the \textit{legislative powers} of the House as distinct from its privileges.\textsuperscript{260}

An issue of particular importance is the extent to which parliamentary privilege can be abrogated by statute without an express declaration to that effect. It has been said at times that any statutory abrogation or amendment of parliamentary privilege must be done expressly, not impliedly.\textsuperscript{261} This view appears inconsistent with the general principle that rights may be amended by statute expressly or by 'necessary implication'. It has also been said that such an express declaration is required at the Commonwealth level by virtue of s 49 of the Constitution.

The principal authority relied on at general law for parliament to use express words when abrogating parliamentary privilege is the decision of the House of Lords in \textit{The Duke of Newcastle v Morris}.\textsuperscript{262} An argument was put in that case that new bankruptcy legislation which applied to all debtors whether traders or non-traders did not apply to non-traders who were members of Parliament because, unlike earlier legislation, no reservation had been inserted in respect of their privileges — in particular, the immunity from arrest. The House of Lords rejected this interpretation, holding that all members were subject to the legislation as debtors, but in the course of doing so, the court accepted that members' privileges were not

\textsuperscript{257} \textit{Arena v Nader} (1997) 71 ALJR 1604 at 1605. Rather cryptically, the Court referred to the critical question being whether the legislation 'invalidly erodes the institution of Parliament itself'. Although this statement has been relied on to suggest that the freedom of speech may have been constitutionally entrenched (see H Evans, 'Franca Arena and parliamentary privilege' (1998) 1 \textit{Constitutional Law and Policy Review} 1), it must be remembered that it was only made in the context of whether special leave to appeal should be granted. Accordingly, it indicates that the point is arguable, not established.

\textsuperscript{258} \textit{Arena v Nader} (1997) 42 NSWLR 427 at 436.

\textsuperscript{259} \textit{Arena v Nader} (1997) 71 ALJR 1604 at 1605.

\textsuperscript{260} Presumably, this is also the position under s 10 of the \textit{Constitution Act 1934} (SA) in relation to the South Australian Legislative Council. These appears to be no manner and form requirement applicable to statutory variations to the privileges of the other State Parliaments.


\textsuperscript{262} (1870) 4 HL 661.
abrogated, in particular, the immunity from arrest. While requiring express words in the statute to abrogate their privileges in this case, the Lord Chancellor, Lord Hatherley, relied on the fact that all previous bankruptcy legislation had expressly reserved them:

It seems to me that a more sound and reasonable interpretation of such an Act of Parliament would be, that the privilege which had been established by Common Law and recognised on many occasions by Act of Parliament, should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute... [emphasis added].

This decision must be considered in the light of the previous legislation which expressly reserved parliamentary privilege. In the absence of such a legislative history of express reservation, abrogation might not require express language. The preferable approach is to adopt the presumption recognised by the rules of statutory interpretation: the legislature does not intend to override fundamental common law principles, especially those concerned with individual rights, unless it has indicated a clear intention to do so. Rights which have enjoyed the benefit of this presumption under the general law include the right against self-incrimination and the right to compensation upon acquisition of property rights.263 The position is clearly stated by Isaacs J in *Ex parte Walsh and Johnson: Re Yates*:

...even where Parliament confessedly possesses plenary power within its own territory, the full literal intention will not ordinarily be ascribed to general words where that would conflict with recognised principles that Parliament would prima facie be expected to respect.264

But as Mason ACJ, Wilson and Dawson JJ observed in *Pyneboard Pty Ltd v Trade Practices Commission*, this presumption is rebuttable by virtue of 'the general principle that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges whether by express words or by necessary implication'. 265

The test is solely one of ascertaining the intention of parliament, having regard to the language of the statute, interpreted in its historical context.266 The importance of the historical context is well illustrated by the rejection by the Judicial Committee of the

263 See *Clissold v Percy* (1904) 1 CLR 363 at 373; *The Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563.

264 (1925) 37 CLR 36 at 93.

265 (1983) 152 CLR 328 at 341. See for example *Hawkins v Gathercole* (1855) 24 Lj Ch 332 where the ecclesiastical privilege against distress was held not to be abrogated by statute.

Privy Council in *In re Parliamentary Privilege Act*267 of the argument that the *Parliamentary Privilege Act 1700* (Imp) had impliedly repealed art 9 of the *Bill of Rights*. That Act and its predecessors, beginning with the Act 12 & 13 Will 3, c 3 in 1700, permitted the commencement of suits against members of Parliament from the dissolution or prorogation of Parliament until the meeting of a new Parliament 'any privilege of Parliament to the contrary notwithstanding'. The argument that this abrogation of privilege also extended to the freedom of speech in Parliament was rejected. Parliament's intention was only to abrogate the privilege against civil proceedings being brought against members for the period of 40 days after Parliament's dissolution and 40 days prior to its meeting again.268

The preferable view to adopt is that the presumption against the abrogation of fundamental rights is particularly strong in relation to parliamentary privileges, given their importance to the effective functioning of parliament. Parliament is unlikely to intend to alter its privileges without making its intention clear. Accordingly, a court will require very clear evidence of parliament's intention before parliamentary privilege is abrogated by statute.269 In some cases an express intention may be necessary; in others it may not.270

**Commonwealth position**

In 1983 a Joint Opinion of the Commonwealth Attorney-General, Senator Gareth Evans, and the Commonwealth Solicitor-General, Sir Maurice Byers, was given that Commonwealth secrecy provisions did not abrogate the freedom of speech enjoyed by members of State Parliaments.271 The Joint Opinion arose out of revelations made in the South Australian House of Assembly by Mr Peter Duncan MLA which appeared to be based on evidence given in camera to the Hope Royal Commission on Australia's security and intelligence agencies. On the issue of statutory abrogation of parliamentary privilege, the Joint Opinion expressed this view:

[I]t is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary


268 See the dissent of Lord Denning which as a dissenting opinion of the Judicial Committee was unable to be published although it was subsequently published as an Annexure in G F Lock, above note 16 at 88. Lord Denning at 85 regarded the 1770 Act as directed to the Houses and art 9 as directed to the Courts so that no conflict was possible.

269 In *Aboriginal Legal Service of Western Australian (Inc) v Western Australia* (1993) 9 WAR 297, Rowland J at 304 accepted the submission that 'clear words in a statute' were required to limit parliamentary privileges.

270 See *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444 at 453-4 per Fitzgerald P.

before it may be taken away: see Duke of Newcastle v Morris (1870) LR 4 HL 661 at 671, 677 and 680. In the case of the Parliament of the Commonwealth, s 49 of the Constitution requires an express declaration.272

The first point (the need for an express declaration) has already been dealt with. The second requires closer examination, for it suggests that s 49 prevents the Commonwealth impliedly amending its privileges. Section 49, which has been cited earlier, contains two limbs. The first limb adopts the powers, privileges and immunities of the House of Commons as at 1901 until they are declared by the Commonwealth Parliament. The other limb empowers the Commonwealth Parliament to so declare. Although the High Court in R v Richards; Ex parte Fitzpatrick and Browne273 referred to this limb as contemplating a comprehensive enactment of privileges, it did so in the context of an argument that the privilege of the House of Commons to commit for contempt was not available, as the Commonwealth had declared its privileges for the purposes of s 49 by enacting the Parliamentary Papers Act 1908 (Cth) and the Parliamentary Proceedings Broadcasting Act 1946 (Cth). The Court made it clear that the privileges of the House of Commons continue to apply until such time as the Parliament pursuant to s 49 has comprehensively declared its privileges. This still has not occurred.

It must follow, however, that its privileges, including those derived from the House of Commons, are amenable to ad hoc amendment and abrogation by Commonwealth legislation just as the privileges of the House of Commons in 1901 were subject to legislative change. But what is the legislative source of authority for these ad hoc amendments? In R v Richards; Ex parte Fitzpatrick and Browne274 the view was expressed per curiam that both the Parliamentary Papers Act 1908 (Cth) and the Parliamentary Proceedings Broadcasting Act 1946 (Cth) were enacted pursuant to s 51(xxxix) as laws incidental to the execution of an exercise of power by Parliament, rather than pursuant to s 51(xxxvi)275 and s 49. To which legislative power they were incidental is not clear — either it was s 49 with s 51(xxxvi), or else the whole body of Commonwealth legislative power. If ad hoc amendments do not constitute an exercise of the first limb of s 49 as such, s 49 cannot be relied on to support the need for an express declaration. Parliament must simply indicate its intention clearly in accordance with the principles of interpretation outlined earlier.

The issue of statutory abrogation of parliamentary privilege arises acutely in relation to witnesses appearing before Parliament or its committees when they are asked to provide evidence which they are under either a statutory or a general law duty not to disclose. It is clear that by virtue of art 9 of the Bill of Rights no witness can be impugned for disclosing information contrary to a duty of confidentiality under the general law. The difficulty lies in respect of statutory duties of

272 At 86 (para 8).
273 (1955) 92 CLR 157 at 168.
275 The power to make laws concerning 'matters in respect of which the Constitution makes provision until the Parliament otherwise provides'.

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confidentiality which have the potential to override the privilege of freedom of speech. If Parliament intends to abrogate freedom of speech when imposing these statutory duties, it must express this intention in very clear words.

Odgers asserts that witnesses appearing before a House or a parliamentary committee of the Commonwealth Parliament are immune from prosecution for disclosing information which they are prohibited by statute from disclosing. Two grounds are relied on: (i) the immunity accorded evidence given to a House or a committee by s 16 of the Parliamentary Privileges Act 1987; and (ii) that the relevant statutes do not expressly abrogate the immunity afforded by parliamentary privilege. As noted earlier, express abrogation may be unnecessary in some cases where Parliament's intention is clear. This view was expressed by the Commonwealth Solicitor-General in 1991 when the issue arose as to whether witnesses appearing before the Parliamentary Joint Committee on the National Crime Authority were protected by parliamentary privilege if they disclosed information contrary to secrecy provisions in the National Crime Authority Act 1984 (Cth). A detailed account of the various opinions given by the Solicitor-General and the Attorney-General's Department is given in Odgers. The final opinion of the Solicitor-General concluded that the secrecy provisions abrogated parliamentary privilege by 'necessary intendment' — in other words, express words were not required to amend parliamentary privilege. Nevertheless, Odgers regards this issue as unresolved.

Commonwealth abrogation of State parliamentary privilege

The Joint Opinion referred to earlier in relation to the revelations made by Mr Peter Duncan MLA in 1983 in the South Australian House of Assembly also raised the issue of whether Commonwealth legislation could abrogate State parliamentary privileges. That Opinion concluded that Mr Duncan was not in breach of the relevant Commonwealth secrecy provisions since they did not purport to abrogate the parliamentary privilege of freedom of speech under s 38 of the Constitution Act 1934 (SA). But it was the view expressed in the Joint Opinion that federal legislation was capable, in certain cases such as in time of war, of abrogating State parliamentary privilege — which prompted the Senate to refer that issue to its Standing Committee on Constitutional and Legal Affairs.

The Senate Committee in its 1985 Report cited earlier, Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments, reached the contrary conclusion by a majority, on two grounds:

276 H Evans, above note 6, p 47.
277 H Evans, above note 6, pp 47-49.
278 H Evans, above note 6, p 50. E Campbell, above note 20, p 168 requires express words to abrogate privilege but when discussing the effect of statutory secrecy provisions at 171-172 omits reference to this issue.
279 See E Campbell, above note 139.
that since State parliamentary privilege formed part of the ‘Constitution’ of each State, s 106 prevented the Commonwealth’s legislative powers being used to abrogate that privilege even in time of war; and

(ii) abrogation of the privilege would infringe that limb of the Melbourne Corporation principle which protects the capacity of the States to function as such. 281

The latter of these grounds is the more persuasive since s 106 is made subject to the Constitution. 282 Contrary to the view expressed in the Joint Opinion that the Melbourne Corporation principle is confined to interference with State executive power, the High Court in Western Australia v Commonwealth (the Native Title Act Case) 283 has since held that the principle also protects State legislative power. Moreover, a Commonwealth law which purported to abrogate State parliamentary privilege would impair the very ‘machinery of government’, the Parliament, which, according to the Native Title Act case, is protected by the Melbourne Corporation principle. 284 A further basis for protecting State privileges is the implied freedom of political communication under the Commonwealth Constitution. 285

Conclusion

It is surprising that, despite several centuries of evolution, the precise scope and effect of parliamentary privilege remains obscure in so many respects. This chapter touches only on a few of the issues awaiting resolution. Central to them all is an appreciation of how far these privileges must extend to ensure the efficacy of parliament without at the same time unreasonably impairing individual rights. While an assessment of parliamentary privilege is desirable, the implied freedom of political communication may vest that task in the High Court rather than in the parliament, at least in relation to the privileges of the Commonwealth Parliament. The impact of that implied freedom is likely to be greater on the privilege of freedom of speech which is examined in the next chapter.

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281 PP 235/1985: see conclusions (1) and (2) on p xix and chapter 3.
284 At 481.
285 E Campbell, above note 139 at 207-209.
Introduction

Probably the most significant parliamentary privilege is the freedom of speech enshrined in art 9 of the Bill of Rights 1689:

... that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Article 9 declared what had probably been established at law by the House of Lords decision in Elliot's Case. The freedom of speech conferred refers to three activities within parliament: a speech, a debate and its proceedings. The essence of this privilege is that no liability attaches to what a member says or does in a speech, a debate or in parliamentary proceedings. Other principles derive from art 9 including, for example, the restriction on the scope of judicial review of parliamentary proceedings. Moreover, members cannot be compelled to give evidence of parliamentary proceedings without the leave of their House.

The rationale for the actual freedom of speech enjoyed by members is that it is an essential privilege in order for members and hence each House to perform their parliamentary functions. Although not sufficiently appreciated, the clear implication from this immunity is that members remain accountable to their own House and hence to the electorate for what they say and do within the protection of this privilege. The responsibility of each House to regulate its own members is clearly stated by Erskine May:

1 CF (1667-87) 19; LJ (1666-75) 166.
3 Chubb v Salomons (1854) 3 Car & K 75; 175 ER 469, cited by Gibbs J as the Royal Commissioner appointed to inquire into and report on certain matters relating to members of the Police Force and the National Hotel, Petrie Bight, Brisbane (10 April 1964) a ruling on parliamentary privilege in Appendix F at 180 and following, and later as Gibbs ACJ in Sankey v Whitlam (1978) 142 CLR 1 at 37.
Article IX preserves the authority of both Houses to restrain and even punish their Members who, by their conduct, offend the House.\(^5\)

Correspondingly, each member is under a duty ‘to refrain from any course of action prejudicial to the privilege’.\(^6\) This was affirmed by Mr Speaker Sneddon in the House of Representatives in 1979:

The privileges of the House are precious rights which must be preserved. The collateral obligation to this privilege of freedom of speech in the Parliament and the essential complementary privileges of the House will be challenged unless all members exercise the most stringent responsibility in relation to them.\(^7\)

A recent example of a member being called to account by her House was the action taken by the NSW Legislative Council in relation to allegations made under privilege by Mrs Franca Arena MLC that the Premier, the Leader of the Opposition and a judge appointed as a royal commissioner had conspired to suppress the names of alleged paedophiles. Pursuant to legislation enacted by the NSW Parliament, the Legislative Council authorised the Governor to establish a special commission of inquiry into her allegations, waiving parliamentary privilege except that enjoyed by Mrs Arena herself. This inquiry found that her allegations were completely without foundation.\(^8\)

Subsequently, a ‘statement of regret’\(^9\) by Mrs Arena was accepted by the House.\(^10\)

Earlier, Mrs Arena had failed in her legal challenge to the inquiry. In refusing special leave to appeal to the High Court, Brennan CJ, Gummow and Hayne JJ recognised the important role of each House to hold their members accountable for exercising their privilege of freedom of speech:

A House of Parliament in which allegations are made has a legitimate interest in knowing, and perhaps a duty to ascertain, whether there is substance in allegations made by a member on a matter of public interest.\(^11\)

The Arena case demonstrates how this freedom has the potential to cause harm, especially to people’s reputations. That risk is the inevitable cost of securing independence for the deliberations of parliament, but it is the responsibility of each

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\(^6\) D Limon and W R McKay, above note 4, p 84.


\(^8\) See the Report of the Special Commission of Inquiry into Allegations made in Parliament by the Honourable Franca Arena MLC 7 November 1997 by the Hon J A Nader QC.

\(^9\) This statement was in terms similar to those of a specific apology previously demanded by the House.

\(^10\) See Minutes of the Proceedings of the Legislative Council No 54, Wednesday 1 July 1998 at 634-635.

House to minimise that risk by taking action against members who abuse their freedom. Another safeguard is for a House to provide those who are adversely affected by a member's speech with a right of reply. This affords those persons adversely referred to by a member in a House the opportunity to seek to have a reply published in Hansard. In according to a request, the House does not express a view on whether it agrees with the content of the reply. A right of reply has been adopted in several Australian parliaments, although it has been resisted in the United Kingdom.

A further restriction on the freedom of speech of members occurs by way of the rules of debate prescribed in standing orders. Typically, they are 'directed primarily towards achieving orderly debate and good temper, not to restricting the subject matter of debate'. However, they prevent members, for instance, from referring disrespectfully to the Sovereign or her representatives, or from using offensive words against either House, other members and the judiciary. Imputations of improper motives and personal reflections against members are considered 'highly disorderly'.

The Arena case prompts an inquiry into the present justification of this immunity. Without this freedom, it has been said that parliament would have developed into 'polite but ineffectual debating societies'. Moreover, it has been regarded as the key to parliamentary supremacy over the Crown and its ministers. But are these concerns still relevant today? The main rationale for the immunity is that it is essential for securing the independence of parliament by ensuring the capacity of members to be informed of all points of view in resolving the policy and legislative

12 Commonwealth Senate (Privilege Resolution No 5 of 25 February 1988); House of Reps (August 1997); New South Wales Legislative Assembly (Motion November 1996) and Legislative Council (Resolution 13 November 1997); Queensland (Resolution of 18 October 1995, reintroduced on 11 October 1996); South Australia Legislative Council (Sessional Order March 1999); Tasmanian Legislative Council (Sessional Order 30 June 1999); Victoria (Resolution of the Legislative Assembly 4 November 1999 para (7)); WA Legislative Assembly (SO); ACT (Resolution May 1995). Corporations as well as individuals have been accorded the right to reply under the Senate's Privilege Resolution No 5 which merely refers to persons: see Privileges Committee recommendation on 21 October 1999 referred to in the Department of the Senate Procedural Information Bulletin No 137 at 4. A right of reply is expressly accorded corporations in Queensland.

13 Note that the 1999 UK Joint Committee Report on Parliamentary Privilege recommended against this right given the risk that a reply is seen as passing judgment on a member and that those referred under privilege might feel obliged to seek to reply for fear of being seen to accept the allegation (paras 220-221).

14 Report of the Joint Committee on Parliamentary Privilege (UK, 1999) at para 188.

15 House of Reps SO 74.

16 House of Reps SO 75.

17 House of Reps SO 76.


19 As above.
issues put before them in parliament. An environment is created in which members of parliament are entirely free to canvass their views without fear of being unfairly challenged outside parliament by the executive or by the people through the courts or other tribunals. Despite executive dominance of the parliament arising through the party system, the parliament has thereby retained its capacity to criticise the executive. Moreover, the investigatory role of parliamentary committees would be severely hampered without freedom of speech for their witnesses.

This chapter examines the range of activities which fall within the scope of freedom of speech, concluding that clarification is required. It also considers the effect of the freedom on the admissibility of evidence in legal proceedings. This aspect is concerned with art 9's prescription that parliamentary proceedings cannot be 'impeached or questioned' outside parliament. How far this protection extends is the subject of an intense judicial debate which has yet to reach the High Court of Australia. This debate calls for a careful assessment of the justification of the freedom in contemporary Australia. That assessment should have regard to the undiminished standing of the freedom for over 300 years — a testimony to both the respect which it has earned and the indulgence it has enjoyed from those it protects. But more significant will be the balancing of competing public interest factors to arrive at a freedom which protects the operation of parliament with minimal impact on the administration of justice and individual rights.

As for 'waiving' freedom of speech, the accepted position is that neither a member nor a House has the capacity to waive the art 9 freedom because it is a statutory provision. Support exists for maintaining this position to avoid the possibility that a capacity to waive the freedom might be politically abused.

Scope of freedom of speech: nature of activities

The freedom of speech in art 9 of the Bill of Rights is confined to three activities: speeches, debates and the proceedings of parliament. While the nature and scope of the former two activities are fairly clear, that is not the case with parliamentary proceedings. At the core of these proceedings are, of course, the proceedings of parliamentary sittings — the speeches and debates, as well as the passage of legislation. Also included are the tabling of motions and amendments to motions or bills and the tabling, asking and answering of questions to ministers and other members. A register of members' pecuniary interests might also attract the privilege.

20 See Prebble v Television New Zealand Ltd [1985] 1 AC 321 at 335 (PC).
22 See above at para 4.2.A.
23 Contrast Rost v Edwards [1990] 2 WIR 1280 at 1293 per Popplewell J holding the House of Commons register not privileged.
The proceedings of parliamentary committees including the evidence given by any person to those committees are also covered,\textsuperscript{24} as are those who present petitions to parliament.\textsuperscript{25} The principal difficulty arising from the generality of the expression 'proceedings in parliament' is to define its outer limits and, in particular, the activities associated with speeches, debates and proceedings which are also entitled to freedom of speech. Responsibility for determining the scope of the privilege in this respect lies squarely with the courts or parliament and not with either House.

It is clear that members are not protected by the privilege in respect of all their parliamentary duties when performed outside parliamentary proceedings. However, the closer the relevant activity is connected to the proceedings of parliament, the easier it is to argue that it should be protected by the privilege.\textsuperscript{26} If the activity relates to the member's constituency duties only, it is unlikely to fall within the scope of the privilege. What is important is the degree of connection to parliamentary business. In this context, two categories of communication may be considered: (i) communications between members, or between a member and a minister; and (ii) communications between members and constituents or other persons.\textsuperscript{27}

\textit{(i) Communications between members or between a member and a minister}

Only those communications between members, or between a member and a minister, which have a close relationship to parliamentary business are protected. Such communications include any discussion of drafts of oral questions, questions on notice, or motions, and any discussion of draft speeches to be made in the House.\textsuperscript{28} Discussions between members in parliamentary party meetings (or caucus) on legislative matters are unlikely to be protected.\textsuperscript{29}

On the other hand, communications between a member and a minister in relation

\textsuperscript{24} Goffin v Donnelly (1881) 6 QBD 307. Contrast the view that certain committee functions are executive: CJC v Nationwide News Pty Ltd (1994) 74 A Crim R 569 at 586 per Pincus JA; Corrigam v Parliamentary Criminal Justice Committee [2000] QSC 96.

\textsuperscript{25} Lake v King (1667) 1 Wms S 131; Halden v Marks (1996) 17 WAR 447.

\textsuperscript{26} The typing of a statement to be made by a member in parliament is covered: Holding v Jennings [1979] VR 289.


to constituency matters have an uncertain status. In the Strauss Case,\(^\text{30}\) the House of Commons refused by a narrow vote of 218 to 213 to accept the report of its Privileges Committee that a letter written by Mr Strauss MP to a minister which was critical of the London Electricity Board was protected by parliamentary privilege.\(^\text{31}\) It is suggested, however, that privilege attaching to a communication between a member and a minister on a constituency matter is justified given the efficiency, discreteness and utility of such a communication when parliament is not sitting.\(^\text{32}\) Also of uncertain status are informal meetings held between members of parliamentary committees and even formal meetings of parliamentary committees convened outside the precincts of parliament.\(^\text{33}\)

All these forms of communication described so far, except that in the Strauss case, were recognised as entitled to protection by the Commonwealth Joint Select Committee on Parliamentary Privilege in its 1984 Report.\(^\text{34}\) In recommending the adoption of a statutory provision to extend the scope of ‘proceedings in Parliament’ to cover these communications, the Committee confined the following recommended provisions to defamation proceedings.\(^\text{35}\)

\begin{enumerate}
\item That the Parliament adopt an expanded definition of proceedings in Parliament in the following terms — That without in any way limiting the generality of the 9th Article of the Bill of Rights or the interpretation that would otherwise be given to it, for the purposes of a defence of absolute privilege in actions or prosecutions for defamation the expression ‘proceedings in Parliament’ shall include:
\begin{enumerate}
\item all things said, done or written by a Member or by an officer of either House of Parliament or by any person ordered or authorised to attend before such House, in or in the presence of such House and in the course of the sitting of such House and for the purposes of the business being or about to be
\end{enumerate}
\end{enumerate}

\(^{30}\) Report from the House of Commons Committee of Privileges HC (1956-57); HC Debates 591 (8 July 1958).


\(^{34}\) PP 219/1984.

\(^{35}\) PP 219/1984 at para 5.29. In formulating the recommended provisions, the Committee acknowledged the assistance gained from the recommendations of the 1967 House of Commons Report on Parliamentary Privilege and the 1976-1977 recommendations of the Privileges Committee which reviewed those 1967 recommendations (Third Report from the Committee of Privileges: Recommendations of the Select Committee on Parliamentary Privilege HC 417 (1976-77)).
transacted, wherever such sitting may be held and whether or not it be held in the presence of strangers to such House: provided that for the purpose aforesaid the expression 'House' shall be deemed to include any committee, sub-committee or other group or body of Members or Members and officers of either or both of the Houses of Parliament appointed by or with the authority of such House or Houses for the purposes of carrying out any of the functions of or representing such House or Houses;

(b) questions and notices of motion appearing, or intended to appear, on the Notice Paper, and drafts of questions and motions which, in the case of draft questions, are to be put either orally or as questions on notice, and in the case of draft motions, are intended to be moved, and draft speeches intended to be made in either House, provided in each case they are published no more widely than is reasonably necessary;

(c) written replies or supplementary written replies to questions asked by a Member of a Minister of the Crown with or without notice as provided for in the procedures of the House;

(d) communications between Members and the Clerk or other officers of the House related to the proceedings of the House falling within (a), (b) and (c).

These recommendations have been given substantial effect by the Parliamentary Privileges Act 1987 (Cth) which is examined below. Although an exposure draft of the Report had included a provision to accord privilege to the Strauss situation, this was deleted from the Final Report. The Committee preferred to make no recommendation on this situation given the need for compelling reasons before further eroding the protection of reputation by an extension of absolute privilege.36

Finally, it should be noted that a communication from a member within the precincts of the House does not attract the privilege of freedom of speech. This was firmly established by the 'Zircon affair' in the House of Commons.37 In 1987 an attempt was made by several members of that House to screen a film in one of its meeting rooms, despite BBC agreement not to screen it because of the danger it posed to national security by revealing details of a secret defence project, codenamed 'Zircon'. Moreover, the High Court had granted an injunction against one of the producers of the film, Mr Duncan Campbell, from revealing directly or indirectly any details of the Zircon project. After unsuccessfully applying for an injunction to prevent the members from screening the film, the Attorney-General requested the Speaker to issue an order prohibiting the film's screening. This the Speaker was reluctant to do until advised on Privy Counsellor terms of the threat to national security.

The subsequent report of the Committee of Privileges of the House of Commons condoned the action taken by the Speaker. The Committee found no breach of privilege arose as a result of the ban on the film. The privilege of freedom of speech was quite

36 At para 5.22.
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properly limited by the Committee to the debates and proceedings in Parliament. It did not extend to activities occurring simply within the precincts of Parliament, such as the screening of a film in one of the rooms of the House of Commons. 38

(ii) Communications between members and constituents or other persons

It has been held that correspondence between a member and a constituent, even on a matter of parliamentary business, is not protected by freedom of speech as a ‘proceeding in parliament’. 39 While it may not seem unreasonable to regard the provision of information for the purpose of a parliamentary speech or debate to be incidental to the parliamentary functions of a member, the wide ranging circumstances in which such information may be provided preclude absolute immunity attaching to such communications as a general rule. Distinctions might otherwise have to be drawn between information supplied to a member voluntarily or at the member’s request, information which is relevant or irrelevant, and information which is actually used or not by the member. Appreciation of such difficulties may explain the lack of support for the extension of the privilege to this situation.

Another explanation is that defamatory communications between a constituent and a member are likely to attract the protection of qualified privilege. This defence, which may be defeated by proof of malice, requires that the person making the defamatory statement has an interest or duty in making it and that the persons to whom it is made have a corresponding interest or duty in receiving it. This defence has recently been expanded by the High Court in Lange v Australian Broadcasting Corporation 40 to conform to the implied freedom of political communication in relation to government and political matters. This unanimous decision overturned the special constitutional defence recognised earlier by a majority of the Court in Theophanous v Herald and Weekly Times Ltd. 41 Instead, the Court expanded the common law defence to cover a person who mistakenly honestly publishes a defamatory imputation in relation to a government or political matter to a large audience. 42

Consideration now needs to be given to the statutory definition of ‘proceedings in parliament’ adopted by the Commonwealth and Queensland parliaments.

38 Zircon Report at paras 16 and 35.
40 (1997) 189 CLR 520.
41 (1994) 182 CLR 104.
42 See (1997) 189 CLR 520 at 574: the defendant must establish reasonable grounds for ‘believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue’. 

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Statutory definition: ‘proceedings in parliament’

A statutory definition of ‘proceedings in parliament’ is provided in s 16(2) of the Parliamentary Privileges Act 1987 (Cth). This definition is intended, ‘in addition to any other operation’, to declare the position under art 9 of the Bill of Rights 1689. Section 16(2) provides:

‘proceedings of Parliament’ means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;
(b) the presentation or submission of a document to a House or a committee;
(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
(d) the formulation, making or publication of a document including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

Although the precise scope of this statutory definition is not readily apparent, it still provides some guidance. By limiting it to ‘the transacting of the business of a House or of a committee’, the recommendations of the Commonwealth Parliamentary Privilege Report are adopted. Thus, communications between members or between a member and a minister on a constituency matter unconnected with parliamentary business are not covered by this statutory definition. This accords with the view ultimately taken by the House of Commons in the Strauss case. However, s 16(2) appears to cover communications between members and constituents or other persons where they are ‘for purposes of or incidental to the transacting of the business of a House or of a committee’.

The scope of s 16(2) has been considered by the Queensland Court of Appeal in O’Chee v Rowley where Senator O’Chee was sued for defamation in respect of a radio interview he gave on commercial fishing of marlin in protected fields in North Queensland. The Senator asked a question in the Senate on the issue prior to the

43 The 1999 UK Report of the Joint Committee on Parliamentary Privilege (HL Paper 43; HC 214 (1998-99)) recommended a definition based on the Australian definition in s 16(2) with the addition of the maintenance of any register of interests.
44 An exposure draft of the 1984 Report has included a provision to accord privilege to the Strauss situation but it was deleted from the Final Report (para 5.22).
45 H Evans (ed), above note 21, p 41 agrees with this position. Another notable feature of this statutory definition is that it incorporates ‘acts done’, as well as ‘words spoken’ — so it would seem that the act of revealing a confidential document is capable of attracting privilege.
In proceedings for discovery, he claimed that 43 documents relevant to the proceedings were privileged under s 16(2) on the basis that they 'were created, prepared, brought into existence or came into [his] possession for the purposes of or incidental to the transacting of the business of the Senate'. The trial judge, Williams J, classified these documents generally as comprising: letters addressed to the Senator; reports prepared for other persons on long line tuna fishing in marlin waters; a diary note by the Senator of an 'attendance on constituent'; letters exchanged between the Senator and another member of Parliament; and notes of telephone conversations made by the Senator.

Williams J applied48 to s 16(2) the traditional view of the general law espoused in Erskine May49 and adopted by Allen J in R v AJ Grassby50 that no parliamentary privilege attaches to communications between informants and members in circumstances where the member is asked to raise a matter in Parliament. No privilege arose whether the member actively sought the document to raise in parliament or whether it was simply provided in the hope that it would be raised there. However, this narrow approach to the operation of s 16(2) was rejected on appeal to the Queensland Court of Appeal.

A majority of Fitzgerald P and Moynihan J agreed with the reasoning of McPherson JA for allowing the appeal but their Honours required further particulars by supplementary affidavit before concluding that the documents were privileged under s 16. Only McPherson JA was prepared to accept their privileged status on the basis of the particulars already provided. Subject to these evidentiary requirements, the majority agreed with McPherson JA that all those documents written by the Senator, comprising diary notes, file notes of attendances and conversations and letters, were documents within 'proceedings in Parliament' in s 16(2)(c) having been prepared for the purpose of or incidental to the transaction of Senate business (that is, the question he asked in the Senate and the subsequent debate).51

As for those documents sent to the Senator, these only fell within s 16 once 'the member or his or her agent does some act with respect to [them] for the purposes of transacting business in the House'.52 Such an act might be 'procuring, obtaining or retaining possession' of documents for the purpose of being sufficiently informed on a topic before raising it in parliament. Hence, unsolicited mail may become privileged if the member 'elects to keep it for purposes of transacting business of a House'.53 As well, other documents dated

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47 See 67th Report of the Senate Committee of Privileges, Possible Threats of Legal Proceedings against a Senator and Other Persons PP141/1597 which found contempt of parliament had occurred in so far as a threat of legal proceedings had been made against a person for providing information to Senator O’Chee which he used in a parliamentary speech.
48 Unreported judgment of 18 April 1997 at 8.
49 D Limon and W R McKay (eds), above note 5, p 128-129.
51 (1997) 150 ALR 199 at 208-209.
52 At 209.
53 At 209.
subsequent to the matter being discussed in the Senate are not necessarily incapable of being privileged given that they may have been generated in anticipation of further parliamentary debate — even if they are produced two to three months after the last Senate discussion. On the interpretation of ‘proceedings in Parliament’ in s 16(2), McPherson JA concluded:

By s 16(2) of the 1987 Act proceedings in Parliament include the preparation of a document for purposes or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purposes; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to ‘proceedings in Parliament’.55

The next issue was whether requiring the production of these documents within s 16(2)(c) was to question or impeach ‘the preparation’ of these documents for the purpose of transacting the business of the Senate — this being the effect of engrafting the definition in s 16(2)(c) onto art 9. His Honour concluded that this was so, in that disclosure would impair their preparation retrospectively.56 Finally s 16(4), which specifically prevents a court or tribunal from admitting a document or oral evidence taken in camera by a House, was held not to define exhaustively the position on the production of documents in legal proceedings.

Queensland has also attempted to define ‘proceedings in Parliament’ in s 3 of the Parliamentary Papers Act 1992 (Qld) in terms substantially identical to those of the Commonwealth definition. The only differences are that the Queensland definition expressly refers to proceedings of an inquiry held under the authority of the House (ss 2 and 3(3)) and includes documents ‘laid before’ as well as presented or submitted to the House, a committee or inquiry (s 3(3)(d)).57

Conclusion on activities covered by the freedom

There appears to be no basis for regarding the current undisputed scope of the privilege of freedom of speech in relation to the speeches, debates and proceedings of parliament as other than an essential and necessary right on the part of all members of parliament to speak freely, without fear of outside legal challenge, on any matter on which they feel it their duty to speak in the public interest. Whether this privilege should be qualified in relation to criminal acts occurring within the scope of parliamentary proceedings is considered in Chapter 8.

54 At 209-210.
55 At 215.
56 At 210.
57 There appears to be no difference between having a document laid before, presented, submitted or tabled before a House.
Although the original rationale for this privilege was to protect members from executive interference, the prospect today of interference from any person or body outside of the legislature is just as significant. The various functions of a modern parliament — in particular, those concerned with the review of government policy and action and those of an investigatory kind — reinforce the need for freedom of speech. Given the practical control the executive has over parliament, there is now, just as there was in the 17th century, good reason for protecting members for what they might say during the course of parliamentary proceedings; otherwise, their capacity to criticise government action, and to review and investigate matters of public interest, would be severely affected.

At least two issues present themselves in relation to the scope of this freedom. The first is to clarify those circumstances in which the freedom arises. The second is to decide whether any further restrictions ought to be placed on the exercise of this freedom. Each of these issues is dealt with in turn.

(i) **Width of privilege**

The rationale for any widening of the scope of the privilege must be to ensure members are able to perform their parliamentary functions of review and investigation in relation to any matter of public interest. Accordingly, each of the following situations requires clarification.

- **Communications between a member of parliament and a minister**

  The extension of parliamentary privilege to communications between a member and a minister, if they are concerned with parliamentary or constituency matters, can be supported on at least two grounds: first, it enables a member to disclose information on a restricted basis to the appropriate minister, instead of having to make a public statement in the course of parliamentary proceedings; secondly, a member is able to pursue the matter with the minister while parliament is not sitting.58

- **Communications between members of parliament**

  Communications between members concerning draft speeches and motions ought to be protected, since they are incidental to the proceedings of parliament.59 Other communications between members in relation to constituency or other matters should be protected only if this is necessary in order for members to perform their parliamentary and constituency functions.

- **Communications between a member of parliament and a constituent**

  As regards communications between members and constituents or other persons, it is difficult to isolate those which are necessary for members to receive for the purposes of their parliamentary and constituency functions. The solution is offered

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59 Recommended by the Commonwealth Joint Select Committee Report on Parliamentary Privilege at para (a) quoted earlier.
by the Queensland Court of Appeal in O'Chee v Rowley\(^60\) which confers protection only on those communications which are acted on by the member for the purpose of transacting business in the House.

Whatever scope is agreed on for the privilege of freedom of speech, it must be defined as accurately and as clearly as possible. Unless this is done, the rationale for according such protection, namely, the facilitation of open discussion and criticism of issues by members of parliament is eroded by the uncertainty which members will feel about their legal position.

(ii) Further restrictions on the exercise of the freedom

Having considered the reach of the privilege, are there any further restrictions other than those outlined above which should be considered? The confidentiality attaching to committee proceedings and the operation of the sub judice convention\(^61\) are the two most significant restrictions on the privilege of freedom of speech recognised and enforced by parliament. Both of these restrictions are examined in Chapter 9 which discusses the duty of confidentiality.

Apart from those restrictions, the privilege provides absolute protection from all civil and criminal proceedings. Whether it should do so in relation to criminal acts occurring within the scope of parliamentary proceedings is considered in Chapter 8. Also of concern is whether this immunity should extend to matters of national security. This issue was considered in the United Kingdom by the Zircon Report which acknowledged that a conflict exists between the public interest in maintaining freedom of speech in parliament and the public interest in protecting national security. All of the options to protect national security by restricting freedom of speech by legislation, by resolution of the House or by standing orders were rejected on the basis that they were unacceptable in principle and/or ineffective.\(^62\) The 1999 Report of the Joint Committee on Parliamentary Privilege acknowledged that '[i]t is self-evident that members should wilfully divulge classified information in the House only in the most exceptional circumstances and after long and careful thought'.\(^63\)

Whatever scope is given to the privilege of freedom of speech, its conferral of almost absolute immunity can only be justified if the privilege is exercised responsibly and reasonably. As a privilege, it relieves a member from the invidious task of predicting beyond doubt whether or not a statement made under privilege is made in the public interest. On this basis, it is not a privilege which entitles a member to ignore all constraints whether of a moral or legal kind. Here again, the overriding standard to be observed is to act and serve in the public interest.

\(^{60}\) (1997) 150 ALR 199.
\(^{63}\) Report of the 1999 UK Joint Committee on Parliamentary Privilege at para 212.
Effect of freedom of speech: admissibility of evidence concerning parliamentary proceedings

A further difficult aspect of the freedom of speech provided by art 9 is to determine the extent to which reference to speeches, debates or proceedings is permitted in legal proceedings and for what purpose.\textsuperscript{64} It is proposed here to consider this issue both under the general law and under the \textit{Parliamentary Privileges Act 1987 (Cth)} with particular reference to defamation proceedings. The position in relation to criminal proceedings is considered in Chapter 8.

As the fundamental protection derived from art 9 is that no action (whether criminal\textsuperscript{65} or civil\textsuperscript{66}) may be brought against a member or a witness for what they have said or done in the course of parliamentary proceedings, a significant difficulty is whether the privilege also denies reliance on what is said in parliament, not as the basis of legal proceedings against that person, but in \textit{support} of an action based on events occurring outside parliament.\textsuperscript{67} It is clearly accepted by all authorities that the proceedings of parliament may be referred to for the purpose of proving as a fact that certain events occurred in the course of those proceedings.\textsuperscript{68} For example, Hansard may be cited to establish that a member made a particular statement in parliament on a certain day. Even so, parliamentary practice has required the approval of the House before reference could be made to its proceedings for that limited purpose in court.\textsuperscript{69}

But the issue on which the authorities are divided is whether inferences and submissions can be made on the basis of the evidence of those proceedings, not for the purpose of imposing legal consequences on the member or witness, but simply in ‘support’ of those proceedings whether brought by or against the member or witness. In \textit{Church of Scientology of California v Johnson-Smith}\textsuperscript{70} Browne J held that art 9 precluded reference to parliamentary statements by a member to support the plaintiff’s claim that the member’s defamatory statements outside Parliament had been motivated by malice, thereby negating the member’s claim of qualified privilege. His Honour\textsuperscript{71} accepted the Attorney-General’s submission:

\begin{quote}
that what is said or done in the House in the course of proceedings there cannot be
\end{quote}

\begin{footnotes}
\item[65] See \textit{Ex parte Wason} (1869) LR 4 QB 573.
\item[66] See \textit{Dillon v Balfour} (1887) 20 Irish LR 600.
\item[68] See \textit{Church of Scientology of California v Johnson-Smith} [1972] 1 QB 522 at 527; \textit{Monks v Astin} [1982] 2 NSWLR 369 at 373 (CA); \textit{Rost v Edwards} [1996] 2 WLR 1280.
\item[69] This requirement was abolished by the Senate in respect of its proceedings by Privileges Resolution No 10 (25 February 1988). On the practice of the House of Commons, see D Limon and W R McKay (eds), above note 5, p 94 fn 1.
\item[70] [1971] 3 WLR 434.
\item[71] At 437.
\end{footnotes}
examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House. In my view this conclusion is supported both by principle and authority.

Two principles underlying art 9 were relied on: first, 'the House must have complete control over its own proceedings and its own members'; and second, 'a member must have a complete right of free speech in the House without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter'.

The authorities relied on were not on point factually but contain statements supportive of a wide view of art 9 as precluding the questioning of statements made in the course of parliamentary proceedings. In *Stockdale v Hansard*, Lord Denman said 'that whatever is done within the walls of either assembly must pass without question in any other place', while Patteson J observed 'that whatever is said or done in either House should not be liable to examination elsewhere'. Reliance was also placed on statements in *Ex parte Wison* especially that by Lush J: 'I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House'. Little weight, however, ought to be given to this quote, for it contemplates proceedings against a member for what the member has said or done in Parliament. *Dingle v Associated Newspapers Ltd* was regarded as analogous in that Pearson J denied reference to a select committee report, an extract of which was published as part of an alleged libel, for the purpose of impugning it.

A wide view of the scope of the privilege has also been expressed in a series of decisions in Australia. In *R v Turnbull* a former State Treasurer was charged with official corruption and his parliamentary statements were excluded. The purpose for which the Crown wished to rely on them is unclear but Gibson J regarded the privilege as protecting members from use being made of such statements. In

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72 At 437.
73 (1839) 9 Ad & E 1; 112 ER 1112.
74 At 114.
75 At 209.
76 (1869) LR 4 QB 573.
77 At 577.
80 This view was approved by the Court of Queen's Bench in *R v Secretary of State for Trade; Ex parte Anderson Strathclyde plc* [1983] 2 All ER 233 which refused to refer to ministerial statements made in Parliament which were relied on for an application for judicial review of a decision made by the minister outside Parliament. On this point, Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593 at 639 said that it was wrongly decided.
82 At 83.
Holdings v Jennings\textsuperscript{83} Anderson J recognised:

[It is clear law that no proceedings, either civil or criminal, may be taken against a member of Parliament for anything said or done by him in Parliament, and a member is not examinable outside Parliament concerning anything said by him in Parliament; see Ex parte Wason (1869) LR 4 QB at p 573; Bradlaugh v Gossett (1884) 12 QBD 271 at p 275; Stockdale v Hansard (1837) 9 AD & E 1; Dillon v Balfour (1887) 29 LR Ir 606; Blackstone, 1 Com 163; R v Craevey (1813) 1 M & S 273; Chubb v Salomons (1852) 3 Car & Kir 75 [emphasis added].

In Comalco Ltd v Australian Broadcasting Corporation\textsuperscript{84} Blackburn CJ considered the privilege as preventing 'the substance of what was said in Parliament to be the subject of any submission or inference'.

However, the wide view of the effect of the privilege espoused in Church of Scientology was rejected by Hunt J in R v Murphy.\textsuperscript{85} In that case his Honour permitted, for the purpose of testing their credibility, the cross-examination of witnesses on their prior statements made to a parliamentary committee. The case was the second of two criminal prosecutions brought against Justice Lionel Murphy for attempting to pervert the course of justice. The same ruling had been made by Cantor J in the first trial\textsuperscript{86} while also upholding the right of the Crown to cross-examine Justice Murphy on a written statement he had given to a Senate committee. Senate committees had been investigating allegations against the judge to ascertain whether an address for removal was warranted under s 72 of the Constitution. Before both trial judges, Counsel representing the Senate argued that such evidence was inadmissible by virtue of parliamentary privilege.

Hunt J confined the privilege under art 9 to preventing reliance on what is said in parliament or to its committees for the purpose of bringing an action against that person, not when the action was based on conduct occurring outside parliament and the evidence is used to establish a motive or intention. His Honour thereby confined the privilege to ensuring that no legal consequences are visited upon the witness for what was said in parliament or to its committees:

I remain of the view that what is meant by the declaration that 'freedom of speech ... in parliament ought not to be impeached or questioned in any court or place out of parliament' is that no court proceedings (or proceedings of a similar nature) having legal consequences against a member of parliament (or a witness before a parliamentary committee) are permitted which by those legal consequences have the effect of preventing that member (or committee witness) exercising his freedom of speech in parliament (or before a committee) or of punishing him for having done so.

\textsuperscript{83} [1979] VR 289 at 291.
\textsuperscript{84} (1983) 78 FLR 449 at 453.
\textsuperscript{85} (1986) 5 NSWLR 18 at 33-38.
Cross-examination going to the credit of a witness in curial proceedings — based upon the inconsistency between his evidence before a parliamentary committee and his evidence in court, or even upon the untruthfulness of the former — does not of itself visit legal consequences upon the witness, and neither (where the witness is a party) do the proceedings themselves visit such consequences upon him as a result of what he had said or done before the parliamentary committee. If, as a result of such cross-examination, the party to the proceedings is not believed by the tribunal of fact — and for that reason loses his case (or he is convicted) — that result is a consequence of what is seen by that tribunal to be the true facts given in evidence before them; it cannot logically be said to be a consequence of what the party had said to the parliamentary committee. To resort once more to the language of causation, what the party said to the parliamentary committee may possibly be thought to be the causa sine qua non, but it was not the causa causans of the loss of his case. The causa causans or the real cause of that loss is that the jury accepted the case against him and not his own case, perhaps by reason of his lack of credit — which may have been revealed by what he said to the committee, but which existed in any event.\textsuperscript{87}

In support of the approach taken by Hunt J were earlier statements in \textit{Gipps v McElhone}\textsuperscript{88} where a defamation action was brought against a member of the NSW Parliament in relation to comments he made about the plaintiff to another member outside Parliament. Martin CJ\textsuperscript{89} and Manning J\textsuperscript{90} indicated they were prepared to allow reference to subsequent parliamentary statements made by the defendant for the purpose of establishing malice to defeat the defence of qualified privilege. However, the judgments made no reference to parliamentary privilege. Subsequent support for Hunt J is found in the Full Court of South Australia in \textit{Wright and Advertiser v Lewis},\textsuperscript{91} which is discussed below in the context of defamation proceedings.

Since \textit{R v Murphy}, a number of decisions in Australia have approved the principle of the \textit{Church of Scientology} and rejected the ruling of Hunt J.\textsuperscript{92} In \textit{R v Jackson}\textsuperscript{93} Carruthers J held evidence of what the accused had said in Parliament inadmissible for the purpose of establishing that he had lied to Parliament as corrobative evidence of official corruption. His Honour followed \textit{Church of Scientology} and expressly declined to follow \textit{R v Murphy}. Also, Beaumont J in \textit{Amann Aviation Pty Ltd v The Commonwealth},\textsuperscript{94} relying on s 16(3) of the \textit{Parliamentary Privileges Act 1987} (Cth), disallowed reference to what had been said in Parliament for the purpose of proving that the Commonwealth was not ready and willing to proceed with a contract and

\begin{footnotes}
\footnotetext{87}{(1986) 5 NSWLR 18 at 38-39.}
\footnotetext{88}{(1881) 2 NSWR 18.}
\footnotetext{89}{At 23.}
\footnotetext{90}{At 25.}
\footnotetext{91}{(1990) 53 SASR 416.}
\footnotetext{92}{See \textit{Australian Broadcasting Commission v Chatterton} (1986) 46 SASR 1 at 18 per Zelling ACJ; contrast Prior J at 35-36; \textit{AJ Grassby} (1991) 55 A Crim R 419 at 430-432 per Allen J.}
\footnotetext{93}{(1987) 8 NSWLR 116.}
\footnotetext{94}{(1988) 19 FCR 223.}
\end{footnotes}
hence was not entitled to terminate it. His Honour adopted a wide view of the
privilege under the general law:

On behalf of the applicant it is submitted that the tender of the extract from
_Hansard_ does not offend s 16(3) because it is for the limited purpose of proving that
the Senator made a statement in Parliament in which he admitted having the
conversation alleged. It is true that, before the enactment of s 16, it was permissible
to use _Hansard_ for the limited, but non-contentious, purpose of proving that a
member of Parliament was present in the House on a particular day. According to
the memorandum explaining the operation of s 16(3)(c), this is still a legitimate
approach. This would accord with the language of s 16 and with its apparent
purpose, that is to say, that a member of Parliament should be able to speak in
Parliament ‘with impunity and without any fear of the consequences’: per Gibbs
ACJ in _Sankey v Whitlam_ (1978) 142 CLR 1 at 25. Where, as here, the subject-matter
of the passage from _Hansard_ is contentious in that it is sought to be used to impugn
the conduct of the Senator, in the context of a denial by the respondent of any
impropriety, it is almost inevitable that the tender of _Hansard_ would lead to an
examination of the circumstances in which the Senator came to make the
statement and that this would further lead to an attempt to assess the credibility of
this evidence and to compare it with other evidence already given. Such an
examination, in a contentious area, cannot be reconciled with the complete
freedom of speech envisaged by the _Bill of Rights_ and the Act.95

More recently, both the House of Lords in _Pepper v Hart_96 and the Privy Council in
_Prebble v Television New Zealand Ltd_97 on appeal from the New Zealand Court of
Appeal have accepted the decision in _Church of Scientology_. Only the Privy Council
considered _R v Murphy_ and regarded the reasoning of Hunt J as incorrect.98 The
_Prebble_ case is discussed below in the context of defamation proceedings.

Lord Browne-Wilkinson, who delivered the principal judgment in _Pepper v Hart_,
rejected any suggestion in _Church of Scientology_ that art 9 denied any reference to
parliamentary speeches except for the purpose of what was said on a particular
day.99 But his Lordship’s rejection of the wide terms of the effect of art 9 in that
case was only to allow reference to ministerial statements in Parliament to assist
in the interpretation of ambiguous legislation — no support for the reasoning of
Hunt J can be found in his Lordship’s judgment. Indeed the following warning

95 At 230-231.
96 [1993] AC 593. See also _Hamilton v Al Fayed_ [2000] 2 WLR 609 (HL) where Lord Browne-
Wilkinson (with whom the rest of the Court agreed) at 620 adopted the wide view of the
freedom: ‘The normal impact of parliamentary privilege is to prevent the
court from entertaining any evidence, cross-examination or submissions which challenge the
veracity or propriety of anything done in the course of parliamentary proceedings’
98 At 333.
indicates acceptance of the wide effect of art 9 not to permit the questioning of
the intentions and motives of members: 'No doubt all judges will be astute to
ensure that counsel does not in any way impugn or criticise the Minister's
statements or his reasoning.'

It seems to be suggested by Sir Clarrie Harders that the ruling of Hunt J in R v
Murphy and the principle from Church of Scientology are reconcilable: in other words,
from the latter case there is the general principle that what is said in parliament
cannot be used to support an action which is based on events occurring outside
parliament, while the former case provides an exception to that principle so that
what is said in parliament may be used to test that person's credibility in legal
proceedings to which they are not a party.

Any reconciliation of R v Murphy and Church of Scientology appears dubious. The
mere testing in court of the credibility of a witness who has given evidence to a
parliamentary committee may have repercussions, even legal consequences, at a
later time. There is the potential for conflict to arise between a House acting against
a witness for contempt for misleading the House and the court taking action for
perjury. And what of a witness in commercial proceedings who is a director of the
company which is the subject of the proceedings? In these circumstances, principle
and the weight of authority support Church of Scientology and its wide view of the
privilege. However, as further difficulties arise with this wide view in relation to
defamation proceedings brought by or against members, further assessment of that
view is given below in relation to defamation proceedings.

Operation of the freedom in any other place out of parliament

Sir Edward Coke as quoted by Blackstone described the freedom of speech in
these terms:

whatever matter arises concerning either house of parliament, ought to be
examined, discussed and adjudged in that house to which it relates, and not
elsewhere [emphasis added].

This passage highlights one factor seemingly overlooked in the judicial debate
above: namely, that art 9 precludes the speeches, debates and proceedings of
parliament from being impeached or questioned in any court or in any other place out
of parliament. To confine the protection afforded by art 9 against the imposition of
legal consequences on those who are engaged in parliamentary proceedings fails to
give effect to the intention that other bodies apart from courts were to be precluded
from questioning those proceedings. The immunity must extend beyond courts to

100 Sir C Harders, above note 86.
102 Contrast O'Sullivan J in Wright and Advertiser v Lewis (1990) 53 SASR 416 at 447.
any tribunal,\textsuperscript{104} including royal commissions,\textsuperscript{105} with power to summon witnesses. In so far as members of parliament or parliamentary witnesses are called before these inquiries, unless they are protected by art 9 in respect of their parliamentary statements, they are vulnerable to being questioned on their reasons, motives and even their sources of information in respect of those statements.

It is important to note that official inquiries are not precluded from investigating issues or even allegations raised in parliament, provided no reference is made to parliamentary statements nor any line of inquiry is taken in connection with those statements.\textsuperscript{106} Article 9 simply prevents the particular statements made in parliament from being examined as such, including any inquiry as to their undisclosed sources of information. This was obviously understood by Townley J in holding that a senator could not be compelled to answer questions before the Royal Commission into Certain Crown Leaseholds\textsuperscript{107} which was established to investigate an allegation of corruption made in the Senate. As the Royal Commissioner, his Honour observed:

Whatever a member’s constituents may do or say to him for what he has said in Parliament it seems to me that he may not be compulsorily examined as to it by the Executive Government or by the courts.

Investigation of the motives and intentions of members might also arise if they were to be interrogated by police or security personnel in respect of what they have said in parliament. Such a case arose in the United Kingdom in Sandys case in 1938. Mr Sandys, a member of the House of Commons, wrote a letter to the Secretary of State for War advising that he had received information relating to British defence preparations. He was questioned by the Attorney-General and threatened with prosecution unless he revealed his sources of information. He was also summoned to appear before a military court of inquiry. The Select Committee on the Official

\textsuperscript{104} Section 16 of the \textit{Parliamentary Privileges Act} 1987 (Cth) declares the use of parliamentary proceedings in a court or tribunal, the latter being defined in s 3(1) to mean any person or body having the power to examine witnesses on oath.


\textsuperscript{107} (1956) St R Qd 225 at 230.
Secrets Act found these actions against the member constituted a clear breach of privilege. A similar case arose in Australia in 1948 when Mr Fadden, then the Leader of the Country Party, was interrogated by security officers in his Parliament House office as to his informants for a statement he had made in Parliament.

Although it has been suggested that art 9 prevents the questioning of parliamentary proceedings by any person or body having the power to examine witnesses on oath, it should not be confined in that way, otherwise it allows executive interrogation by police or other investigators. This is not to suggest that members are not free to co-operate with police investigations into matters related to their parliamentary statements, but any co-operation is to be entirely voluntary.

In Western Australia, two royal commissions in the 1990s faced the difficulties which arise from a wide view of the freedom of speech. The first was the Royal Commission into Commercial Activities of Government and Other Matters (the WA Inquiry) in 1991 which unsuccessfully sought to negotiate with both Houses of the Australian Parliament to refer to evidence given to various parliamentary committees. The Report of the Royal Commission rejected the wide view of the privilege which prevents what is said in parliamentary proceedings from being referred to or questioned outside parliament, in particular, the Commission rejected the view that this wider protection is needed to ensure that witnesses co-operate in parliamentary inquiries, knowing that they cannot later be held accountable. In recommending a review of the freedom to permit parliamentary proceedings to be questioned outside parliament without imposing legal liability for what is said, the Commission observed:

We have no doubt that if it is understood by members of Parliament or persons appearing before a parliamentary committee, that they may be called to account for their parliamentary statements at a later time, they are more likely than not to speak honestly, although no less freely. To suggest otherwise is to equate the right to speak freely in Parliament with the right to be disingenuous. Such a proposition is fundamentally inconsistent with the right of all citizens to be governed in an open and accountable manner.

The difficulties with this view are: first, that it fails to define the parameters of the permissible external review; and second, it assumes that such a review will only be

109 See E Campbell, above note 18, p 43.
111 See the detailed account given of these negotiations in the Report of the Royal Commission into Commercial Activities of Government and Other Matters, 1992, Part 1 Vol 1 at 3.6.67-3.6.79.
112 At 3.6.5-3.6.6.
113 See rec 33 at 3.6.8.
114 At 3.6.6.
exercised responsibly, even though it is the possibility of unjustified executive interrogation which the wide view of the privilege guards against. And as the Report notes, there is no impediment to the general public (including the media) from questioning what has been said within the scope of the privilege. Far from being 'puzzling' (according to the Report), the obstacle to any official questioning of parliamentary proceedings is perfectly understandable given that it is an exercise of executive power.

The other royal commission in Western Australia to face the difficulty of art 9 was the Marks Royal Commission established in 1995. Its terms of reference endeavoured to avoid infringing art 9 by confining the inquiry to the circumstances preceding and following the presentation of a petition to the Legislative Council by the Hon John Halden MLC on behalf of Mr Brian Easton.

Mr Easton had been involved in divorce proceedings and the petition alleged that his ex-wife Penny Easton and her sister had given false evidence in those proceedings and that Penny Easton had been given confidential information by the then Leader of the Opposition, the Hon Richard Court MLA. Four days after presentation of the petition, Penny Easton committed suicide. On the basis of findings by a Select Committee of the Legislative Council that the petition was misleading and unfair, the House ordered Mr Easton to apologise. On failing to do so, he was imprisoned for seven days for contempt.

Meanwhile, the former Premier, Dr Carmen Lawrence, became embroiled in controversy over the extent of her knowledge of the petition before its presentation. Accordingly, the newly elected government of Richard Court appointed the Hon Mr K H Marks QC, a retired Victorian Supreme Court judge, as a royal commissioner ‘to inquire and report on whether the circumstances and events preceding and following the presentation of [the Easton petition] involved conduct that was an improper or inappropriate use of executive power or public office or was motivated by improper or inappropriate considerations’. 117

This inquiry was unsuccessfully challenged in the Supreme Court of Western Australia: Halden v Marks. In response to the argument that the inquiry was empowered to infringe parliamentary privilege by investigating the events preceding and following the presentation of the petition, the Court refused to express an opinion on the matter for fear of ‘intruding into the exclusive domain of Parliament to “determine for itself without review, what is contempt”’. 119 Thereafter, Commissioner Marks ruled on various submissions of breaches of privilege. However, he was assisted by a ruling of the President of the Legislative Council of 16 May 1995 that ‘[a]lthough the presentation of a petition is as much a proceeding as a conference of managers, the preparation, including circulation, of a

115 At 5.8.5.
119 At 463, citing Victoria Legislative Assembly Speaker v Glass (1871) LR 3 PC App 56 at 573.
petition is not’. The royal commission’s report concluded that as Mr Halden had suggested to Mr Easton that he present the petition, he had acted improperly by ‘using Easton’s grievances and allegations for his own personal interests’. Professor Campbell rightly suggests that this finding questions Mr Halden’s motives for presenting the petition.

Parliamentary Privileges Act 1987 (Cth)

In response to the rulings of Cantor J and Hunt J in the Murphy trials, the President of the Senate introduced the Bill for the Parliamentary Privileges Act 1987 (Cth) which Odgers’ cites as ‘enacted primarily to settle a disagreement between the Senate and the Supreme Court of NSW’. While the 1987 Act endeavours to resolve the position at the Commonwealth level, it of course does not do so at the State level. Although reference has already been made to the definition of ‘proceedings in Parliament’ in s 16(2), s 16(1)-(5) must now be considered.

Parliamentary privilege in court proceedings

16 (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ‘proceedings in Parliament’ means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
(a) the giving of evidence before a House or a committee, and evidence so given;
(b) the presentation or submission of a document to a House or a committee;
(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

120 The Marks Royal Commission at 22.
121 At para 9.20(a).
123 H Evans, above note 21, p 34. Sir Clarrie Harders in his article, above note 86, was very critical of s 16 especially in denying the right to cross-examine witnesses for the purpose of testing their credibility.
(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of: 
(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; 
(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or 
(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:
(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or 
(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to: 
(a) a question arising under section 57 of the Constitution; or 
(b) the interpretation of an Act; 
neither this section nor the Bill of Rights, 1688 shall be taken prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

The terms of s 16(2) and (3) are extraordinarily wide in their practical effect. This was noted earlier in relation to the protection afforded communications with members of parliament: see O'Chee v Rowley.\textsuperscript{124} Another recent example of the difficulties which may arise from the width of s 16 is the Colston affair. In April 1997, allegations were made that Senator Mal Colston had made false claims for travel allowances. He was then the Deputy President of the Senate and an independent senator, having resigned from the ALP in 1996 after being re-elected a senator for Queensland. Statements in reply to these allegations were tabled in the Senate by the Senator and by one of his staff (in which she claimed responsibility for the mistaken claims). The Senator duly refunded approximately $6000 in allowances. When the staff member later retracted her statement, the Government referred the matter to the Federal Police for further investigation. At the same time, there were attempts in the Senate to establish an

\textsuperscript{124} (1997) 150 ALR 199.
inquiry by the Privileges Committee to decide whether the Senator had misled the House. The Government objected to such an inquiry in view of the obstacles likely to arise from s 16 in the police investigation and in any future prosecution.

Conflicting opinions were given by the Chief General Counsel of the Commonwealth, Mr Henry Burmeister, and by the Clerk of the Senate, Mr Harry Evans, as to the appropriateness of a Senate inquiry operating concurrently with a police investigation. Two principal difficulties were identified by the Commonwealth's Chief General Counsel: first, the inability in subsequent legal proceedings to cross-examine any witnesses on evidence given to a Senate inquiry (which was the very reason for the enactment of s 16); and secondly, the effect s 16(3) may have on any documentation submitted to such an inquiry. The latter difficulty arises from the definition of 'proceedings in Parliament' in s 16(2) which includes '(b) the presentation or submission of a document to a House or a committee'. Literally, para (b) when read with subs (3) has an operation which is absurdly wide. In the context of the Colston affair, original travel documents submitted as evidence to a Privileges Committee inquiry might be incapable of being used in any legal proceedings by virtue of s 16(3)(b), for those documents would be tendered and used for the purpose of questioning the intention of any person, namely, Senator Colston. A similar difficulty arises under s 3(3)(c) and (d) of the Parliamentary Papers Act 1992 (Qld). Within the accepted rules of statutory interpretation, s 16(2)(b) needs to be confined to documents prepared for presentation or submission to the Parliament or to a committee.

The extraordinary width of s 16(3) of the Parliamentary Privileges Act 1987 (Cth) was implicitly acknowledged by the UK Joint Committee on Parliamentary Privilege in its 1999 Report. Although the Committee recommended the United Kingdom Parliament enact the same provision, it also recommended that it be qualified for '[i]n one respect the Australian statute may go too far'. The Report continued:

> It is difficult to see how there could be any objection to the court taking account of something said or done in Parliament when there is no suggestion that the statement or action was inspired by improper motives or was untrue or misleading and there is no question of legal liability. We recommend that the prohibition be coupled with a proviso to the effect that the court may take such statements or conduct into account.127

In view of the apparent width of s 16, it is not surprising that challenges to its constitutional validity have been raised both judicially and extrajudically. Beaumont J in Amann Aviation Pty Ltd v The Commonwealth128 upheld s 16(3) as merely declaratory of the general law and hence not an impermissible interference in the judicial function in violation of Ch III of the Constitution. On the other hand, Sir Clarrie Harders argued

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127 At para 86.
that in so far as s 16 purported to deny the right to cross-examine witnesses on prior inconsistent statements, it was invalid for impermissibly interfering with the judicial function.\textsuperscript{129} He also argued that it infringed the right to cross-examination recognised in art 14(3)(e) of the International Covenant on Civil and Political Rights.\textsuperscript{130}

However, the most recent challenge to the validity of s 16(3) is that it needs to be read down so as not to infringe the implied freedom of political communication under the Commonwealth Constitution — at least in relation to the conduct of defamation proceedings. This view was expressed by Pincus and Davies JJA in the Queensland Court of Appeal in \textit{Laurance v Katter}.\textsuperscript{131} On the other hand, the South Australian Full Court in \textit{Rann v Olsen}\textsuperscript{132} rejected this view, upholding the validity of s 16(3). Before considering this issue further, the effect of freedom of speech on defamation proceedings both under the general law and under s 16 of the \textit{Parliamentary Privileges Act} needs to be considered in light of the above discussion.

\textbf{Effect of freedom of speech in defamation proceedings}

Where defamatory statements are made in a parliamentary speech, or as part of a debate or the proceedings of parliament or of its committees, art 9 precludes any action against those responsible for such statements whether a member of parliament or a witness appearing before a House or committee. Where defamatory statements are made by a member outside the 'proceedings of parliament', no privilege attaches to those statements.

It can be appreciated in view of the above discussion that difficulties may arise when defamation proceedings are brought on the basis of statements made outside parliament but in which one or more parties wish to refer to what has been said in parliament, such as occurred in the \textit{Church of Scientology} case.\textsuperscript{133} In particular, recent cases demonstrate the difficulties which arise when a member of parliament sues for defamation and wishes to refer to statements made in parliament to help establish the cause of action or where the defendant wishes to refer to such statements to establish a defence.

In \textit{Prebble v Television New Zealand Ltd},\textsuperscript{134} an appeal from the New Zealand Court of Appeal to the Judicial Committee of the Privy Council, the plaintiff, a former minister and member of the New Zealand House of Representatives, sued the

\begin{itemize}
  \item \textsuperscript{129} Sir C Harders, above note 86 at 140.
  \item \textsuperscript{130} Sir C Harders, above note 86 at 142; art 14(3)(e) provides 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'
  \item \textsuperscript{131} (1996) 141 ALR 447 (Qld Court of Appeal). Special leave to appeal to the High Court was granted but the matter was settled in May 1998.
  \item \textsuperscript{132} [2000] SASC 83.
  \item \textsuperscript{133} \textit{Church of Scientology of California v Johnson-Smith} [1972] 1 QB 522.
  \item \textsuperscript{134} [1995] 1 AC 321.
\end{itemize}
defendant for defamation in respect of a television programme which, according to the plaintiff, accused him of being party to a conspiracy to sell off state owned assets on unduly favourable terms in return for political donations. The program referred to statements made in Parliament and the defendant wished to refer to those statements to establish the truth of its accusations. In doing so, the defendant wished to allege that the plaintiff had misled the Parliament by suggesting that the Government did not intend selling off state owned assets.

The Privy Council upheld the view of the New Zealand Court of Appeal that art 9 freedom of speech prevented reference to what was said in parliament even in defamation proceedings brought by a member where the defendant wished to refer to the member’s parliamentary statements only for the purpose of establishing a defence. The Board acknowledged the conflict which arises in such a case but gave paramountcy over the interests of the administration of justice to “the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information”. In adopting a wide view of the privilege, the Board emphasised the public interest in ensuring that members and witnesses appearing before parliamentary committees are not inhibited.

The Board rejected both of the defendant’s arguments which attempted to confine the effect of the privilege. The first was based on the ruling in R v Murphy that the privilege only precluded reference to statements made in parliament where legal consequences were sought to be imposed against their maker. The Board regarded this view of Hunt J as erroneous, noting that s 16(3) of the 1987 Act contained “the true principle to be applied”:

This view [of Hunt J] discounts the basic concept underlying article 9, viz. the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.

Moreover to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict

135 At 336.
136 At 333, relying on “the long line of dicta that courts will not allow any challenge to what is said or done in Parliament” and that it was inconsistent with the Church of Scientology case which had been approved by the House of Lords in Pepper v Hart [1993] AC 593 and by Comalco Ltd v Australian Broadcasting Corporation (1983) 78 FLR 449, both of which held “that it would be a breach of privilege to allow what is said in Parliament to be the subject matter of investigation or submission”.

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between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue. 137

The second argument, that privilege only arose when the member was sued for defamation, was unsustainable since the privilege could not depend on who brought the proceedings. 138

The Privy Council disagreed with the decision of the South Australian Court of Appeal in Wright and Advertiser v Lewis 139 on which this second argument was based. In that case, the Court of Appeal refused to strike out particulars of a defence and interrogatories in a defamation action brought by a member of the South Australian Parliament in respect of a letter published in a newspaper which accused the member of making unfounded and defamatory statements in Parliament. The particulars of the defence and interrogatories which referred to the statements made in Parliament were challenged by the member as infringing parliamentary privilege. The Court rejected this challenge, holding that privilege could not be raised in a case brought by a member.

King CJ allowed reference to the parliamentary statements for the purpose of defending defamation proceedings brought by the member, for to hold otherwise would involve 'a gross distortion of the law of defamation'. 140 Nor would such reference inhibit the member's exercise of free speech in Parliament:

There can be no doubt that some of the more general expressions of the ambit of Parliamentary privilege found in the cases and in learned writings, if understood literally, would have the effect of precluding a defendant from justifying imputations on a Member of Parliament in relation to his statements and conduct in the Parliament. But the authors of those general expressions were not confronted with that particular issue and there does not appear to be any interest of Parliament or the public which warrants such a rule. Freedom of speech and deliberation in the Parliament is the primary value sought to be protected by parliamentary privilege. To accord to a defendant the right to defend himself against an action for defamation by proving truth, would not impinge upon such freedom. A member would not be inhibited in the exercise of free speech or of his Parliamentary duties by fear of legal consequences, because he would be aware that his actions and motives could not be examined in court unless he instituted the proceedings which rendered such examination necessary. Only the member's action in launching

138 It might also have been rejected since '[t]he important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say' — said in respect of the first argument at 334.
139 (1990) 53 SASR 416.
140 At 421-422.
proceedings alleging a false imputation could lead to an examination in court of the issue of the falsity of the imputation, and therefore of the member's statements and conduct. I cannot think of any other public or Parliamentary interest which could be impaired by such an examination in such circumstances.

I do not think that a defendant, so defending himself, can be regarded in any real sense as impeaching or questioning the freedom of speech, debates or proceedings in parliament as forbidden by art 9; nor can the courts be fairly regarded as doing so if they permit a defendant to so defend himself. It would not be sought to visit any legal consequences on the member, nor to examine his or her actions or motives except so far as that examination might be rendered necessary by the member's own action. The object would be merely to repel the accusation made by the member that a false imputation had been made against him or her. If parliamentary privilege operated to prevent a person, exposed to action by a member for defamation, from defending himself or herself by proving the truth of the criticism of the statements or conduct of the member, it would indeed be 'turned into an abominable instrument of oppression': Adam v Ward.\(^{141}\)

White J expressly agreed with the judgment of King CJ but relied on two specific factors: (1) as in Adam v Ward, the member's action came 'out of the blue', without any preceding altercation between the parties; and (2) if reference were denied the defendant would be unable to disprove malice in order to maintain the defence of qualified privilege.\(^{142}\) Olsson J adopted the view of North P in News Media Ownership v Finlay\(^{143}\) that the privilege is no more than 'a shield of defence'.\(^{144}\) As noted earlier, his Honour regarded R v Murphy as not inconsistent with the principle from Church of Scientology.\(^{145}\)

Both of the cases relied on in Wright and Advertiser v Lewis, the decision of the House of Lords in Adam v Ward\(^{146}\) and News Media Ownership v Finlay\(^{147}\) were defamation actions brought by a member of Parliament in respect of criticism of his performance. Statements made by the member in Parliament, while noted to be protected by absolute privilege, were still used for the purpose of establishing the cause of action or for arguing the defence of qualified privilege — yet the issue whether such reliance infringed parliamentary privilege was not raised in either case.\(^{148}\)

Since Prebble, the South Australian Full Court has revisited this issue in Rann v

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\(^{141}\) At 426-427.

\(^{142}\) At 451 and 432-433.

\(^{143}\) [1970] NZLR 1089.

\(^{144}\) (1990) 53 SASR 416 at 447.

\(^{145}\) [1971] 3 WLR 434.

\(^{146}\) [1917] AC 369.

\(^{147}\) [1970] NZLR 1089.

\(^{148}\) The reason for this was surmised by White J to be that it is up to the parties to raise the issue and not for the court to raise it: (1990) 53 SASR 416 at 430. This is, with respect, an unsatisfactory view, given the importance of the freedom of speech to the functioning of parliament.
Olsen\textsuperscript{149} which involved a defamation action brought by the Leader of the Opposition against the South Australian Premier for accusing him of lying to a Commonwealth parliamentary committee. While the Court confined itself to the position under s 16(3) of the \textit{Parliamentary Privileges Act 1987 (Cth)}, it was, at least in the leading judgment of Doyle CJ, more sympathetic to the position taken in \textit{Prebble} than that in \textit{Wright and Advertiser v Lewis}. Particular emphasis was placed on the need for the courts to respect the principle of non-intervention in relation to parliamentary proceedings. As well, the Court concluded that s 16(3) was a valid law despite burdening the implied freedom of political communication because it was reasonably appropriate and adapted to enhancing freedom of speech in parliament. Further consideration is given below to this finding in relation to the validity of s 16(3).

The harshness of the wide view of the privilege taken by the Privy Council in relation to defamation actions is alleviated in part by the court's ability in an appropriately extreme case to avoid injustice by staying the action. In \textit{Prebble}, however, the order of the New Zealand Court of Appeal that the proceedings be stayed unless privilege was waived by the House of Representatives was reversed as the defendant was able 'to put forward the overwhelming majority of the matters upon which it relies in justification of the alleged libel'.\textsuperscript{150}

\textbf{Assessment}

The fairness of the approach adopted in \textit{Prebble} is open to serious question given the obstacles it places in the path of the administration of justice. Even a stay of proceedings does not produce justice, as illustrated by the frustrated attempt in the United Kingdom of Mr Neil Hamilton MP to clear his name in defamation proceedings against \textit{The Guardian} newspaper.\textsuperscript{151} Even if art 9 were intended to have this wide effect, a reassessment of the justification of this immunity for contemporary parliaments is clearly needed. This requires a balancing of the competing public interest factors: the due administration of justice and ensuring members (and so each House) are free to perform their parliamentary functions, particularly as both legislators and reviewers of the executive. It is difficult to see how the restrictions imposed on the admissibility of evidence and the risk of a miscarriage of justice are outweighed \textit{in every case} by the protection accorded members' independence — especially when members themselves are precluded from relying on 'privileged' statements. Such criticisms have already been voiced by Professors Enid Campbell\textsuperscript{152} and Geoffrey Marshall.\textsuperscript{153} And yet, as noted earlier in

\begin{itemize}
  \item[149] [2000] SASC 83
  \item[150] [1995] 1 AC 321 at 339.
  \item[151] \textit{Hamilton v Hencke; Greer v Hencke} (21 July 1995); \textit{Allason v Haines} (14 July 1995).
  \item[152] E Campbell, above note 64. See also M Chesterman, \textquote{Privileges and Freedoms for Defamatory Political Speech'} (1997) 19 Adel LR 155-215 at 192-193.
\end{itemize}
this chapter, there is good reason for according the privilege a wider scope that that given by Hunt J in *R v Murphy* to ensure members and parliamentary witnesses are not subject to judicial and executive inquiry.

The difficulty in balancing these competing interests to resolve this issue encourages exploration of other options by statute. One approach is to allow each House to waive the privilege in appropriate cases, such as when a member or another person needs to refer to parliamentary statements to establish a defence. Members alone are unable to waive this privilege which is for the benefit of parliament and not simply its members, nor would it be appropriate to confer this discretion on them. Accordingly, the 1999 UK Report of the Joint Committee on Parliamentary Privilege recommended, in the light of *Prebble*, a statutory procedure for each House to waive privilege in legal proceedings provided no one is thereby subjected to a legal liability for what was said under privilege. This was suggested in substitution for the existing limited statutory right given to individual members to waive privilege in defamation cases provided by s 13 of the *Defamation Act 1996* (UK). This option, of course, carries with it the danger of political abuse.

A more radical option is to confine the immunity to those cases where a member is subjected to a legal liability on the basis of what the member said or did in the course of parliamentary proceedings. This approach, adopted by Cantor J and Hunt J in the *Murphy* cases, depends on a distinction being drawn between using parliamentary statements to base a legal action and using them merely to support such an action. Although maintaining this distinction appears feasible, this option subjects the motives of members to judicial scrutiny. The traditional view is that this ought not to be allowed in order to enable them to perform their parliamentary functions. While this might in part be justified theoretically by the doctrine of separation of powers, it is based on the view that members only feel free to express their views if they realise they cannot be called to account anywhere except in the House. The Report of the WA Inc Royal Commission challenged this view on the ground that members and parliamentary witnesses are more likely to give truthful statements if they are liable to account outside the House. This argument ignores, however, the nature of the political process and the risks associated with making unfavourable statements. It also ignores the whole process of political accountability which operates swiftly — and at times with extraordinary force and effect — on those who mislead parliament.

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154 See the ruling given by the Speaker in 1952 (Cth Parl Debates, Vol 219, at 1991-3 and 2104-5); and *Australian Broadcasting Commission v Chatterton* (1986) 46 SASR 1 at 20 per Zelling ACJ.

155 HL Paper 43; HC 214 (1998-99), Recommendations 1-5, paras 60-90.

156 See *Hamilton v Al Fayed* [2000] 2 WLR 609 (HL) which allowed defamation proceedings to continue on the basis of Mr Hamilton’s waiver of privilege. Without that waiver, a stay would have been ordered.

It seems that none of the options proposed is entirely satisfactory. A compromise is clearly required. It is suggested in the conclusion to this chapter that on balance the wide view of the privilege ought to be maintained in conjunction with a capacity on the part of each House to waive the privilege in appropriate cases.

Commonwealth Parliamentary Privileges Act and the implied freedom of political communication

These difficulties with the scope of art 9 identified in Prebble and Wright have recently been considered under s 16 of the Parliamentary Privileges Act 1987 (Cth) by the Queensland Court of Appeal in Lawrance v Katter and by the South Australian Full Court in Rann v Olsen. In the former case, a member of the Commonwealth Parliament was sued in defamation for saying outside Parliament on national radio and television that his allegedly defamatory statements made in Parliament were 'backed up with the hardest of hard evidence'. The plaintiff wished to incorporate the member's parliamentary statements with this statement made outside Parliament in order to establish defamation. The plaintiff demurred to the member's defence which claimed that s 16 of the 1987 Act precluded reference to what he had said in Parliament.

On the basis of the above authorities, there appears to be little chance of success under the general law for incorporating the parliamentary statements as part of the allegedly defamatory statement. This is not simply using the parliamentary statements for the purpose of 'supporting' the action. Had the defendant actually repeated his parliamentary statements outside Parliament rather than merely referred to them, it is unlikely that those statements would be privileged. Nevertheless, two arguments have been put to support the privilege extending that far: first, the repetition of parliamentary statements outside parliament remain part of the proceedings of parliament and second, to deny privilege is in effect to question the identical statements made inside parliament under privilege. The first of these arguments was mentioned by Zelling ACJ in Australian Broadcasting Corporation v Chatterton where in obiter his Honour regarded arguable that privilege attached to the same statements made out'. Prior J disagreed, rejecting both of the arguments above. The

158 (1996) 141 ALR 447 (Qld Court of Appeal).
159 [2000] SASC 83.
160 Contrast the report of Gibbs J as the Royal Commissioner appointed to inquire into and report on certain matters relating to members of the Police Force and the Nanonal Hotel, Petrie Bight, Brisbane (10 April 1964) at 183-4 where he refers to the possibility of incorporating by reference to what was said under privilege.
161 See R v Abingdon (1793) 1 Esp 226 at 228, 170 ER 337 at 338; R v Creevy (1813) 1 M & S 273, 105 ER 102.
162 (1986) 46 SASR 1 at 18-19.
163 At 35-36. See also R v Lord Abingdon (1793) 1 Esp 226, 170 ER 337; R v Creevy (1813) 1 M & S 273, 105 ER 102.
same view was adopted by Lieff J in Stopforth v Goyer. The member may, however, rely on qualified privilege where publication is to a limited audience.

All members of the Court in Laurance v Katter acknowledged that s 16 of the 1987 Act was drafted in extraordinarily wide terms. In their view its terms, if taken literally, were capable of preventing a member from relying on his or her own parliamentary statements in order to prove the elements of a defamation action and of preventing a defendant in the same way from establishing a defence. Pincus JA posed the example of how untenable s 16 was in a case where a member is critical of someone under privilege and that person's response is the subject of a defamation action brought by the member. The defendant is then unable to refer to what the member originally said of the defendant under privilege to justify the response. Of course, this is the position under the general law according to the Privy Council in Pebble, subject to the overriding qualification that in an appropriate case the action should be stayed.

While a majority of the Court (Pincus and Davies JJ) concluded that s 16(3) could not validly operate in that manner and so allowed (in part) the demurrer, Fitzgerald P in dissent upheld the validity of the provision despite the wide net it cast. In noting that s 16(3) may prevent a member from suing in defamation for even a malicious publication of known falsehoods concerning proceedings in Parliament, his Honour opined:

I do not find that particularly surprising or objectionable. Parliamentary 'powers, privileges and immunities' belong to Parliament ... not the individual members, and it is not unjust or unreasonable that the public interest which they are intended to serve has adverse consequences for parliamentarians as well as ordinary citizens who are without recourse for defamation published of them by a member of parliament in Parliament. Indeed, the defamed member of parliament at least has a public and absolutely privileged forum in which to respond to maliciously false defamation by an ordinary citizen, as well as the opportunity to achieve vindication by having the citizen punished by the material House for contempt.

(The final point in that quote requires correction, since under the Commonwealth's Parliamentary Privileges Act libels on a House or its members no longer constitute contempt of parliament.)

However, the majority, noting also the difficulties for a defendant in such a case, confined the operation of s 16(3) to avoid that result. Davies JA derived from the context of s 16 an overriding requirement in s 16(3) that evidence concerning the proceedings of parliament would only be inadmissible 'if that would impeach or

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164 (1978) 87 DLR (3d) 373; compare Roman Corp Ltd v Hudsons Bay Oil & Gas Co Ltd (1972) 23 DLR (3d) 292, affirmed (1973) 36 DLR (3d) 413; Re Clark and Attorney-General of Canada (1977) 51 DLR (3d) 33.
165 (1996) 141 ALR 447 per Fitzgerald P at 480, per Pincus JA at 482, and per Davies JA at 488.
166 At 480.
167 Section 6.
question the freedom of proceedings in Parliament’, observing this would also ‘achieve a satisfactory balance between the public interest in protecting the freedom of political discussion and the competing public interest in protecting the freedom of speech in Parliament which s 49 authorises’.168 His Honour concluded that condition was not satisfied in this case. Pincus JA took a different approach, reading down s 16(3) so as not to apply to defamation proceedings in order to avoid infringing the implied freedom of political communication under the Constitution.169

Reference has already been made in Chapter 5 to the approach of Fitzgerald P in dissent, rejecting the applicability of the implied freedom of political communication to s 49. However, it was argued there that while the adoption by s 49 of the House of Commons privileges is not subject to the implied freedom, any expansion of those privileges by statute and any exercise of a privilege must accommodate the implied freedom. The position is therefore more difficult in the case of a provision like s 16 if it declares and expands the scope of the House of Commons privilege.

Once it is accepted that s 16 burdens the freedom of political communication by precluding reference to parliamentary proceedings in support of any legal proceedings, the critical issue becomes whether this expansion is reasonably appropriate and adapted for giving effect to a legitimate public interest — namely, the effective functioning and integrity of Parliament — and whether the burden imposed is only incidental and not disproportionate.170

This process was not followed by Pincus and Davies JJA in Laurence v Katter. However, it was by Doyle CJ in Rann v Olsen who declined to follow either of their interpretations of s 16(3):

I am conscious of the unattractive and potentially unjust nature of the result that s 16(3) produces in the present case. I have already identified the potential burden upon freedom of communication. But I accept the high importance of freedom of speech in Parliament, meaning that the truth of what is said in the course of protected speech should not be subjected to legal challenge. I also accept the high importance of the principle of non-intervention. I am conscious of the need to pay appropriate deference to the judgment of Parliament as to the extent to which it should go in protecting its powers, privileges and immunities.

My conclusion that s 16(3) is valid rests also on the fact that in this respect Parliament has pursued a legitimate objective, has chosen means in pursuit of that objective that are appropriate, and have (sic) produced a burden on freedom of communication generally that is unavoidable if the desired level of protection is to

168 (1996) 141 ALR 447 at 490.
169 At 486.
170 See Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 166 at 142-144, 157-162, 169.
be given to communications made in the course of proceedings in Parliament.\textsuperscript{171}

Judicial opinions are likely to differ when assessing s 16(3) in this way. On this approach, it is probable that Pincus and Davies JJA would arrive at a similar view to that they expressed in \textit{Laurence v Katter}.

\textbf{Conclusion}

The position at common law in Australia is obviously unclear as to the scope of the immunity of freedom of speech in cases where reference is sought to be made to statements made under privilege for a purpose other than imposing legal liability on their maker. Such a reference seems to have been statutorily precluded in relation to the Commonwealth Parliament\textsuperscript{172} subject to the implied freedom of political communication.\textsuperscript{173}

It is a difficult task to decide what should be the appropriate scope of art 9 freedom of speech. No challenge is warranted to the immunity of members and witnesses from legal liability for what they say or do within 'parliamentary proceedings', except perhaps in relation to their criminal liability (which is considered in Chapter 8).\textsuperscript{174} The difficulty arises in justifying the extension of the immunity to prevent \textit{any reference} to privileged statements or actions. The principal argument in favour of that extension is that such references call into question the motives and intentions of members and witnesses and thereby undermine their freedom to express views without fear of ever being called to account outside Parliament. The importance of creating this 'fearless environment' was emphasised by Gibbs ACJ in \textit{Sankey v Whitlam}:

\textit{[O]ne important reason for the privilege stated in art 9 is that a member of Parliament should be able to speak in Parliament with impunity and without fear of the consequences.}\textsuperscript{175}

Similarly, Lord Browne-Wilkinson in \textit{Pepper v Hart} observed:

\begin{quote}
\textit{Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected Members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech).}\textsuperscript{176}
\end{quote}

\begin{itemize}
\item \textsuperscript{171} [2000] SASC 83 at 187-188.
\item \textsuperscript{172} Section 16(3) \textit{Parliamentary Privileges Act 1987} (Cth).
\item \textsuperscript{173} See \textit{Laurence v Katter} (1996) 141 ALR 447 (Qld Court of Appeal).
\item \textsuperscript{174} See the 1999 \textit{UK Report of the Joint Committee on Parliamentary Privilege}, para 167.
\item \textsuperscript{175} (1978) 142 CLR 1 at 35. At 35, his Honour specifically observed that no reference to the proceedings of Parliament was sought to found the charges or 'to support' them.
\item \textsuperscript{176} [1993] AC 593 at 538.
\end{itemize}
Another ground in support of according art 9 a wide operation is that members and witnesses can be pursued in ways other than by litigation. The possibility of being questioned by royal commissions and other forms of inquiry can be just as inhibiting as the possibility of legal proceedings — especially when such inquiries are usually instigated by the executive. Somewhat less persuasive is the argument that any conflict between parliament and the courts in relation to what has been said under privilege must be avoided to preserve the dignity and effective functioning of parliament.

How do these arguments rate against those advocated for narrowing the scope of art 9? The principal argument is that the interests of the administration of justice require that reference be made at times to what has been said under privilege, not for the purpose of impugning a member or witness for what is said or done there, but to resolve some other issue which has arisen in those proceedings. It is argued that this need to access relevant evidence, clearly evident in defamation cases such as Prebble, outweighs the benefit arising from the creation of a ‘fearless environment’. The restrictions flowing from a wide view of art 9 on the administration of justice especially in defamation and criminal proceedings provide significant support for that argument.

It seems that both the interests of the administration of justice and the freedom of speech of members and witnesses need to be accommodated. The Prebble approach is unsatisfactory because it favours the latter over the former. Whatever solution is devised, it will entail a compromise of both legitimate interests. It is suggested that a reasonable compromise is to maintain the wide view of art 9 while conferring on each House the power to waive the privilege in appropriate circumstances, particularly when required in the interests of the administration of justice.

This approach coincides with that recommended by the 1999 Report of the UK Joint Committee on Parliamentary Privilege for the UK Parliament. The Report recommended, as part of the statutory codification of parliamentary privilege in that country, provisions which affirm the wide view of art 9 given in Prebble but with each House having the discretion to waive the privilege when ‘justice so requires ... without damaging the interests of the House as a whole’ and without exposing anyone to the risk of legal liability. As noted earlier, the Report recommended that s 16(3) of the Parliamentary Privileges Act 1987 (Cth) be adopted with the qualification that the privilege not arise when ‘there is no suggestion that the statement or action was inspired by improper motives or was untrue or misleading and there is no question of legal liability’.

It may be that this qualification is best left to the discretion of each House, given the difficulty entailed in its drafting. On the other hand, this increases the possibility of political partisanship which is the obvious deficiency in the UK proposal. The

177 The freedom of speech accorded witnesses appearing before parliamentary committees is a more recent extension of the privilege: CJ (1818) 389.
178 1999 UK Report of the Joint Committee on Parliamentary Privilege recs 1-5.
179 At para 76.
180 At para 86.
only protection suggested by the Joint Committee against this danger was the establishment of a committee of senior members to advise the presiding officer with guidelines where "the general approach will be to waive privilege unless there is good reason for not doing so". It seems that the risk of political partisanship is unavoidable unless either of the 'extreme' positions on art 9 is adopted — yet it is clear that a compromise is required. That is the task and challenge of parliament.

**Ethical obligations**

A legal explanation of the scope of the privilege of freedom of speech does not address the ethical duties of members in relation to their exercise or enjoyment of that freedom. Although Part III of this book explores these ethical duties, it is appropriate to mention here two particular duties which relate to the freedom of speech:

- not to abuse parliamentary privilege by raising trivial matters as a breach of privilege; and
- not to abuse the privilege of freedom of speech by making baseless attacks against others.\(^{182}\)

In 1984, the Final Report of the Joint Select Committee on Parliamentary Privilege recommended that both Houses of the Commonwealth Parliament adopt at the commencement of each session the following resolution to remind members of their responsibilities when exercising their freedom of speech:

> [t]hat, in the exercise of the great privilege of freedom of speech, Members who reflect adversely on any person shall take into consideration the following:

1. the need to exercise the privileges of Parliament in a responsible manner;
2. the damage that may be done by unsubstantiated allegations, both to those who are singled out for attack, and to the standing of Parliament in the community;
3. the very limited opportunities for redress that are available to non-Members;
4. the need, while fearlessly performing their duties, to have regard to the rights of others;
5. the need to satisfy themselves, so far as is possible or practicable, that claims made which may reflect adversely on the reputations of others are soundly based.\(^{183}\)

\(^{181}\) At para 80.
\(^{182}\) L M Barlin (ed), above note 61, pp 724-725.
\(^{183}\) PP 219/1984, rec 4, at 12-13.
Part III

Standards of Conduct
Chapter 7

Introduction to standards of conduct

Part III reviews the standards which presently guide or ought to guide members in the performance of their parliamentary duties. They may conveniently be divided into criminal and civil standards. Accordingly, Chapter 8 examines corruption offences in relation to members, while the chapters following deal with the duty of confidentiality, conflict of interest and other standards. The standards outlined in these chapters range from criminal offences to good ethical practice. Most have evolved under the general law or as rules or customs of Parliament. Others, particularly those discussed in Chapter 11, are based on no more than basic ethical values. Together they support the integrity of key players in the democratic process.

Although it is not possible here to comprehensively cover all of the rules and standards applicable to members, an attempt has been made to refer to those which are most prominent. Nor is it possible to survey all the relevant incidents which have arisen in political practice; the emphasis in this Part is on those clearly established standards recognised by the general law and parliamentary practice.

A surprising feature to emerge from an analysis of these standards is the lack of correlation in some instances between their philosophical foundation and political reality. This is particularly so in relation to those standards recognised by the general law which are based on the premise that each member bears the responsibility to act always in the public interest and never out of self-interest. To describe the fundamental obligation of members in such absolute terms clearly fails to accommodate the modern party system, where most members of Parliament owe duties and loyalties to a political party and where many policy issues are resolved within the parliamentary party room before being debated in their Houses. As many of those standards derive from the 19th and early 20th century in the absence of a sophisticated party system, they need to be reassessed in the light of that system. Most will remain relevant to the modern state but their application will need to accommodate the realities of the political process.
Purpose and rationale of standards

Although the immediate purpose of these civil and criminal standards is to support members of parliament in their role as the people's representatives, their ultimate purpose is to protect the institution and functions of parliament itself. The intimate connection between both purposes is obvious. Nor is their purpose confined to the practical exercise of these functions; equally important is their effect in maintaining public confidence in the capacity of each member and of parliament as a whole to perform their respective functions in the public interest. Given their special responsibility to vote the supply of money to the executive and their privilege of freedom of speech, it is not surprising that very high standards are expected of members of parliament.

The principal role of a member of parliament is to represent the interests of his or her constituents in the law-making function of the parliament. In particular, members are the first sentinels of the rights and interests of the people. Of almost equal importance is their role in forming and reviewing the executive government. In both these roles, the traditional view is that a member must always act in the public interest. This obligation is based on the fundamental premise that all power of government derives from the people for whom it serves. In other words, there is a trusteeship created between the people and those who serve in the three branches of government: the legislature, the executive and the judiciary. Members and officers of each of those branches exercise an ever increasing power over the rights and liberties of individuals, the economy and the commercial system.

This duty to exercise governmental power in the public interest has been recognised for centuries by such political philosophers as Plato, Cicero, Rousseau, Wang An Shih, Abdul Rahman Ibn Khaldun and Edmund Burke. Nowhere is it so
comprehensively stated than in the US Senate Code of Official Conduct which contains the following declaration of Senate policy:

The ideal concept of public office, expressed by the words, 'A public office is a public trust', signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or of a few; and that the officer must never conduct his own affairs so as to infringe on the public trust. All official conduct of Members of the Senate should be guided by this paramount concept of public office. 9

In Australia, this paramount obligation of members to act only in the public interest was recognised by three High Court decisions early in the 20th century. In two cases, contracts were held to be void as against public policy because they created a conflict of interest which tended to interfere with the duties of a member of Parliament: Wilkinson v Osborne 10 and Horne v Barber 11. The third case found a particular agreement with a member to constitute a criminal conspiracy: R v Boston 12.

All three cases involved a scheme whereby a member agreed, in return for a financial benefit, to influence the executive to confer a benefit on certain parties. These schemes were held void or illegal because they interfered with the duty of a member to act only in the public interest when supervising the activities of the executive. This fundamental obligation of a member of parliament was forcefully put by Knox CJ in R v Boston in referring to the agreement in that case:

It operates as an incentive to the recipient to serve the interest of his paymaster regardless of the public interest, and to use his right to sit and vote in Parliament as a means to bring about the result which he is paid to achieve. It impairs his capacity to exercise a disinterested judgment on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him, instead of a representative of the people. 13

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9 First version of the code in 1968; revised in 1977. Now in Senate Rules 34-43. The Manual of Standards of Ethical Conduct for Employees of the Executive Branch from the US Office of Government Ethics begins at p. 5: 'That "public office is a public trust" has long been a guiding principle of government' and cites in footnote 1: 'This creed, the motto of the Grover Cleveland administration, has been voiced by such notables as Edmund Burke (Reflections on the Revolution in France 1790), Henry Clay (speech at Ashland, Kentucky, March 1829), John C Calhoun (speech, Feb 23, 1835), and Charles Sumner (speech, US Senate, May 31, 1872). See also C Farina, "Keeping Faith: Government Ethics & Government Ethics Regulation", Report of the American Bar Association Committee on Government Standards’ 45 Admin L Rev 287 (Summer 1993).'

10 (1915) 21 CLR 89.
11 (1920) 27 CLR 494.
12 (1923) 33 CLR 386.
13 At 393.
Isaacs and Rich JJ in their joint judgment expressed ‘the fundamental obligation’ of a member of parliament as ‘the duty to serve’ and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community’ (their emphasis).\(^\text{14}\) Also in *Home v Barber*,\(^\text{15}\) Rich J expressed most clearly the concept of the public trust in referring to the ‘obligations and the responsibility of the trust towards the public implied by the position of representatives of the people’.\(^\text{16}\) His Honour’s description of the obligation of members reflects that given by Knox CJ:

Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid (cf *Hamilton v Wright* [9 Cl & Fin, at p 123]).\(^\text{17}\)

The ‘public interest’ in this context is in effect the purpose which those who exercise power conscientiously believe to be most appropriate for the general welfare of that society. Since minds differ on whether a policy will enhance society’s welfare, the public interest is a flexible concept to accommodate a range of views.

**Public confidence**

Central to the standards of a member of parliament is their concern with maintaining public confidence in the integrity of members and hence with the parliamentary process. The reason for this is that the people are entitled to feel confident that their power or sovereignty is being exercised for *their* benefit. As the famous American counsel Archibald Cox noted, the stability of government rests on the maintenance of public confidence:

> Both a free society and a democratic government require a high degree of public confidence in the integrity of those chosen to govern.\(^\text{18}\)

This confidence can be easily eroded by the appearance of a conflict of interest. For this reason, the fundamental ethical requirement for members is to avoid *actual, potential and apparent* conflicts of interest.\(^\text{19}\)

\(^{14}\) At 400.

\(^{15}\) (1920) 27 CLR 494.

\(^{16}\) At 502.

\(^{17}\) (1920) 27 CLR 494 at 501.


\(^{19}\) See for example Tanzania’s *Public Leadership Code of Ethics Act 1995* which refers in the Code of Ethics to the obligation of public leaders to arrange their affairs to ‘prevent real, potential or apparent conflicts of interest from arising’ (s 6).
At times, the requirement to avoid apparent conflicts of interest appears unfair and harsh, especially when abused by political opponents. Yet a member who creates the appearance of a conflict of interest is simply inviting the closer inspection of his or her motives — it is a self-imposed vulnerability. Unless the appearance can be dispelled by the member, the political consequence is likely to be the assumption of unethical behaviour. The appearance of a conflict of interest is one of the hazards of the game of politics. Nonetheless, it is a hazard which ought not to be capitalised on, for as Dr Noel Preston has warned, '[t]he politicisation of ethics is deplorable inasmuch as it disables both moral and political judgment'. 20

Political process: the party system

In assessing whether a member has betrayed the public trust, it is essential to have regard to the nature of the political process in Australia. A member faces a barrage of pressures: from their constituents, political party, colleagues and the media. How are these pressures to be resolved? To suggest that they must always act in the ‘public interest’ substitutes one conundrum for another. They cannot be expected to have ‘the powers of detachment of anchorites’! 21 Yet to determine what is in the public interest is their function and responsibility; hence, these pressures must be handled in a manner which allows for a fair and honest determination of the issues. As s I of the Code of Conduct for Members of the United Kingdom House of Commons declares, standards of conduct guide them in handling those pressures:

The purpose of the Code of Conduct is to assist Members in the discharge of their obligations to the House, their constituents and the public at large. 22

Yet by far the greatest pressure, if not obligation, comes from the member's own political party and its rules of party discipline. Although the strictness of these rules varies between political parties, members are usually bound to follow the decisions made in the party room or caucus. Hence, the critical debates within each parliamentary party occur in the privacy of the party room rather than in the public arena of parliament. It is imperative, though, that these party room meetings not stifle the capacity of members to decide issues in the public interest. No doubt they will take into account electoral consequences — for few members would deny that it was in the public interest for their party to be re-elected! — but there is obviously a limit on how far this factor can influence a decision. Again, the overriding concern must be with the public interest.

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21 Adopted from the judgment of Gleeson CJ in Greiner v ICAC (1992) 28 NSWLR 125 at 145.

22 The Code of Conduct for Members of Parliament, approved by resolution of the UK House of Commons on 24 July 1995 (see Appendix A).
Provided issues have been fairly and ethically decided in the party room, the rules of party discipline can legitimately demand either obedience to the decision reached or else resignation from the party. At times, controversial issues are not resolved in the party room so that members are given a 'conscience vote' in Parliament. Here, members must also decide the issue as best they can in the public interest. But where a member is unhappy with his or her party room decision, difficult choices may have to be made, as the Bowen Report recognised:

Notwithstanding the constraints of party, in the last resort the Member of Parliament must retain his own judgment, and his duty to exercise that judgment independently. If he cannot in conscience follow the dictates of his party in a particular matter, he must decide whether it is better, perhaps for other reasons, for him to remain in the party and endeavour to effect changes in party attitude from within, whether to vote against party policy in the Parliament, to resign from the party to allow himself freedom of action in the matter or even, in the extreme case, whether to resign from the Parliament.23

Clearly, the party system has a profound impact on the process by which issues are decided in accordance with the public interest, as well as on the determination which is made. But the ethical framework within which members must act within this system should remain intact. Indeed, it is imperative that the party system respect and reinforce that ethical framework. Unfortunately, this complex accommodation of the party system with the public interest is not sufficiently understood by the electorate, and this has no doubt contributed to the increasing level of public cynicism of politicians and the political process.

Indeed, what lies at the heart of this cynicism in Australia is public ignorance of the nature of the political, governmental and constitutional systems. In particular, it is not well appreciated that the political process inherently involves the balancing of competing interests by negotiation and compromise, whether in the party room or in the chambers of Parliament. Bargaining is often necessary to achieve the resolution of difficult public issues. Certain interests are likely to be preferred over other interests — but this should occur not because the members wish to favour one group over another, but because they believe the final outcome to be in the best interests of the community as a whole. This process must be explained to the people. And, yes, it is often difficult to assess whether it has been faithfully followed. Accordingly, every effort needs to be made to assure the people that this is so. Consequently, there needs to be at times an adjustment of standards of ethical behaviour to take account of political expediency and compromise. This can be seen in relation to the prescription and application of bribery and corruption offences. It also renders tricky any attempt to convert ethical rules into rules of law:

Questions of law are ultimately able to be resolved by the courts. Matters of ethics

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23 Report of the Committee of Inquiry established by the Prime Minister on 15 February 1978, Public duty and private interest (July 1979) (the Bowen Report) at para 2.9.
are, almost by definition, unable to be resolved by resort to rules or laws. Ethics questions are matters for judgment about competing values, and therefore matters about which there may be continuing disagreement, ambiguity, or uncertainty.\textsuperscript{24}

It is essential that any discussion of safeguarding the integrity of members occurs in a positive atmosphere which recognises the privilege and honour of those vested with the public trust. No assumption is made that those who occupy public office lack integrity. Rather, the desire is to assist those in public office vested with that awesome responsibility to act always in the public interest. That is the essential purpose of these standards.

**Source and nature of standards**

The standards to which members are subject derive from morality, parliamentary custom and standing orders, as well as the general law. As they range from mere ethical principles to positive legal obligations, the sanctions for infringing these standards varies as widely as their foundation.

Ethical standards derived from society's morality, while taken for granted in the past, are often included as aspirational principles in modern codes of conduct. For example, in Tasmania, the *Code of Ethical Conduct for Members of the House of Assembly* begins with a ‘Statement of Commitment’ which acknowledges the ethical duties owed to the people of the State, to the constituents, and to the members' colleagues:

\begin{quote}
To the people of this State, we owe the responsible execution of our official duties, in order to promote human and environmental welfare.

To our constituents, we owe honesty, accessibility, accountability, courtesy and understanding.

To our colleagues in this Assembly, we owe loyalty to shared principles, respect for differences, and fairness in political dealings.
\end{quote}

More prescriptive standards have, of course, been developed by the Houses in exercise of their supervisory role over their members. This role was considered in Chapter 5 as one of the powers of each House within the scope of parliamentary privilege. Most prominent are the rules in relation to conduct occurring during the proceedings of parliament and the requirements of ad hoc disclosure considered in Chapter 10 on conflict of interest.

At the top of the hierarchy of standards are those prescribed by the general law and statute. These impose both criminal and civil obligations on members. The criminal standards are considered in the following chapter on the abuse of public trust. The civil standards are discussed in later chapters on the duty of confidentiality and conflict of interest. Significant in relation to the criminal standards and to a lesser

extent to the civil standards is the status of a member as a 'public officer' which renders the member liable to various common law offences and equitable remedies for official misconduct.

The 1999 Report of the UK Joint Committee on Parliamentary Privilege recognised the spectrum of conduct which these standards encompass:

It is perhaps worth stressing the appreciable gap between corruption and disciplinary matters which Parliament normally considers. Carelessness, forgetfulness, misinterpretation of the rules of registration and declaration, or even flagrant disregard of them, is usually a long way from corruption.

Standard setting

The trend to adopt mechanisms such as a register of interests or a code of conduct to support the integrity of members of parliament is simply part of a wider phenomenon of government accountability which is affecting all three branches of government. The executive has been made more accountable by freedom of information legislation, the wider application of the rules of procedural fairness, and the enhanced processes of parliamentary and judicial review. The judiciary similarly come under greater public scrutiny. So with members of parliament, concern with their integrity is simply the torch of public accountability being shone on another level of government. It is another example of the checks and balances so eloquently explained by Thomas Madison in The Federalist no 51:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

One of the reasons often given for adopting these mechanisms is to improve the low level of public confidence in the integrity of politicians and public officials. This view reflects the fact that mechanisms are generally adopted only in response to significant public scandals, such as Watergate in the United States.

25 R v White (1875) 12 SCR (NSW) (L) 322; affirmed by a majority of the High Court in R v Boston (1923) 33 CLR 386 at 392-393, 401-402 and 408. Compare the United Kingdom where ministers but not members are regarded as 'public officers': Report of the Royal Commission on Standards of Conduct in Public Life 1976 (the Salmon Report), Cmdn 6524, paras 307 and 308.
26 See P D Finn, 'Public Officers: some Personal Liabilities' (1977) 51 ALJ 313.
27 At para 184.
confidence depends ultimately, however, on the performance of those entrusted to govern. These mechanisms only support and assist members in the performance of their onerous duties and responsibilities. Their efficacy cannot be assessed simply in terms of any change in the level of public confidence, nor is it possible to determine whether public confidence is enhanced by these measures. Their primary achievement must be the extent to which they have assisted members to serve the public interest better.

It should be noted, however, that increased levels of public scrutiny of government, especially by an active media, renders public confidence in government more vulnerable now than in the past. Yet at the same time, there is unlikely to have been any significant change in the nature of a conflict of interest and its prevalence. So what has rendered public confidence more vulnerable is not necessarily a decline in the observance of ethical standards but the increased likelihood that infringements of those standards will be detected. (Indeed, it could also be argued that public expectation in recent times has caused those standards to be raised.) Consequently, greater interest has been aroused in the range of mechanisms available to protect and enforce these standards. Although they cannot eradicate corrupt or unethical conduct, they may deter such conduct, assist in its detection and impose appropriate safeguards.

Codes of conduct

A fairly recent phenomenon in the field of public integrity is the adoption of a code of conduct. These codes range from those which prescribe general standards of ethical conduct incapable of specific enforcement (aspirational), to those with quite specific standards subject to a rigorous enforcement regime (prescriptive). Many codes fall between these two extremes. Some are devised as true ‘codes’ by consolidating all the standards and mechanisms concerned with the maintenance of members’ integrity, such as the obligations of ad hoc disclosure and the requirements of a register of interests. Few codes of conduct, however, have been adopted for members of parliament in Australia. This is due in part to the difficulty in reaching any consensus among members as to their appropriate ethical standards.

31 This view is supported by former President of the Senate and ALP Senator, Michael Beahan, ‘Parliamentary Ethics, Political Realities’ in Preston and Sampford (eds), above note 20, p 128.
32 See the First Report of the Committee on Standards in Public Life (UK House of Commons, May 1995) (the Nolan Committee) at 3.
33 Most notable are the respective codes of the two Houses of the United States Congress: The Code of Official Conduct of the House of Representatives (House Rule XLIII) and The Senate Code of Official Conduct (Rules 34 to 43 of the Standing Rules of the Senate).
On the other hand, different perceptions of ethical conduct must surely encourage the formation of codes of conduct to resolve these differences.\textsuperscript{34}

**Australian codes of conduct**

Relatively few codes of conduct have been adopted in Australia for members of parliament. The first parliamentary code of conduct was adopted in Victoria and it remains the only one prescribed by statute: Pt I of the *Members of Parliament (Register of Interests) Act 1978* (Vic). This code is reproduced in Appendix 5. Entitled ‘Code of Conduct’, Pt I contains only s 3 which declares that members of the Victorian Parliament are bound to observe a range of standards in paras (a) to (f) relating to confidential information, receipt of financial benefits, avoidance of conflict of interest, ad hoc disclosure and obligations as ministers. Infringement of the code constitutes contempt for which the member may be fined by his or her House up to $2000, non-payment of which renders the member’s seat vacant (ss 9 and 10).

Codes of conduct have also been adopted by the Tasmanian House of Assembly\textsuperscript{35} in 1996 and by both Houses in NSW\textsuperscript{36} in 1998 (see Appendix 6). These codes include statements of general ethical principles as well as additional standards relating, for example, to the use of public property and on leaving public office. The Tasmanian House of Assembly also adopted a Code of Race Ethics\textsuperscript{37} which promotes, inter alia, respect for the rights of minorities and reconciliation with indigenous Australians.

None of these codes of conduct is statutory. The Tasmanian code is prescribed by SG 2A. In NSW, both Houses adopted essentially the same code by resolution.\textsuperscript{38} Enforcement of each of these codes is ultimately the responsibility of the appropriate House where any infringement constitutes contempt. However, both Houses in NSW are assisted by the jurisdiction of the Independent Commission Against Corruption (ICAC) to make a finding of ‘corrupt conduct’ against a member.

The role of ICAC in relation to members of the NSW Parliament has had an interesting history. When the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) was enacted, ICAC was empowered to investigate the conduct of any public official in NSW to determine whether a finding of ‘corrupt conduct’ should be made. A public official was defined to include a minister and a member of parliament. To constitute corrupt conduct, it had to fall within the very wide

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\textsuperscript{35} Code of Ethical Conduct for Members of the House of Assembly.

\textsuperscript{36} The Legislative Assembly on 5 May 1998 and the Legislative Council on 1 July 1998.

\textsuperscript{37} A Federal Parliamentarians’ Code of Race Ethics was also proposed.

\textsuperscript{38} Resolution of the Legislative Council of 26 May 1999; resolution of the Legislative Assembly of 5 May 1998.
definition of s 8 as well as amount to a criminal offence, a disciplinary offence, or reasonable grounds for dismissal. How these provisions applied to a minister arose in what became known as the 'Metherell Affair'.

In 1992, Dr Terry Metherell resigned from the Legislative Assembly to accept an appointment to a senior public service position. The appointment was arranged by the then NSW Premier, Mr Greiner, and the Minister of the Environment, Mr Moore. It aroused intense public criticism as a case of 'jobs for the boys'. The NSW Parliament referred the matter to ICAC which made findings that both Mr Greiner and Mr Moore had engaged in 'corrupt conduct' within ss 8 and 9 of the ICAC Act on the basis that there were 'reasonable grounds' for their dismissal as ministers by the Governor. Both these findings were overturned on appeal to the NSW Court of Appeal on the basis that the Commission had not applied an objective test in determining whether there were 'reasonable grounds' for their dismissal.39

In effect, the Court interpreted s 9 as requiring recognised standards of conduct for ministers before an objective determination could be made. So the view was taken that until codes of conduct were adopted, ICAC was unable to make any finding of corrupt conduct against a member unless it constituted a criminal offence.40 To prompt each House of the NSW Parliament to adopt an 'applicable code of conduct', the definition of 'corrupt conduct' in s 9 of the Act was amended to include 'in the case of conduct of a Minister of the Crown or a member of a House of Parliament a substantial breach of an applicable code of conduct'.41

Since each House adopted the same code of conduct in 1998, ICAC is now able to make a finding of corrupt conduct against a member but only in respect of a substantial breach of the code. Such a finding is reported to the member's House which decides what disciplinary action it should take. As noted in the context of parliamentary privilege, the punitive powers of the NSW Houses are limited to a reprimand, censure, suspension and even expulsion when imposed for defensive rather than punitive purposes. A finding of criminal conduct by a member is referred by ICAC to the Director of Public Prosecutions for prosecution.

Both Houses in NSW also appointed a Parliamentary Ethics Adviser to advise members, at their request, on 'ethical issues concerning the exercise of [their] role as a Member of Parliament (including the use of entitlements and potential conflicts of interest).42

Proposed codes

At the Commonwealth level and in the other States and the two Territories,
recommendations have been made for a code of conduct but they have not been implemented.

The Bowen Report recommended a code of conduct instead of a register of interests. A draft Framework of Ethical Principles for Members and Senators of the Commonwealth Parliament was proposed in 1995 by the Parliamentary Working Group although it has not been adopted by either House. As the title of the proposal indicates, these ethical principles are not prescriptive, reflecting the seven principles of the Nolan Committee. This proposed framework, however, contains eight principles:

(1) loyalty to the nation and regard for its laws;
(2) diligence and economy;
(3) respect for dignity and privacy of others;
(4) integrity;
(5) primacy of the public interest;
(6) proper exercise of influence;
(7) personal conduct; and
(8) additional responsibilities of parliamentary office holders.

In South Australia, the Legislative Council required the Joint Standing Legislative Review Committee to recommend a code of conduct for members of the Parliament. In April 1996 the Committee issued a discussion paper together with a draft code which incorporated substantially the same standards as those proposed by the federal framework. No report arose from that paper.

In Western Australia, the Commission on Government in 1996 recommended that a standing committee of each House be established to prepare a code of conduct for members and ministers. It was also proposed that each committee provide continuing ethical advice, investigate allegations of breaches of the code and make recommendations to the House. These recommendations have not been acted on.

In Queensland, two proposals for a code have been made. The first, proposed by the Electoral and Administrative Review Commission (EARC) in 1992, referred to five general obligations of a member: respect for the law and the system of government; respect for persons; integrity; diligence; and economy and efficiency. An explanation of each of these obligations was also provided. The second proposal was a draft Code of Ethical Conduct for Members of the Queensland Legislative...
Assembly48 tabled by the Members' Ethics and Parliamentary Privileges Committee in 1998. This is more aspirational than the EARC proposal, commencing with a 'Statement of Ethical Principles' which are listed as: integrity of the parliament; primacy of the public interest; independence of action; appropriate use of information; transparency and scrutiny; and appropriate use of entitlements. This is followed by a summary of all the various standing orders, resolutions and customs which relate to members.

In the ACT, the Legislative Assembly Standing Committee on Administration and Procedures recommended a proposed code of conduct49 which contained standards in relation to: conflict and disclosure of interest; personal benefit; personal behaviour of members; dealing with Assembly property and corporate obligations.

UK Code of Conduct


The Code of Conduct declares the fundamental obligations of members 'to act on all occasions in accordance with the public trust', 'to act in the interests of the nation as a whole', and to make 'decisions solely in terms of the public interest'. More aspirational than prescriptive, it includes the following seven general principles of conduct enunciated by the Nolan Committee:

Selflessness
Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family, or their friends.

Integrity
Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.

Objectivity
In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability
Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

49 Inquiry into the proposed Ethics Committee/Code of Conduct, May 1991 at para 9.6 and see draft code attached in Appendix A.
Openness
Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty
Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership
Holders of public office should promote and support these principles by leadership and example.

Also included in the Code are general standards in relation to avoiding conflicts of interest, resolving them in the public interest, preserving the dignity of the House, declaring personal interests, refusing to act as paid advocates or accepting any payment for parliamentary services, using allowances for public purposes, and observing the duty of confidentiality.

The Guide to the Code is, however, much more prescriptive, containing detailed rules in relation to the Register of Members' Interests, the ad hoc declaration of interests, the advocacy rule and the complaint procedure. These matters are considered in chapters 10-12 of this work.

Purpose of a code of conduct

Despite their popularity in both public and private arenas, few codes of conduct have been adopted in Australia for members of parliament. The ambivalence which these codes arouse in Australia is in marked contrast with the enthusiasm with which registers of interest have been embraced. The reasons for this lie in the arguments for and against the adoption of a code. Opposition to a code is based primarily on three grounds: a code only states the obvious in terms of ethical standards; it may encourage attacks on the integrity of members; and as a gimmick, it can only increase public cynicism of the political system.

On the other hand, quite substantive grounds support a code of conduct depending where along the aspirational/prescriptive spectrum it lies. An aspirational code at least reminds members of the fundamental duties and standards which they must observe. It also provides a role model for others engaged in public service. These benefits are notably enhanced with more prescriptive codes. Their specific standards provide better guidance to members in a range of ethical dilemmas. At the same time, they allow the conduct of members to be more objectively assessed. It has also been suggested that they may assist in the determination of whether particular conduct on the part of a member constitutes ‘corrupt’ conduct. While a code of conduct may bolster public confidence, an enforcement regime is usually needed to make any significant impact.

50 See the Report of the 1999 UK Joint Committee on Parliamentary Privilege at para 178.
A useful statement of the purposes of a code of conduct appears in the code proposed for federal Canadian legislators:

1. to recognise that service in Parliament is a public trust;

2. to maintain public confidence and trust in the integrity of Parliamentarians individually and the respect and confidence that society places in Parliament as an institution;

3. to reassure the public that all Parliamentarians are held to standards that place the public interest ahead of Parliamentarians' private interests and to provide a transparent system by which the public may judge this to be the case;

4. to provide for greater certainty and guidance for Parliamentarians in how to reconcile their private interests with their public duties;

5. to foster consensus among Parliamentarians by establishing common rules and by providing the means by which questions relating to proper conduct may be answered by an independent, non-partisan advisor.  

The Nolan Committee (UK) endorsed the value of a code of conduct in these terms:

A code of conduct is essential for a modern Parliament. It is essential for the respect of the institution, and it is important for the protection of the members themselves.

That such guidance is needed is shown by surveys conducted in Australia, Canada, the United Kingdom and the United States which reveal different perceptions of corruption by their respective legislators.

The process by which a code of conduct is formulated can be critical to its acceptance both by members and the electorate. Most codes are developed by

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52 Appendix 1 of the Nolan Committee's Draft Code of Conduct for Members of Parliament and The Seven Principles of Public Life. Other support for a code given by the Riordan Committee (Commonwealth Joint Committee on Pecuniary Interests of Members of Parliament); UK Redcliffe-Maud Committee (Prime Minister's Committee on Local Government Rules of Conduct).
54 M Atkinson and M Mancuso, 'Do we need a code of conduct for politicians?' (1985) 18 Canadian Journal of Political Science.
56 J Peters and S Welsh, 'Political corruption in America' (1978) 72 American Political Science Review.
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members themselves rather than imposed from outside. The most desirable approach, however, is to include some community participation in that process.

Content

As indicated earlier, the content of a code can vary from the purely aspirational (referred to as a code of ethics) to the highly prescriptive. Most codes combine these features to maximise the benefits of their adoption. Although it is clearly impossible to prescribe detailed rules to cover every ethical dilemma, a number of prescriptive rules is feasible and desirable. Their inclusion necessitates, however, an enforcement mechanism.

Central to most codes of conduct are obligations to avoid or resolve conflicts of interest. The usual approach is to require members to declare their personal interests whenever these conflict or appear to conflict with their public duties, (conflicts of interest are considered in Chapter 10), but the range of standards in a code of conduct is usually not confined to conflict of interest. Other standards may be included in relation to:

(1) the use of confidential information;
(2) the acceptance of gifts and hospitality;
(3) the use of public resources;
(4) on leaving public office;
(5) personal conduct;
(6) compensation for services rendered as a member;
(7) the improper use of influence;
(8) the acceptance of political donations; and
(9) the conduct of members in the House —
   (a) disorderly conduct
   (b) abusing freedom of speech
   (c) misleading Parliament.

Apart from (1) which is considered in Chapter 9, further consideration is given to these other standards in Chapter 11. It must be remembered that practically all of them exist, not because they may be found in a code of conduct, but as part of the general law or the customs or practices of parliament.

Oath of allegiance

Members of all Australian legislatures are required to make and subscribe an oath or affirmation before taking their seat. The oath in all jurisdictions is in terms similar to those prescribed for members of the Commonwealth Parliament:

I, A B, do swear that I will be faithful and bear true allegiance to Her Majesty Queen
Elizabeth the Second, Her heirs and successors according to law. SO HELP ME GOD!\(^{57}\)

The affirmation similarly affirms and declares allegiance to the Queen. The form of both the oath and affirmation could be improved to include reference to the obligation of members 'to serve the interests of the people' of the Commonwealth, State or Territory concerned, and where a members' code of conduct exists, to observe that code.\(^{58}\) Alternatively, a 'statement of commitment' to this effect could be made in addition to the oath or affirmation.\(^{59}\)

**Conclusion**

Despite the difficulty in their formulation and the inevitable public cynicism they arouse, formal recognition of the standards of conduct expected of members of parliament is essential for protecting the institution of parliament and its members. As there is an important role for both aspirational and prescriptive standards, a code of conduct provides a convenient and accessible vehicle to house these standards for the guidance of members and the electorate.

The following three chapters deal with the most important specific standards: corruption and bribery offences (Chapter 8); the duty of confidentiality (Chapter 9); and conflict of interest (Chapter 10). A fourth chapter (Chapter 11) covers a range of other specific standards.

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57 See the Schedule to the Commonwealth Constitution.


59 See the Tasmanian Code of Ethical Conduct for Members of the House of Assembly (SO 2A). The same statement of commitment was recommended by the Queensland Members' Ethics and Parliamentary Privileges Committee in its Draft Code of Ethical Conduct for Members of the Queensland Legislative Assembly (May 1998) at 2-3.
members of parliament: law and ethics
Chapter 8

Abuse of public trust — corruption offences

Introduction

A member [of Parliament] is the watch-dog of the public; and Cerberus must not be seduced from vigilance by a sop.

*R v Boston* per Higgins J.¹

This chapter examines the criminal liability of members of parliament, both common law and statutory, in relation to their official functions. As with all other standards of members, their criminal liability is based on their fundamental obligation to act in the public interest. However, an infringement of that obligation should only attract a criminal penalty if it involves a serious abuse of the public trust — it must lie at the extreme end of the spectrum of conduct which falls below that expected of members by the community. Where along that spectrum lies the dividing line between criminal and non-criminal conduct is not clearly defined.² A significant reason for that is the very nature of the political process as one of compromise and bargaining. Not surprisingly, a further complication is the uncertainty over how far art 9 freedom of speech immunises members from criminal liability.

There are at least three areas of the criminal law which pertain to the criminal liability of members in their official capacity: bribery, extortion and official misconduct. (Other offences also apply to members as either public officials or as a members of the public but they fall outside the scope of this book.)³ These offences are often referred to as offences of ‘official corruption’ because they involve an abuse of the public trust in the performance of their functions both inside and outside the

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¹ (1923) 33 CLR 386 at 410.
² This was recognised in the *Final Report of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General* (December 1995), Ch 3, at 277 and following.
³ See for example s 92 *Criminal Code* (NT) — bargaining for offices in the public service.
House. However, the term ‘corruption’ has no clear meaning at common law. To prosecute ‘corrupt conduct’, it must constitute either a common law or statutory offence. Although statutes such as the Independent Commission Against Corruption Act 1988 (NSW) (ICAC Act) refer to corruption or ‘corrupt conduct’, they specifically define the elements of the offence. In that way, ‘corruption’ is simply a label to describe the criminal liability of public officials. To provide certainty, statutory provisions which proscribe acts done ‘corruptly’ should therefore be avoided.

Each of the offences of bribery, extortion and official misconduct in relation to members is considered in this chapter. An attempt is made to provide guidance to members as to when conduct is criminal. In doing so, assistance is gained from the position in the UK, Canada and the US. Of particular importance are the offences of bribery and extortion. While the latter is often mistakenly thought to require coercion, the relationship between the two offences is much closer. For bribery, a benefit must be offered to or accepted by a member in order to influence the member in the exercise of his or her duties as a member. For extortion, the member as a public officer must take or accept a benefit knowing that he or she has no right to take that benefit and does so ‘under colour of office’. The focus of each of these offences differs — with bribery, it is on the influence sought, whereas with extortion, it is on the taking of an undue benefit.

Bribery

Historical outline

The payment of bribes to public officials was a widespread phenomenon in England for centuries. The first attempt at controlling official corruption was the enactment of the First Statute of Westminster 6 in 1275 which, in various chapters, dealt with instances of extortion, such as the unlawful taking or acceptance of benefits by various public officials. This Statute was in response to the revelations of extortion by sheriffs, bailiffs and other officials contained in the report known as The Hundred Rolls 8 which was commissioned by Edward I in 1274.

Professor Finn has shown that this early focus on the unlawful receipt of benefits on account of one’s official position (that is, extortion) gradually shifted to the acceptance

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4 Sections 8 and 9 as defined by the NSW Court of Appeal in Greiner v ICAC (1992) 28 NSWLR 125.
5 The jurisdiction of integrity regimes, such as ICAC, defined by reference to ‘corruption’, is criticised as corruption ‘monstering’: Findlay, ‘Corruption Control and Monstering’ (1991) 12 Current Issues in Criminal Justice 36.
6 Statute of Westminster I, 3 Edw (1275).
7 Chapters 26, 27, 30 & 31.
9 The name of the report came from the fact the royal commissioners made inquiries from each of the political divisions called the ‘hundreds’.
of benefits for exercising official power for particular purposes (that is, bribery). According to Coke, bribery offences originally applied to judges and extortion offences to public officers. However, by the publication of Coke’s Institutes of the Laws of England in the 17th century, the offence of bribery applied to all public officers.

Members of Parliament were not excluded from the corrupt practices affecting officialdom. Even after the Glorious Revolution of 1688, William III offered members numerous official positions in order to gain some control of Parliament. Accordingly, Parliament adopted a number of measures to protect itself and its members from Crown influence. One of these was the resolution of the House of Commons on 2 May 1695 which declared its disapproval of bribery of members of Parliament:

That the offer of any money, or other advantage, to any member of Parliament, for the promoting of any matter whatsoever, depending or to be transacted in Parliament, is a high crime and misdemeanour, and tends to the subversion of the English constitution.

Even before this resolution, Parliament regarded the acceptance of bribes by members as a grave offence warranting, in many cases, expulsion from the House. In 1694, the Speaker of the House of Commons, Sir John Trevor, was expelled from the House for accepting 1000 guineas from the City of London in return for assisting the passage of the Orphans Act.

There are two notable aspects of this 1695 resolution. First, it is declaring bribery as a high crime according to the lex et consuetudo Parliamenti and not as a common law offence. Secondly, the offer or acceptance of a bribe must be concerned with the member’s role in parliamentary proceedings rather than outside the House. This restriction is not clear from the explanation of the resolution given by Erskine May which has been adopted by Parliaments throughout the Commonwealth as the basis of a criminal offence:

The acceptance by any Member of either House of a bribe to influence him in his conduct as such Member, or of any fee, compensation or reward in connection with the promotion of, or opposition to any bill, resolution, matter or thing submitted

11 Institutes of the Laws of England, 3 Co Inst 147. What is regarded as the first bribery statute, 8 Rich 2, ch 3 (1384), applied only to judges of the King’s Bench and Common Pleas and Barons of the Exchequer. This statute remained in force until 1881.
14 CJ (1693-97) 274.
or intended to be submitted to the House or any committee thereof is a breach of privilege. 15

A consequence of the 1695 resolution appears to be that there is no common law offence of bribery in relation to the parliamentary activities of members of the United Kingdom Parliament. The House of Commons thereby assumed exclusive jurisdiction over bribery of members in relation to their official activities whether within or outside the scope of art 9 freedom of speech. This was also the conclusion of the Royal Commission on Standards of Conduct in Public Life (the Salmon Report) 16 which recommended 17 that bribery of members within their parliamentary capacity be made a criminal offence. The Report warned, however, that members were liable for bribery in relation to conduct occurring outside their parliamentary duties:

We should make it clear that corrupt transactions involving a Member of Parliament in respect of matters that had nothing to do with his parliamentary activities would be caught by the ordinary criminal law [emphasis added]. 18

However, in 1992 a Member of the House of Commons was tried for misuse of public office for accepting benefits in return for using his influence on behalf of a company and was acquitted. 19 The conclusion of the Salmon Report has also been questioned by two United Kingdom inquiries: the Nolan Committee 20 and the 1999 Report of the Joint Committee on Parliamentary Privilege. 21 Indeed, the latter report recommended legislation to render members liable for bribery even when it occurs within the scope of art 9, provided any prosecution has the consent of the Attorney-General. 22

The Salmon Report's conclusions were based on the view that a member does not hold a public office. The classic test of a 'public officer' is that espoused by the English Court of Criminal Appeal in R v Whitaker:

A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the

17 At para 311.
18 At para 308.
21 At para 136.
22 Recommendation 13 and paras 166-73. There is an extensive discussion of all the options at paras 143-165.
in both Australia\textsuperscript{24} and Canada\textsuperscript{25} a member of parliament has been held to be a public officer.\textsuperscript{26} Moreover, it may well be that for the purposes of the common law offence of bribery, the critical requirement is not the holding of a public office, but the violation of a public trust.

\textbf{Common law offence}

A classic definition of the general offence of bribery at common law is given by \textit{Russell on Crime}:

[Bribery is the receiving or offering any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.\textsuperscript{27}]

While specific statutory provisions dealing with bribery of members of parliament have been enacted at the Commonwealth level,\textsuperscript{28} in South Australia\textsuperscript{29} and in the code jurisdictions\textsuperscript{30} of Queensland, Tasmania, Western Australia and the Northern Territory, the common law offence of bribery continues to exist at the Commonwealth level and in NSW, Victoria and the ACT. The two principal Australian cases on the common law offence of bribery of members of parliament are \textit{R v White}\textsuperscript{31} and \textit{R v Boston}.\textsuperscript{32}

\textbf{R v White}

In \textit{R v White}, an early decision of the NSW Supreme Court in 1875, the Court upheld the conviction of White for offering a bribe to a member of the NSW Legislative Assembly in the lobby of the House. The bribe was offered to obtain the member's vote in the House for compensation on resumption of a property. While noting the lack of judicial precedent, the Court (Martin CJ, Hargraves and Faucett JJ) declared that the offer or acceptance of a bribe by a member of parliament

\begin{itemize}
  \item\textsuperscript{23} [1914] 3 KB 1283 at 1296.
  \item\textsuperscript{24} See \textit{R v Boston} (1923) 33 CLR 386.
  \item\textsuperscript{25} See \textit{R v Bunting} (1885) 7 OR 524.
  \item\textsuperscript{26} See G Zellick, 'Bribery of Members of Parliament and the Criminal Law' [1979] \textit{Public Law} 31.
  \item\textsuperscript{27} J W Cecil Turner, \textit{Russell on Crime} (12th ed) Sweet & Maxwell Limited London 1986 vol 1, p 381, citing 3 Co Inst 149; 1 Hawk c 67 s 2; 4 Bl Com 139; 3 Stephen, \textit{Hist CrL} 250.
  \item\textsuperscript{28} Section 73A \textit{Crimes Act 1914} (Cth).
  \item\textsuperscript{29} Section 249 \textit{Criminal Law Consolidation Act 1935} (SA).
  \item\textsuperscript{30} Criminal Codes: ss 59 & 66 (Qld); ss 71 & 72 (Tas); s 60 (WA); ss 59 and 60 (NT).
  \item\textsuperscript{31} (1875) 13 SCR (NSW) 322.
  \item\textsuperscript{32} (1923) 33 CLR 386.
\end{itemize}
constituted an offence at common law. The Court's reasoning relied more on the *injury to the public* occasioned by bribery of members than whether they held a public office. Only Faucett J expressly held that they did so. Both Hargraves and Faucett JJ recognised that members hold positions of public trust and confidence and hence are amenable to the common law of bribery when they abuse this public trust. They implicitly rejected a narrow scope for the common law offence of bribery based upon some restricted interpretation of 'public office'. They regarded all those who hold 'offices of public trust and confidence' as liable to account for bribery.

While avoiding any reference to public office, Martin CJ implicitly accepted the reasoning of the other two judges by emphasising the injury to the public which bribery of members inflicts. After reviewing the case law on bribery from early in the 17th century, the Chief Justice simply extended the offence, in the absence of direct precedent, from the situation where it applies to bribery of electors voting in parliamentary elections to the bribery of those elected to vote in parliament:

> The injury to the public is more direct, and is certainly greater in tampering with the person actually elected, than with the persons who elect him ... [A] legislator who suffers his vote to be influenced by a bribe does that which is calculated to sap the utility of representative institutions at their foundation.

Interestingly, almost no reference was made in any of the judgments to the effect of parliamentary privilege where a member is bribed to vote in a particular way in parliament. Martin CJ appears to reject an argument that bribery of members is more appropriately dealt with by parliament than by the courts, by referring to the rejection of the same argument in relation to the bribery of electors in *Rex v Pitt and Rex v Mead* in 1762. Nor was such an argument supported by the absence of any direct judicial precedent, for, in his view, this may well be due to the particular difficulty of establishing that the offer or receipt of a benefit to or by a member is a bribe. In any event, as the offence was one of attempted bribery occurring in the lobby of Parliament, it was arguably beyond the scope of parliamentary privilege.

While *R v White* establishes that it is a common law offence to offer a benefit in order to influence the vote of a member in parliament, as well as to accept such a

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33 (1875) 13 SCR (NSW) 322.
34 At 338.
35 Per Hargrave J at 334 and per Faucett J at 339.
36 Per Hargrave J at 334.
37 At 327-330.
38 At 330.
39 At 330.
40 (1762) 3 Burr 1335; 97 ER 861.
41 (1875) 13 SCR (NSW) 322 at 331.
42 This is so if the decision in *United States v Brewster* (1972) 408 US 501 (discussed below) is followed in Australia.
benefit, little guidance is given in any of the judgments as to other circumstances in which a member may be implicated in a bribery offence. For instance, is it a bribe for a member to accept a benefit on account of exercising his or her influence on behalf of a constituent? This was answered affirmatively by the High Court in *R v Boston*.

*R v Boston*

In *R v Boston*, a majority of the High Court found a criminal conspiracy in an agreement to pay a member of the NSW Legislative Assembly large sums of money in return for using his position to secure the acquisition of certain property by the NSW Government and to put pressure on the Minister for Lands.

Given that a criminal conspiracy requires an agreement between two or more persons to commit an unlawful act, the issue in *R v Boston* was whether the acceptance of money by a member to exert pressure on the Executive constituted an unlawful act. The defendant argued that it did not because the agreement contemplated no act on the part of the member which was to be performed in Parliament, hence what was to occur fell outside the member’s official duties as a legislator. In rejecting this approach, the majority judges varied in their reasoning.

Knox CJ regarded such an agreement as tending to the *public mischief* and hence capable of constituting a criminal conspiracy. The House of Lords has since declared there is no common law offence of conspiracy to effect a public mischief. The other majority Justices, Isaacs and Rich JJ (in a joint judgment) and Higgins J, while acknowledging that the member's official or legal duties were confined to those of a parliamentary nature, nevertheless regarded any act of a member for reward in terms of exerting pressure on a minister outside parliament as a violation of public trust. Such behaviour seemed to be regarded by their Honours as a criminal offence although only Higgins J expressed this view in the context of a member’s official duties — and while leaving open the position, his Honour indicated that if, by the agreement, the member were to act entirely outside the House, this would also constitute an indictable conspiracy.

Isaacs and Rich JJ considered the member ‘guilty of a breach of high public trust’ for entering into such an agreement. Their Honours expressly followed *R v White* in holding that a member is a public officer. However, Knox CJ avoided any discussion of this issue, while Higgins J regarded it as immaterial: ‘He is a Member of Parliament holding a fiduciary relation towards the public, and that is enough.’

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43 (1923) 33 CLR 386.
45 *R v Withers* [1975] AC 842.
46 (1923) 33 CLR 386 at 402-403.
47 At 409.
48 At 407.
49 At 410.
50 At 405.
51 (1875) 13 SCR (NSW) 322.
52 (1923) 33 CLR 386 at 412.
Gavan Duffy and Starke JJ in their joint dissent adopted a strikingly different position. First, in their view, a member did not hold public office and, therefore, was not subject to the common law as such. They gave no justification for this view because of the second ground for their dissent, namely, that the count was too widely drawn. Their Honours considered the count was capable of being satisfied by a criminal or innocent agreement. In other words, they accepted that it may not be unlawful for a member in certain cases to act for reward in exerting influence on the executive:

It is perhaps desirable that members of Parliament should under no circumstances accept money to induce them to urge any course of action on the Executive Government, but it cannot be said that an agreement to do so must in every case constitute a criminal conspiracy by the member and those employing him.

What may be an innocent agreement is indicated in the preceding passage:

The terms of the charge would be satisfied if it were shown that he was to be employed to forward a transaction which he believed to be, and which in fact was, entirely beneficial to the purchasers and desirable in the interests of the community, and which had never been and could never be the subject of parliamentary enactment or discussion.

In recognising the difficulty in drawing the line between conduct which is criminal and that which is unethical, the dissenting judgment demonstrates a more practical appreciation of the realities of political life than the majority judgments. But in denying members are liable at common law as public officers, their Honours ignored the obligations of members to act in the public interest. However, at least three of the six judges did recognise that members of parliament are liable at common law for the criminal offence of bribery if they abuse the public trust in them as the representatives of the people. The elements of that offence are considered below, along with the similar elements of the code offences.

**Code offences: Queensland and Western Australia**

The code offences in relation to the bribery of members of parliament in Queensland (*Criminal Code, ss 59 and 60*) and Western Australia (*Criminal Code, ss 60 and 61*) are...
identical except that the latter defines 'benefit' to mean 'pecuniary or otherwise'.

The Queensland provisions are as follows.

**Member of Parliament receiving Bribes**

59. (2) Any person who, being a member of the Legislative Assembly, asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself, or any other person upon any understanding that the person's vote, opinion, judgment, or action, in the Legislative Assembly, or in any committee thereof, shall be influenced thereby, or shall be given in any particular manner or in favour of any particular side of any question or matter, is guilty of a crime, and is liable to imprisonment for 7 years, and is disqualified from sitting or voting as a member of the Legislative Assembly for 7 years.

(2) The offender cannot be arrested without warrant.

**Bribery of Member of Parliament**

60. (1) Any person who —

(a) in order to influence a member of the Legislative Assembly in the member's vote, opinion, judgment, or action, upon any question or matter arising in the Legislative Assembly or in any committee thereof or in order to induce the member to absent himself or herself from the Assembly or from any such committee, gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for, such member, or to, upon, or for, any other person; or

(b) attempts, directly or indirectly, by fraud, or by threats or intimidation of any kind, to influence a member of the Legislative Assembly in the member's vote, opinion, judgment, or action, upon any such question or matter, or to induce the member to so absent himself or herself:

is guilty of a crime, and is liable to imprisonment for 7 years. 57

The code offences in Queensland and Western Australia are quite narrow in scope compared to those in the other code jurisdictions and under the *Crimes Act 1914* (Cth). The activity, the subject of the bribe, is restricted to within the member's House; that is, the bribe must be intended to influence the member in his or her 'vote, opinion, judgment, or action in the House ... or in any Committee ... or in any Joint Committee'. Although a bribe offered or accepted in respect of a member

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57 There need not be a specific question before the House; the benefit may be offered 'if and when one arises' *R v Connolly No 2* [1922] St R Qld 278 at 288 per Stand. J.
acting outside the House may well be an offence at common law, it is not a bribery
offence under these provisions of the Queensland and Western Australian codes.
However, both codes also prescribe corruption offences for 'public officers' whose
definition is sufficiently broad to include members of Parliament as persons
'discharging a duty ... of a public nature'. The narrow scope of the member specific
bribery provisions may have been intended to be complemented by these general
offences which are considered further below. In addition, corrupt activities of
members outside Parliament may constitute the offence of extortion under s 88 of
the Queensland Criminal Code or a corruption offence under s 83 of the Western
Australian Criminal Code (these also will be dealt with later). In any event, the
member specific bribery provisions clearly require redrafting to bring them in line
with the other code jurisdictions.

The Queensland Criminal Code Review Committee in its draft code in 1991
proposed a new bribery offence in cl 137 which applied to ministers and public
officers as well as members. The elements of the offence were contained in the
definition of 'bribe' to which the clause simply referred. As regards members, the
proposal contained two substantive changes: first, the proposed offence was no
longer limited to member's activities within the House but covered 'the performance
or discharge of the functions' of a member; and second, the proposed offence
omitted reference to any 'understanding' to 'influence' a member, requiring instead
that the receipt of the property or benefit be done 'corruptly in respect of any act
done or to be done, or any omission made or to be made ...' in relation to the
performance of the member's functions.

It is surprising that the Report of the Western Australia Parliamentary
Committee simply concluded, without any discussion, that ss 60 and 61 of the
Criminal Code (WA) and s 7 of the Official Corruption Commission Act 1988 'cover
reasonably adequately the subject of potential bribery of Members of Parlia-
ment'. This contrasts with the concern expressed in the Report of the Royal
Commission Into Commercial Activities of Government and other Matters (the WA Inc Report)
over the inadequacy of ss 82 and 83 of the Criminal Code (WA) in being confined to
acts occurring within 'the performance or discharge of the functions of his office or
employment'. The Report noted that these offences would therefore not cover
influence peddling and forms of extortion.

Code offences: Tasmania and the Northern Territory

The bribery offences prescribed by the Criminal Codes of Tasmania and the
Northern Territory are substantially the same. Sections 71 and 72 of the Tasmanian

58 Section 87 Criminal Code (Qld); s 82 Criminal Code (WA). See also s 77 Criminal Code (NT).
59 Section 1(a) Criminal Code (Qld). See Lanham, Weinberg, Brown and Ryan, Criminal Fraud
Law Book Company Sydney 1987, p 213.
61 Vol 1 1989.
62 At section 8.3.
63 Part II, 1992 at 4.5.2.
Criminal Code provide:

71. Any person who, being a Member of either House of Parliament, solicits, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or any other person, upon any understanding that the exercise by him of his duty or authority as such Member shall be in any manner influenced or affected, is guilty of a crime.

Charge: Receiving [or soliciting] a bribe as a Member of Parliament.

72. Any person who, in order to influence a Member of either House of Parliament in his exercise of his duty or authority as such Member, or in order to induce him to absent himself from, the House or from any Parliamentary committee, gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for such Member, or any other person, is guilty of a crime.

Charge: Bribing [or offering to bribe] a Member of Parliament.[64]

Sections 59 and 60 of the Northern Territory Criminal Code provide:

59. Bribery of Legislative Assembly member

Any person who, in order to influence a member of the Legislative Assembly in the exercise of his duty or authority as a member, or in order to induce him to absent himself from the Legislative Assembly or a committee of the Legislative Assembly, gives, confers or procures, or promises or offers to give, confer or procure, property or a benefit of any kind to, upon or for the member or another, is guilty of a crime and is liable to imprisonment for 7 years.

60. Legislative Assembly member receiving bribe

Any person who, being a member of the Legislative Assembly, solicits, receives or obtains, or agrees to receive or obtain, property or a benefit of any kind for himself or another, upon the understanding that the exercise by the member of his duty or authority as a member shall be in any way influenced or affected, is guilty of a crime and is liable to imprisonment for 7 years.

It is readily apparent how much wider these offences are compared with those in Queensland and Western Australia. The intended effect of the bribe must relate to 'the exercise by the member of his duty or authority as a member' (s 60 Criminal Code (NT)). The nature of the required 'understanding' is, however, problematic, and is discussed below in relation to the elements of the offence.

[64] See Report of the Royal Commission into an attempt to bribe a Member of the House of Assembly & other matters (Tasmania, October 1991) which concerned the prosecution of Edmund Rouse.
**Crimes Act 1914 (Cth)**

Section 73A of the *Crimes Act 1914 (Cth)* prescribes two offences:

1. A member of either House of Parliament who asks for or receives or obtains, or offers or agrees to ask for or receive or obtain, any property or benefit of any kind for himself or any other person, on an understanding that the exercise by him of his duty or authority as such a member will, in any manner, be influenced or affected, is guilty of an offence.

2. A person who, in order to influence or affect a member of either House of the Parliament in the exercise of his duty or authority as such a member or to induce him to absent himself from the House of which he is a member, any committee of that House or from any committee of both Houses of the Parliament, gives or confers, or promises or offers to give or confer, any property or benefit of any kind to or on the member or any other person is guilty of an offence.

The ACT provides an offence in practically identical terms in s 15 of the *Crimes (Offences Against the Government) Act 1989 (ACT)*.

These provisions, which are substantially the same as the Tasmanian and Northern Territory code offences, were inserted in 1982 on the recommendation of the Bowen Committee. The Committee recommended provisions based on the Tasmanian Code rather than on the narrower provisions of Queensland and Western Australia, to ensure that they covered members' activities both inside and outside the House, in particular, representations by members to ministers and public servants. Their recommendation was based on the uncertainty existing at common law as to whether bribery of members of parliament constituted a common law offence and the inapplicability of the general bribery offence in s 73 of the *Crimes Act* which applied only to 'Commonwealth officers'.

**South Australia**

In South Australia, five specific offences relating to public officers are made applicable to members of parliament who are included in the wide definition of 'public officer'. Notably, their rights under parliamentary privilege are expressly preserved.

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67 *Criminal Law Consolidation Act 1935 (SA) Pt VII Div IV ss 249-253*.
68 Section 237(c).
69 Section 240.
The specific bribery offence is in s 249(2) of the *Criminal Law Consolidation Act 1935* (SA):

A public officer ... who improperly seeks, accepts or agrees to accept a benefit from another person (whether for himself or herself or for a third person) as a reward or inducement for —

(a) an act done or to be done, or an omission made or to be made, in his or her official capacity; or
(b) the exercise of power or influence that the public officer or former public officer has or had, or purports or purported to have, by virtue of his or her office, is guilty of an offence.

The element of 'acting improperly' is defined in s 238:

(1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.

(2) A person will not be taken to have acted improperly for the purposes of this Part unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.

(3) Without limiting the effect of subsection(2), a person will not be taken to have acted improperly for the purpose of this Part if—

(a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner;
(b) there was lawful authority or a reasonable excuse for the act, or
(c) the act was of a trivial character and caused no significant detriment to the public interest.

(4) In this section —

'act' includes omission or refusal or failure to act;
'public officer' includes a former public officer.

This offence extends to two situations: (1) where the contemplated official act is the exercise of influence; and (2) where the public officer purports to exercise a power which he or she does not have. More importantly for members is the definition of 'acting improperly' which requires them to have 'knowingly or recklessly [acted] contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public
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officers of the relevant kind'. This test allows for the special role of members to engage in what are regarded by the community as legitimate political 'deals' without technically infringing the bribery laws. Further, any public disclosure made by the member of such a deal (from time to time deals are made public between political parties or their parliamentary leaders) must be taken into account in determining whether the member acted improperly. These provisions would clearly accommodate, for example, a deal such as the 'Accord' reached in Tasmania between the Tasmanian Minority Government and the Greens in 1989.

General bribery offences

The Criminal Codes of Queensland, Tasmania, Western Australia and the Northern Territory also provide for bribery offences in relation to those who hold public office which could include members of parliament. It may be that the specific bribery offences for members of parliament indicate that those general offences were not intended to extend to members.

The Queensland and Northern Territory Code provisions require the benefit to be given on account of the discharge of a duty by the public officer who is charged with the performance of that duty. The Tasmanian Code provision requires the benefit to be given on account of the discharge of the duties of the office. How far these provisions extend to the activities of members outside parliament is unclear.

Support for the wide view can be gleaned from the approach adopted by the High Court in Herscu v The Queen in holding that the 'duties' of a minister were not confined to specific legal duties but referred to the functions of the office, which included exerting influence as a result of one's position. While a member has a function in representing the interests of his or her constituents, whether it can be said that this function extends to making representations to the executive on behalf of persons who are not constituents remains problematic. A further difficulty with these Code provisions is their use of the term 'corruptly'.

More comprehensive is the Western Australian Code provision, enacted in 1988, which refers to the functions of office:

62. Any public officer who obtains, or who seeks or agrees to receive a bribe, and any person who gives, or who offers or promises to give, a bribe to a public officer, is guilty of a crime and is liable to imprisonment for 7 years.

Section 1(i) defines 'bribe':

70 The definition in the WA Criminal Code expressly includes a member of parliament although public officer is defined as anyone 'exercising a power under a written law': s 1.
71 Section 87 Criminal Code (Qld). See R v McCann [1998] 2 Qd R 56 on 'holder of any public office'. Unclear whether this includes members of parliament.
72 Section 77 Criminal Code (NT).
73 Section 83 Criminal Code (Tas).
The term 'bribe' means any property or benefit, whether pecuniary or otherwise, sought, offered, agreed upon, given or obtained for the person being or to be bribed or any other person, in respect of any act done or to be done, or any omission made or to be made, or any favour or disfavour shown or to be shown, in relation to the performance or discharge of the functions of any office or employment, or the affairs or business of a principal.

The difficulty remains with this provision in relation to the scope of the 'functions' of members of parliament.

**Analysis of the elements of a bribery offence**

The key elements of a bribery offence are essentially the same at common law and under the Australian statutory provisions:

1. a benefit is offered, accepted, or solicited;
2. to or by a member of parliament;
3. in order to influence, or upon an understanding to influence the member;
4. in the member's behaviour in office or in the exercise of his or her duty or authority as a member.

It is evident from the elements of both the common law and statutory bribery offences, apart from the South Australian offence, that they only concern the bribery of *future* official action. Benefits offered or received in respect of *past* official action are not caught by these offences.

The most significant difference between the common law and the statutory provisions concern the second element listed above: at common law the benefit must be given to the member, but by statute it can be offered to or accepted by a third person. Each of these key elements will be examined in turn.

(1) 'a benefit is offered, accepted or solicited'

The nature of the benefit offered, accepted or solicited, both at common law and under the Australian statutory provisions, may be of a pecuniary or non-pecuniary kind. Russell's definition of bribery at common law refers to 'any undue reward'.

The use of 'reward' indicates a very broad test which will include money, goods, services, forgiveness of a debt and even sexual favours. The requirement that the reward be 'undue' precludes the commission of an offence if the reward is so small — a treat that it is unlikely to influence an official.

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75 J W Cecil Turner, above note 27, p 381.
76 See *HM Advocate v Dick* (1901) 3 F (Ct of Sess) 59 at 64.
78 See *Woodward v Malby* [1959] VR 794, where a book of matches was held too trivial. See also Willes J in the Bodmin Case (1869) 1 O'M & H 124 at 125; *S v Deal Enterprises* 1978 (3) S A 302.
Section 73A of the *Crimes Act 1914* (Cth) refers to 'any property or benefit of any kind', while 'property' is defined in s 3 to include 'money and everything, animate or inanimate, capable of being the subject of ownership'. Hence, non-tangible rewards must be covered by the reference to 'benefit of any kind'. The other Australian statutory provisions adopt the same wording, although the Western Australian provision expressly adds 'whether pecuniary or otherwise'. These statutory provisions seem to reflect the common law position.

An important issue in relation to members of parliament is the extent to which campaign donations, political favours and other political advantages may be viewed as 'benefits' or 'undue rewards'. A distinction needs to be drawn here between rewards or benefits which devolve personally on a member and those which enhance the member's political position, whether this be in relation to the member's prospects of re-election or of ministerial appointment, or advancement to positions of influence, such as on certain parliamentary committees, or promotion of the member's policies. In other words, certain benefits of a political nature may be unobjectionable, at least to the extent that the criminal law is concerned, because the very nature of a representative democracy entails political bargaining and compromise.79

A member who promises to support another member's motion in parliament or a particular policy outside Parliament in return for that member's political support in a similar respect cannot be viewed as providing or receiving a reward or benefit in order to corrupt official action. In such a case, the element of 'reward' is absent. One might argue that the conferral of mutual political support still involves a derogation of duty in adopting another's formulation of policy without necessarily considering whether it is in the public interest. However, it is unlikely that a member would support another's stand if it was clearly, in the view of the member, not in the public interest. If this did occur, such a derogation of duty is one more appropriately dealt with by the electorate or the member's party than by the criminal law.

However, in 1991 a political agreement in Tasmania thrust this issue to prominence when the 'Accord' entered into between the minority Field Labor Government and the Green Independents in Tasmania became the subject of criminal investigation. By this Accord, the Green Independents agreed to support the minority Government by voting in favour of supply and against any no confidence motions. In return, they received administrative benefits to the value of $353,000 for support services in 1990-91 which exceeded the allowance of $329,000. This arrangement was referred by the Director of Public Prosecutions in Tasmania who was asked to advise on whether it breached ss 71 and 72 of the *Criminal Code* (Tas). The Director's report80 concluded that the special allowances provided to the Green Independents should not be viewed as 'benefits' within the statutory provisions:

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The funding for support services received by the Green Independents, whilst no doubt of benefit to them, is received by them (and their staff) pursuant to the exercise of their duties and functions as Members. These are not personal payments unconnected with the exercise of Parliamentary duties.\textsuperscript{81}

Even if there were a technical breach of the Criminal Code, the Director concluded that no prosecution was warranted in the public interest, given the acknowledgement and acceptance of the Accord by the Governor, the Parliament and the community.\textsuperscript{82}

This Tasmanian experience bears out the view expressed earlier that certain benefits of a political nature received by members should be recognised by the law as legitimate. Accordingly, the Australian statutory provisions need to be read down to exclude these legitimate benefits. On the other hand, the common law definition of bribery seems to be more flexible by incorporating the requirement that the undue reward 'incline that person to act contrary to known rules of honesty and integrity'.

\textit{Political benefits}

A closer look needs to be given to the range of 'political' benefits which may be offered to members in Australia to determine if any provide the basis for prosecution for bribery. In particular, campaign contributions, agreements not to run for office, logrolling and retainers are discussed.

\begin{itemize}
  \item \textbf{Campaign contributions}
  
  The ethical status of campaign contributions depends on the circumstances in which they were given. Contributions made to assist in the costs of an election campaign of a candidate whose policies the donor supports raise no ethical concerns provided the donor is not subsequently given preferential treatment. For this reason it would be preferable that the donors remain anonymous. This would also insulate against conflicts of interest arising. On the other hand, the receipt of campaign contributions may give rise to a range of ethical dilemmas, from a conflict of interest to bribery, depending on the intent of the donor and member. The element of intent is considered further below.

  \item \textbf{An agreement not to run for office}

  An agreement not to run for office provides a significant benefit to those contesting a seat and any favour they give in return may be questioned as bribery. For instance, during a preselection process, another party member may offer not to run against the incumbent member provided the member appoints that person to the member's personal staff. Is the benefit of the other person's agreement not to run against the incumbent member sufficient for a bribery charge? This benefit is certainly one of a direct political advantage and was held to be a 'thing of personal advantage' within the New York bribery statute in \textit{People v Hochberg}.\textsuperscript{83}
\end{itemize}

\textsuperscript{81} At 2.
\textsuperscript{82} At 2.
\textsuperscript{83} (1978) 62 AD 2d 239; 404 NYS 2d 161.
If the decision not to run against an opponent was made to obtain a personal benefit (for example, appointment to a statutory body) in the event a particular opponent is successful, and this is understood by that opponent, the conferral of that benefit would clearly be improper. It constitutes a significant breach of public trust and may warrant prosecution, although difficulties of proof will no doubt arise. If, on the other hand, the member adopts a particular policy advocated by the withdrawn opponent in return for that person’s agreement not to run against the member, this would be viewed as a legitimate political bargain.

In Tasmania, a variation on the Hochberg case arose in 1991 when the Head of the Premier’s Office, Mr Evans, was charged with bargaining for public office. He offered the position of Ombudsman to the former Labor leader, Neil Batt, after he lost his seat in the 1989 election. The appointment was conditional on Batt signing two undertakings, one renouncing all political affiliations and the other agreeing to be ruled out of any recount in his former seat of Denison. (With multi-member constituencies in Tasmania, had one of the elected Labor members in Denison resigned shortly after the election — which was a possibility — the vacancy would be filled by a recount of the former member’s preferences.) The departure of Batt from the political arena was seen as a distinct political advantage for his former party and the Field Labor Government. This saga of political intrigue is heightened by the fact that the allegation of bribery on the part of the Head of the Premier’s Office was brought by Batt himself. The charge was dismissed in December 1991 by a Tasmanian magistrate for, it would seem, lack of a prima facie case. The magistrate found Batt lacked credibility as a witness but is reported also as relying upon the point that it had not been proven that Evans knew what he was doing was wrong.

For this case to involve bribery of or by a public officer, given that Evans was the only public officer involved (as Batt at the time was a former member), the charge would need to be that Evans solicited a bribe from Batt. The difficulty, though, is to identify the benefit received by Evans. The political advantage was enjoyed by the Labor Government and party. Was Evans, then, an accessory only?

The principle to be applied in each case is whether there has been an abuse of public trust warranting prosecution. Do the common law and statutory offences of bribery accommodate this approach? Unless the statutory offences are read down in the manner adopted by the Tasmanian Director of Prosecutions in relation to the 1991 Accord, they do not on their face accommodate political bargains. In contrast, the common law offence of bribery possesses that inbuilt flexibility by virtue of the requirement that the effect of the undue reward is to cause the official ‘to act contrary to the known rules of honesty and integrity’. This requirement seems eminently capable of accommodating legitimate political compromises and bargains.

*Logrolling*

Logrolling involves vote trading; that is, ‘I will vote for X if you will vote for Y’. More generally, it involves the offer to exercise one’s official power in a particular way if another public official does likewise. A famous US example of logrolling was
People ex rel Dickinson v Van de Carr\(^{84}\) in 1903 where a New York City alderman wrote to the street cleaning commissioner in the following terms:

> If you will reinstate Antonio Corino, who I think was too severely punished by being dismissed from your department, I will vote and otherwise help you to obtain the money needed for a new plant in Brooklyn.\(^{85}\)

The Court regarded such a proposal as capable of constituting the soliciting of a bribe. Lowenstein\(^{86}\) concedes: 'If the letter in Van de Carr supported a bribery prosecution, there must be thousands of bribes committed daily in Washington, in State capitolss, and in city halls across the United States.'

There have certainly been instances of vote trading within Australian parliaments, especially in the Senate, in the formation of minority governments and in party room factional deals. The predominance of party discipline in Australia distinguishes the Australian political system from that in the United States. Hence, the nature and scope of vote trading and lobbying in Australia is less intense and less obvious. Significant lobbying is directed towards the policy formulators in the political parties who are usually the senior members of the parliamentary parties.

Whether a particular case of vote trading or logrolling constitutes bribery depends again on whether it entails an abuse of public trust. Lowenstein suggests that in the US logrolling is wrongful where it is motivated by a 'corrupt intent'.\(^{87}\) Receipt of any specific personal benefit by a member as a result of logrolling would be evidence of this corrupt intent. But if all that is received is one of the legitimate political benefits noted earlier, then this is unlikely to involve a breach of public trust.

A clear case of logrolling occurred in Papua New Guinea in November 1993 when the Ombudsman Commission found three PNG Members of Parliament had demanded and been paid $145,000 each by Prime Minister Namaliu in return for continuing to support the Government.

- Retainers

The practice of retainers being paid to members of parliament seems to be not as common within the Australian political system compared with the UK and the US.

In the UK, the payment of a retainer to a member to act as a consultant to an organisation or individual is regarded as acceptable provided the member makes all necessary disclosures of this interest and does not initiate or advocate any matter in parliament which will confer an exclusive benefit on that organisation or individual.\(^{88}\) At times, acceptance of a retainer may straddle these boundaries of acceptable and unacceptable behaviour.

\(^{84}\) (1903) 37 AD 386; 84 NYS 461.

\(^{85}\) At 462.

\(^{86}\) D H Lowenstein, above note 78 at 814.

\(^{87}\) D H Lowenstein, above note 78 at 816.

Zellick\textsuperscript{89} points out that even the receipt of a retainer may technically breach UK corruption legislation. The same point can be made in relation to the Australian statutory offences of bribery. According to Zellick, whether a retainer constitutes a bribe will depend on the nature of the transaction and the intention of the parties involved. He suggests the following test:

\begin{quote}
It will be a bribe where it is intended that the Member act covertly in return for the consideration, but it will be permissible if the intention is for the Member to comport himself openly, making declarations where appropriate, or if it can truly be said that he will not use his parliamentary position for the benefit of the person making the payment — such as where it is a purely advisory arrangement — although that is easier said than done.\textsuperscript{90}
\end{quote}

The attitude of the common law of bribery in Australia to the receipt of retainers or other benefits by members in relation to activities occurring outside parliament is not clear, given the diverse judgments in \textit{R v Boston}.\textsuperscript{91} Reference has already been made to the position taken by the majority Justices\textsuperscript{92} that the receipt of benefits by a member on account of acting as a member in seeking to influence the executive in a particular matter constituted a breach of public trust. In contrast, in their dissenting joint judgment Gavan Duffy and Starke JJ were not prepared to regard the receipt of such a benefit \textit{in every case} as conduct of a criminal nature. They said:

\begin{quote}
It is perhaps desirable that members of Parliament should under no circumstances accept money to induce them to urge any course of action on the Executive Government, but it cannot be said that an agreement to do so must in every case constitute a criminal conspiracy by the member and those employing him.\textsuperscript{93}
\end{quote}

This quote highlights the other three elements of the offence of bribery considered next.

\textbf{(2) 'to or by a Member of Parliament'}

At least under the Australian statutory provisions, the benefit may be conferred either on the member or on some other person. The position at common law is not so clear. This was noted by ICAC in its \textit{Report on Investigation into North Coast Land Development} where it queried whether money paid to a political party constituted a bribe at common law when it was paid to influence a member of that party (who held public office) in the performance of his or her official duties.\textsuperscript{94}

\begin{footnotes}
\item[89] G Zellick, above note 26 at 45.
\item[90] G Zellick, above note 26 at 46 — see \textit{R v Bunting} (1885) 7 OR 524 per O'Connor J at 566.
\item[91] (1923) 33 CLR 386.
\item[92] Knox CJ, Isaacs, Higgins and Rich JJ.
\item[93] At 415.
\item[94] ICAC, July 1991, at 617.
\end{footnotes}
(3) "in order to influence" or 'upon an understanding to influence or affect the Member"

The statutory bribery offences in relation to members in Australia require the benefit to be offered or accepted on an understanding that the member's exercise of his or her position will be influenced or affected in some way. The common law offence of bribery seems to require the same element in prescribing that the benefit be offered or received in order to influence the member. Accordingly, benefits offered to or received by members simply on account of past favours are not covered by the Australian statutory provisions nor by the common law. The benefit must be given in order to influence the member in the future. Closer examination is given here to the 'understanding' or 'intent to influence', the specificity of intention, the extent to which the member must be affected, and particular problems with campaign contributions.

(a) 'Understanding' and 'intent to influence'

The need for an 'understanding' or an 'intent to influence' imports the requirement of mens rea on the part of the giver of the benefit. If the giver of the benefit has no intent to influence the member, then no offence of bribery occurs. So if, for instance, a grateful constituent confers a gift upon the local member without any intention to influence the member, and this is known to the member, this is not bribery. But whether the member has committed another offence, such as extortion or official misconduct, or otherwise acted improperly, may need to be considered. If, on the other hand, the member accepts the gift knowing of the constituent's intent to influence but refuses to be so influenced, then there is authority to support a bribery charge against the member in such a case. The position may be different if the giver or receiver acts with the intent of trapping the other party and reporting the matter to the authorities. The better view appears to be that a trapper will not be guilty of bribery so long as it is the other party who instigates the corrupt transaction.

(b) Specificity of intention

It is clear that the reference to an 'understanding' in the statutory bribery offences does not require an agreement as such, but as with the common law offence, simply an intent on the part of the briber to influence the member.

The question which arises here is: how specific, in terms of the conduct of the member, must this intent be to influence the member? Lowenstein identifies three situations where one may intend to influence official conduct in ways which range from the specific to the general:

95 See Williams v R (1979) 23 ALR 369 at 373 per Blackburn J.
96 Lanham, Weinberg, Brown and Ryan, above note 59, p 207.
A person who provides a thing of value to a public official plausibly might hope to influence the official's decisions in any of three ways: 1) by conditioning the gift on the official's agreement to do or not to do something in a particular manner; 2) by causing the official to believe that his chances of receiving similar benefits in the future will be enhanced by acting favourably toward the donor; and 3) by stimulating gratitude or some kindred emotion that influences the official to act favourably toward the donor.  

In the US, there are authorities which regard all three situations as capable of amounting to bribery. Other authorities state the need for 'some more and less specific quid pro quo'. These three situations highlight superbly the spectrum of misconduct which ranges from unethical conduct to criminal misconduct. The first situation is clearly one of bribery; the second belongs to the grey area surrounding that dividing line; and the third is probably not criminal. Of course, difficulties of proof arise in all three situations.

(c) 'Influence or affect' the member

The intention or understanding must be to influence or affect the exercise of the member's functions. At issue here is whether or not the intended effect on the conduct of the member must be to cause the member to act in breach of duty. In other words, does bribery arise even when the member is encouraged to act in the proper manner?

As regards public officials generally, the position at common law is not clear. In Williams v R Blackburn J in obiter was of the view that the common law offence of bribery required an 'intention to procure a breach of duty on the part of the officials bribed'. Yet as Lanham points out, the High Court in R v Boston accepted that conspiracy to bribe a member of parliament to act in the public interest still constituted an offence. Two South African cases, R v Gurney and R v Patel, required no intention that the official act in breach of duty.

As regards statutory offences, Blackburn J in Williams v R interpreted s 73 of the Crimes Act 1914 (Cth) as effecting a change in the common law position by extending to a case where a benefit is offered to encourage public officers, in that case, two police officers, to properly perform their duties. Section 73 also applied even when payment was made for an act already done.

99 D H Lowenstein, above note 78 at 821.
100 See for example US v L'Hoste (1980) 606 F 2d 796 (5th Cir); cert denied 449 US 833.
102 (1979) 23 ALR 369.
103 At 373.
105 (1867) 10 Cox C C 550.
106 1944 A D 511.
107 (1979) 23 ALR 369 at 374.
108 At 373.
The preferable view seems to be that a member is ‘influenced or affected’ simply on receipt of a benefit if it is intended: (a) to persuade the member to change his or her stance on a matter, such as whether to vote in a particular way in parliament; or (b) to encourage the member to vote in the way the member intended to before receiving the benefit; or (c) to encourage the member to decide an issue in a particular way. The statutory offence considered in Williams v R extended to benefits given for acts done in the past. In such a case, it is impossible to require the benefit to influence or affect the action taken.

If there were a requirement to establish a particular breach of duty on the part of a member, it could be argued that this occurs whenever a member accepts a benefit on any understanding because this conflicts with the member’s duty to act in the public interest. As Higgins J put it, ‘to act in violation of his duty to use his office for the public, not for his private interest, is a criminal offence’. 109

(d) Political donations

Clearly, political donations present some difficulty in this context. The circumstances in which the offer or acceptance of political donations may constitute bribery depends on the existence and nature of an intention or understanding to influence or affect the member.

Determining the intention of the donor when making a political donation can obviously be difficult. This was recognised in 1875 by Martin CJ in R v White110 as one factor explaining the absence of any conviction for an attempt to bribe a member of Parliament:

it may not be an uncommon thing for a member of the Legislature to have his conduct influenced by benefits given or promised, but the difficulty of proving that to be a bribe which the parties interested profess to regard as a just attention to the wishes and arguments of proved and steady supporters, may well account for the fact that there has been no conviction for an attempt to bribe a member of Parliament.111

Once the intentions of the donor and donee are ascertained, a distinction can be drawn between two situations which illustrate the delicate line which separates bribery from political financial support.

The first is where a donation is given directly or indirectly to assist the election of a candidate because that person, or the political party of which that person is a member, has a policy on an issue which the donor is keen to see implemented. This is clearly not improper conduct. There may well be an understanding here in terms of their co-incidence of views, but it is not a case where the member is ‘influenced or affected’ in the formulation of that policy.

109 R v Boston (1923) 33 CLR 386 at 409.
110 (1875) 13 SCR (NSW) 322.
111 At 331.
To be distinguished from this situation is where a member accepts a benefit to vote in parliament although they would have voted in the same way if the benefit had not been provided. The receipt of the benefit is a clear breach of duty because of the member's duty to act solely in the public interest.

The second situation is where a political donation is given in return for an undertaking that the member will adopt or even maintain a particular policy. This is unacceptable conduct. In this situation, the member 'obliges' him or herself to the interests of the donor, whereas in the previous case the member assumes no obligation to the donor, leaving unaffected the prerogative to decide from time to time what is in the public interest.

Another situation which occurs, particularly in the US, is the practice of special lobby groups making political campaign contributions with the explicit purpose of guaranteeing access to legislators when required in the future. It is suggested by Lowenstein that such contributions are bribes despite the apparently widely held view in the US community that they are not.112 Such a practice is at least on the borderline of bribery and is certainly a breach of duty to act in the public interest in so far as it is intended to secure preferential treatment on the basis of gratitude rather than merit.

Finally, acceptance of a political donation from a donor who is a witness before a parliamentary committee would be clearly improper on the part of any member of that committee. While it may be difficult to establish bribery, the receipt of the benefit under colour of office might constitute extortion (see further below).113

(4) 'in the member's behaviour in office'114 or 'in the exercise of his duty or authority as a member'115

This element is concerned with the member's official conduct which must be influenced or affected, or intended to be influenced or affected, by the benefit. At common law, this is generally cited as 'behaviour in that office'. As noted earlier, the original basis for regarding bribery as an offence committed only by those who held public office was the need to confine the offence to those situations where the public trust is violated. Accordingly, only if the conduct which is influenced or intended to be influenced falls within the scope of their office or trust will a bribery prosecution be open.

The terminology adopted by the statutory formulations is slightly different from that at common law:

(1) the Commonwealth, Northern Territory and Tasmanian provisions require

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112 D H Lowenstein, above note 78 at 826-828.
113 See the WA Report of the Royal Commission into Commercial Activities of Government and Other Matters, 1992, Part II at 4.5.3.
114 For a discussion of this common law element, see J W Cecil Turner, above note 27, p 381.
115 Section 59 Criminal Code (NT).
the member to be influenced 'in the exercise by him of his duty or authority as such a member';

(2) the Queensland and Western Australian provisions currently prescribe a narrower scope — to influence a member 'in the member's vote, opinion, judgment, or action upon any question or matter arising in the Legislative Assembly ... or in any committee thereof ... or in order to induce the member to absent himself or herself from the Legislative Assembly or from any such committee'.

The formulation in (2), while too narrow in scope, involves little uncertainty in deciding whether the conduct of the member which is the object of the bribe is within the scope of the member's office or trust. The formulation in (1) seems to reflect the application of the common law offence to 'office'.

For the purposes of these criminal offences, the critical question is: what are the duties or functions of a member of parliament? In defining those duties, one is not confined to those specifically imposed on the member by statute or standing orders. A wider perception of 'duties' of a public officer was endorsed by the High Court in 

Herscu v The Queen116 where the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ117 adopted the definition of McHugh JA in 

G J Coles & Co Ltd v Retail Trade Industrial Tribunal:

The duties of a public office include those lying directly within the scope of the office, 'those essential to the accomplishment of the main purpose for which the office was created and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes'. Nesbitt Fruit Products Inc v Wallace (1936) 17 F Supp 141 at 143.118

In 

Herscu v The Queen, the issue was whether conduct of a minister seeking to persuade a local authority to reconsider a planning decision on behalf of a developer occurred 'in the discharge of the duties of his office' within s 87(2) of the Criminal Code (Qld). Interpreting 'duties of his office' to mean 'the functions of his office',119 the High Court upheld the minister's conduct as falling within the scope of the section. The Court emphasised that the section was not so restricted as to apply only to functions the minister was by law obliged to perform.120 Hence, exerting influence as a result of one's position fell within the

117 At 281.
118 G J Coles and Co Ltd v Retail Trade Industrial Tribunal (1986) 7 NSWLR 503 at 524.
120 In the course of its judgment, the Court overruled 

R v David [1931] QWN 2 which held that a charge could not be brought against a policeman pursuant to s 87 for accepting a travelling rug in return for removing a jar of petrol found on the accused's premises after a fire. Macrossan SPJ held that the act of removing evidence was not done within the proper discharge of the policeman's duties and hence, fell outside the scope of s 87. The joint judgment in 

Herscu declared at 283 that '[t]he section is concerned with the violation or attempted violation of official duty rather than with the actual performance of official duty'.
functions and therefore the duties of one's public office as a minister. This point was clearly made by Brennan J:

> When the office is such that the holder wields influence or is in a position to wield influence in matters of a particular kind, the wielding of influence in a matter of that kind is a discharge of the duties of the office. Such a wielding of influence is something done in an official capacity. 121

No reference was made in *Herscu v The Queen* to the Court's earlier decision in *R v Boston*, 122 yet the wide interpretation given to the duties of a public officer seems equally applicable to the duties of a member of parliament. A significant issue in *R v Boston* was whether a member acts as such when seeking to influence or persuade the executive in relation to a particular matter within its control. The defendants submitted that such conduct fell outside the legal duties of a member of parliament which are confined to the member's role in parliament. The majority Justices in *R v Boston* accepted that the central core of the public duties of a member are those of a parliamentary nature, namely, those duties described in the Queensland 123 and Western Australian 124 statutory offences as the member's 'vote, opinion, judgment or action upon any question or matter arising in the House ... or in any Committee'. But their Honours in that case were prepared to extend the scope of the member's public duties beyond this core to encompass the role of a member in seeking to influence the executive. Their rationale was neatly put by Higgins J:

> the words 'to use his position as such member' primarily refer to action in the House; and they can only refer to action outside so far as action outside is based on potential action inside. 125

The potential action inside is the duty of the member to scrutinise in parliament the activities of the executive. To accept a benefit in return for advancing the donor's particular interest with the executive fetters the member's ability to freely review executive conduct. Knox CJ recognised the derogation in duty which arises in such a case:

> It impairs his capacity to exercise a disinterested judgment on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him, instead of a representative of the people. 126

*Isaacs and Rich JJ*, while recognising that as a public officer the member of

122 (1923) 33 CLR 386.
123 Sections 59 and 60 *Criminal Code* (Qld).
124 Sections 60 and 61 *Criminal Code* (WA).
125 (1923) 33 CLR 386 at 469.
126 At 393.
parliament's legal duties are confined to parliamentary activities, and therefore do not extend to 'visiting Departments and advising Ministers or interviewing subordinate officers', \(^{127}\) nonetheless recognised that when a member is paid to deal with the executive on behalf of someone, the member has 'violated his legal duty to the State', \(^{128}\) that is, 'the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'. \(^{129}\)

Further support for this approach can be gathered from the High Court in Wilkinson \(^{130}\) and Home v Barber, \(^{131}\) both of which held agreements invalid for inducing the member in each case to violate his duty to act as a watchdog of the executive. In the light of the Horsell decision, the duties of a member of parliament are not to be restricted to those performed in the parliament but include the representation of the interests of their constituents and review of the activities of the executive. \(^{132}\)

**Extortion**

**Historical outline**

The offence of extortion was the principal weapon against corruption in England from the 13th to at least the 18th century. In particular, Ch 26 of the *First Statute of Westminster* (1275)\(^ {133}\) prohibited the King's officers from taking any benefit on account of their office:

... no Sheriff, or other officer of the King, shall take any reward to do his office, but

\(^{127}\) At 402.
\(^{128}\) At 403.
\(^{129}\) At 400.
\(^{130}\) (1915) 21 CLR 89.
\(^{131}\) (1920) 27 CLR 494.
\(^{132}\) This would appear to be the approach adopted by the Gibbs' Committee in recommending the amendment of ss 73 and 73A of the *Crimes Act 1914* (Cth) to cover a situation where the public official or a member acts in exercise of their duty, functions or authority as such an officer or member, or as having held themselves out as having such duty, functions or authority proposed. *Crimes Amendment Act (No 2) 1990* cl 54 and 58. Other authorities support this approach: *A-G of Ceylon v de Livera* [1963] AC 103, although in that case there was a certain state practice of consultation with the local member. See G Zellick, above note 26 at 44 and *R v Benuzi* [1964] 1 Q B 263. Yet a narrow approach has been adopted in the US, for example *State v Bowling* 5 Ariz App 476, 472 P 2d 928 (1967) where elected officials agreed, in return for pecuniary benefits, to intercede on behalf of people and use their influence with other officials or agencies to achieve a particular outcome. In such cases, the use of influence was held not to be part of their official duties. D H Lowenstein, above note 77 at 818, argues that since the influence derives from the official's position 'their exercise of that influence for an individualised benefit is an abuse of the public trust no less harmful to democratic values than a direct bribe of the decision-maker'.

\(^{133}\) *Statute of Westminster* I, 3 Edw chs 26, 27, 30 & 31 (1275).
shall be paid of what he takes of the King; and he that does, shall yield twice as much, and shall be punished at the King’s pleasure.

Coke asserted that this chapter merely declared the ancient common law but added to the already existing penalties of fine and imprisonment the liability to account for twice the reward received. The general nature of this offence, ‘take any reward to do his office’, indicates that the essential element of the original offence of extortion was the taking of a benefit on account of one’s public office. No force or threat of force was required. An historically important prosecution for non-coercive extortion occurred near the end of the 18th century when Warren Hastings, the Governor of Bengal, was impeached by the House of Commons for taking gifts in violation of his Covenant with the East India Company with no coercion being alleged. Nor was it required by legislation later enacted in 1784 and 1793 which deemed the receipt of any ‘gift or present’ by an employee of the Crown or of the East India Company in the East Indies as extortion and a misdemeanour.

Since the 18th century, the offence of bribery has overtaken extortion as the principal weapon against corruption, reserving the latter primarily for cases of coercion. However, since the gravamen of the offence of extortion is merely the receipt of a benefit to which the public officer is not entitled, it remains an appropriate offence where an abuse of public trust occurs, especially when there is difficulty in establishing the specific requirements of the offence of bribery.

**Common law offence**

The common law offence of extortion is defined in *Halsbury’s* (3rd edition):

>A public officer is guilty of extortion who, from an improper motive and under colour of office, takes from any person any money or valuable thing which is not due from such person at the time when it is taken.

This offence was abrogated in the UK in 1968 on the recommendation (without explanation) of the English Criminal Law Revision Committee. The offence has also been abrogated in Victoria. It remains available at the Commonwealth level and in NSW and the ACT, while it has been given a statutory basis in South Australia.

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135 24 Geo 3, ch 25, s 45 (1784); 33 Geo 3, ch 52, s 62 (1793).
136 J Lindgren, above note 8.
138 Section 32 (1)(a) *Theft Act 1968* (UK).
139 Eighth Report on Theft and Related Offences.
140 See s 3 *Crimes (Theft) Act 1973* (Vic).
141 Section 252 *Criminal Law Consolidation Act 1935* (SA).

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The elements of the offence of extortion at common law appear to be:

1. a public officer;
2. takes or accepts any benefit from a person;
3. which is not due from such person;
4. knowing he or she has no right to take or accept the benefit (the improper motive); and
5. does so 'under colour of office'.

Notably, no violence or oppression is required. The pressure is supplied by virtue of the public office, hence the reference at common law to 'under colour of office'. A number of differences exist between the common law offences of bribery and extortion.

1. Bribery only concerns the conferral of a benefit to influence future official action. Extortion, in addition to influencing future action, also covers benefits conferred on account of past action.
2. Bribery requires the official to have accepted the benefit on the basis of some 'understanding' to act or not to act in some particular way. No such quid pro quo is required for extortion, where it is sufficient to establish that the public officer simply accepted a benefit knowing it is given with some expectation of a future undefined benefit, or that the benefit was induced by the officer. In the latter situation, there is no need to prove any intention on the part of the provider of the benefit.
3. Bribery requires the official to be influenced in his or her capacity as a member of parliament. Extortion 'under colour of office' extends to a case where a member gives the appearance that he or she is acting within but is in fact acting outside the capacity of a member.

In spite of these differences, there is considerable overlap between bribery and extortion. Both seem to adopt fairly wide definitions of the types of benefits which are conferred and, at least at common law, both seem to confine the receipt of these benefits to the official. Also, each offence accommodates customary benefits which in the case of extortion exclude benefits 'voluntarily given to him, and which it is customary to give for the more diligent or expeditious performance of his duty'.

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142 A further requirement of the common law offence of extortion has been expressed by the Gibbs Committee: 'compulsion in a legal sense'. Such a requirement of compulsion limits the offence to only coercive extortion. In the absence of previous authority supporting this view, it is submitted with respect that no element of compulsion is required.

143 Note that the Final Report of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (December 1995) recommended that no separate offence of common law extortion should be included in the Model Criminal Code: ch 3 at 265.

144 Under the US Hobbs Act no personal benefit may be required: see US v Margiotta (1982) 688 F 2d 108 (2nd Circuit); US v Troha (1975) 525 F 2d 1096 (2nd Circuit) where the benefit went to the political party.

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Code offences

The code offences of extortion are of limited scope compared with their common law counterpart. The identical offences in Queensland \(^{146}\) and the Northern Territory \(^{147}\) only apply to persons who are employed in the Public Service. However, the relevant offences in Tasmania and Western Australia apply to all public officers including, therefore, members. In Tasmania, the offence is:

s 84 (1) Any public officer who, under colour of office and otherwise than in good faith, demands, takes, or accepts from any person for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, is guilty of a crime.

The offence in Western Australia also extends to public officers but is in quite different terms:

83 Any public officer who, without lawful authority or a reasonable excuse — ..

(c) acts corruptly in the performance or discharge of the functions of his office or employment, so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and liable to imprisonment for 3 years.

These code provisions have less scope than the common law offence of extortion by virtue of their requirement that the benefit be received for 'the performance of his duty as such officer' and not under 'colour of office'. This latter common law element refers to the functions of the office rather than any narrow interpretation of 'duty', so that the act need not be one the member was required to perform. What this statutory element fails to cover is a situation where a member acts outside the functions of his or her office by misrepresenting the scope of those functions, such as where a member misrepresents that he or she is a member of a particular parliamentary committee and in return for a benefit agrees to take certain action which is favourable to someone. If the member is not a member of the committee then any action taken is not likely to be viewed as 'in the performance of the duty' of the member. The common law offence of extortion avoids any need to show a connection with the performance of official duties or functions, requiring only that the benefit is received under colour of office.

Distinctive also to the Western Australian offence is the requirement that the officer act 'corruptly'. This seems to mean that the officer receive or solicit the benefit knowing that he or she has no entitlement to it, or not caring whether there is such an entitlement.\(^{148}\)

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\(^{146}\) Section 88 Criminal Code (Qld).

\(^{147}\) Section 78 Criminal Code (NT).

South Australia

In 1992, as part of the statutory reforms dealing with offences by public officers which include members of Parliament, s 252 ('Demanding or requiring benefit on basis of public office') of the Criminal Law Consolidation Act 1935 (SA) was enacted:

(1) A person who — 

(a) demands or requires from another person a benefit (whether for himself or herself or for a third person); and 

(b) in making the demand or requirement — 

(i) suggests or implies that it should be complied with because the person holds a public office (whether or not the person in fact holds that office); and 

(ii) knows that there is no legal entitlement to the benefit, is guilty of an offence.

Subsection (2) excludes from the offence industrial demands for pay, conditions of appointment and employment. This offence requires some act of inducement but seems to require no quid pro quo.

Inducement

There are two elements which may be required for the statutory offence of extortion. The first is that the official or, in this case, the member must induce the benefit received in some way. The second is that some degree of quid pro quo is required. Neither of these elements is required for the common law offence of extortion. Inducement is, however, an optional element in the code offences in Tasmania and Western Australia which refer to a public officer who ‘demands, takes or accepts’ a reward. The corresponding South Australian provision does require inducement in the form of a demand or requirement. Also, the Gibbs Committee recommended at the Commonwealth level the substitution of the common law offence of extortion under colour of office with a statutory offence which required inducement:

A statutory offence should be created of a person demanding, exacting or requiring the provision of a benefit to himself or herself or any other person from another person and in making the demand, exaction or requirement the person suggests or implies that it should be complied with because the person holds (i) a Commonwealth office; or (ii) employment by the Commonwealth, a Territory (excluding the Northern Territory and the ACT), a public authority under the

149 Section 237 Criminal Law Consolidation Act 1935 (SA).
150 Section 84 Criminal Code (Tas); s 83 Criminal Code (WA).
151 Section 252 Criminal Law Consolidation Act 1935 (SA).
Commonwealth or an authority of a Territory (whether or not the person holds that office or employment) and the person knows that there is no legal entitlement to the benefit [emphasis added].

In the US, a majority of the Supreme Court in *Evans v United States* held that, consistent with the common law position, no inducement is required where a public official receives a benefit under colour of office under the Hobbs Act: '... the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under colour of official right.' Given that the person who transfers property to the public official must do so as a result of being 'induced ... under colour of official right', the mere acceptance of the payment by the official is sufficient if the official knows it was given to influence him or her.

This approach follows the earlier view of the Court of Appeals for the Fourth Circuit in *United States v Paschal* which regarded the retention of a benefit or gift by a public official on account of the mere performance of the official's duties, as in itself, a misuse of office. For the purposes of a Hobbs Act prosecution, the Court stated:

> It is enough that the benefactor transfers something of significant value to the public official with the expectation that the public official will extend to him some benefit or refrain from some harmful action, and the public official accepts the thing of significant value knowing that it is being transferred to him because of his office.

Hence no specific act of inducement is required, since the nature of the public office constitutes sufficient inducement. Also, the Court rejected any need to establish, where no specific act of inducement occurs, that the public official conferred some advantage to the payer to which the payer was not entitled. In this case, evidence of the passive receipt of two vacations and a Cadillac automobile by...
two North Carolina State engineers as gifts from various highway contractors was held sufficient to enable a jury to find extortion 'under colour of official right'. The purpose of these gifts was apparently to establish and maintain friendly relations with the State engineers to ensure fair treatment from them.

It is likely that the position taken in United States v Paschall\textsuperscript{159} reflects the common law position in Australia.

Quid pro quo

Although the common law and statutory offences of extortion in Australia do not expressly require any form of quid pro quo, it may be that this element can be used, as it has been in the US under the Hobbs Act, to distinguish between lawful campaign contributions and those which are illegal as payments received under 'colour of office'.

This issue was tackled by the US Supreme Court in United States v McCormick\textsuperscript{160} where McCormick, a member of the West Virginia House of Delegates, sponsored legislation to extend the temporary permit program for foreign doctors which enabled them to practice until they pass their State exams. Subsequently, McCormick was asked to support further legislation which proposed to confer permanent licences on those who had practised for a certain number of years under that program. At this time, McCormick was seeking re-election and on one occasion, he mentioned to Vandergrift, the chief lobbyist for the foreign doctors, that his campaign was expensive and he had heard nothing from the foreign doctors. Vandergrift replied that he would talk to the doctors and 'see what he could do'. In due course, Vandergrift gave McCormick substantial payments in cash which were not declared by McCormick either as campaign contributions or in his income tax return. In respect of these payments, McCormick was initially found guilty of extortion 'under colour of office'.

The jury was instructed that for the offence to be established, McCormick must have induced the cash payments but that no quid pro quo was necessary. On appeal, only the issue of the quid pro quo was challenged. The Supreme Court set aside the conviction because the jury instructions failed to distinguish between legitimate campaign contributions and illegal payments under the Hobbs Act. The majority of the Court held that a quid pro quo was necessary for receipt of a payment, ostensibly made as a campaign contribution, to constitute an offence of extortion under the Hobbs Act. The Court recognised the peculiar role of legislators who serve their constituents, at times assisting them personally and seeking political donations at the same time:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the every day business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of

\textsuperscript{159} (1985) 772 F 2d 68.

\textsuperscript{160} (1991) 500 US 257.
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their views and what they intend to do and have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent 'under color of official right'. To hold otherwise would open to prosecution not only conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.161

The Court accepted, however, that campaign contributions may be received in circumstances which constitute extortion 'under color of official right' if a sufficient quid pro quo exists, that is, where:

the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking [emphasis added].162

In requiring an explicit promise or undertaking, the offence is not established if the donor merely has an expectation of benefit.163 The majority was not prepared to comment on whether a quid pro quo was necessary in other cases not involving the payment of campaign contributions.164

In their dissenting opinion, Stevens, Blackman and O'Connor JJ adopted a restrictive view of the Hobbs Act by requiring at least an implicit 'mutual understanding'. In their view:

Subtle extortion is just as wrongful — and probably much more common — than the kind of express understanding that the Court's opinion seems to require ... [I]t is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver, either through the use of force or the use of public office [emphasis added].165

Significantly, they seem to be prescribing this requirement of a mutual understanding for all payments and benefits, not just for campaign contributions.

161 At 273.
162 At 273.
163 At 273; concurring Justice Scalia at 277 refers to 'anticipation of favourable future action' as not in breach of Hobbs Act, but 'an explicit promise of favourable future action' would be.
164 At 279 footnote 10.
165 At 283-284.
They described the boundary line between a legitimate campaign contribution and one which is obtained by extortion in the following way:

(1) if the donor expects to benefit from the candidate's election because the candidate's policy is to support particular legislation or a particular cause and this support exists regardless of whether the contribution is made, then the receipt of the contribution is not improper; but
(2) if the donor makes a campaign contribution because there is a mutual understanding between the donor and the candidate that the candidate will only support particular legislation or a particular cause if a contribution is made, then there is evidence to support a finding of extortion 'under colour of official right'.

Their dissenting opinion found no defect in the trial court's jury instruction that in order to convict McCormick the payment needed to be made 'with the expectation that such payment would influence Mr McCormick's official conduct, and with the knowledge on the part of Mr McCormick that they were paid to him with that expectation by virtue of the office he held'.

These judgments provide quite useful guidance on where the line is to be drawn between conduct which is legitimate political practice and that which is criminal as an abuse of the public trust.

The Supreme Court affirmed McCormick in the following year in Evans v United States: 'We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.'

**Official misconduct**

**Common law**

The classic statement of the common law offence of official misconduct, sometimes referred to as the offence of misbehaviour in public office, was given by Lord Mansfield in *R v Bernbridge*:

Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable.

That such should be the rule is essential to the existence of the country.  

166 [At 287.]
167 [At 284.]
169 [(1987) 3 Dougl 327 at 332; 99 ER 679 at 681.]
On the basis of these two principles, Professor Finn identified four specific common law offences which constitute the offence of official misconduct: fraud in office; wilful neglect of duty (nonfeasance); wilful misuse of official power (misfeasance); and wilful abuse of position (malfeasance). As public officers, Australian members of parliament are potentially within the scope of these offences, although only fraud in office and possibly wilful abuse of position are likely to arise. The latter species of the offence occurs where a member abuses his or her position by exerting influence for an improper reason, such as to derive some pecuniary benefit.

The common law offence of fraud in office encompasses misappropriation of public resources, such as false travel claims. To establish this offence, proof is required of a dishonest motive and that the misappropriation occurs under colour of public office.

The latter element arises, inter alia, where the public officer 'positively utilised his official position or the opportunities it placed before him though he had no official authority at all to act as he did — as where a police officer uses police facilities to which his position gives him access, for his own private purposes'. Members of parliament who abuse their position by making false claims or use their parliamentary resources for personal purposes are liable to prosecution in the non-Code jurisdictions for this offence of official misconduct.

Statute

Apart from Western Australia, the Code States possess a motley collection of offences which fail to adequately cover the four common law offences referred to above and have little or no application to members of parliament.

The Queensland and Northern Territory Code provisions which concern official misconduct other than bribery and extortion, do not apply to members of parliament, being confined to persons 'employed in the Public Service'. In contrast, the relevant offences in the Tasmanian Code apply to 'public officers', but are of very limited application to members: oppression (physical), conflict of interest in contracts and neglect of duty. On the other hand, Western Australia provides a general offence concerned with official misconduct which

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172 At 313-315.
173 At 314.
175 Sections 89, 90, 91, 92, 94, and 200 Criminal Code (Qld).
176 Sections 79, 80, 81, 83, 84, and 122 Criminal Code (NT).
177 Section 84(2) Criminal Code (Tas).
178 Section 85.
179 Section 115.
extends to 'any public officer':

83. Any public officer who, without lawful authority or a reasonable excuse —

(a) acts upon any knowledge or information obtained by reason of his office or employment;
(b) acts in any manner, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or
(c) acts corruptly in the performance or discharge of the functions of his office or employment, so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 3 years.

In 1992 South Australia enacted, as part of the package of measures dealing with official corruption, two offences which significantly cover the common law field of official misconduct: s 251 (abuse of public office) and s 253 (offences relating to appointment to public office).

There are, however, general criminal offences which apply to members to cover the misappropriation of public resources such as the making of false travel claims. For instance, in Queensland s 408C of the Criminal Code (Qld) provides for the offence of fraud whenever a person dishonestly applies to his or her own use, or to the use of any person, property belonging to another.

Meaning of 'corruptly'

Where an element of an offence requires an act to be done 'corruptly', what this means will depend entirely upon the context in which it occurs. Although it is often defined to mean 'dishonestly', a more useful interpretation in the context of a bribery offence is given by McPherson J in Bjelke-Petersen v Burns and Australian Broadcasting Commission:

Nevertheless, the word 'corruption' can be used to mean, not misappropriation in the strict sense, but an 'abuse of power'. It is sometimes so used in equity to connote the use of power to obtain 'some private advantage or for any purpose foreign to the power': see Mills v Mills (1938) 60 CLR 150, 185 ...

Similarly in R v Austin, Harvey and Lane, McPherson SPJ found the unauthorised use of official credit facilities by three State ministers for private purposes meant they had 'corruptly used a public office' within the terms of the Public Officers'
Superannuation Benefits Recovery Act 1988 (Qld). Also, in *R v LLewellyn-Jones*, 183 the defendant was charged on six counts of misbehaviour in a public office. Lord Parker CJ regarded as inherent in the nature of each count that what was alleged to occur was dishonest or fraudulent because each count alleged an intention to gain a personal advantage.

The Final Report of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (December 1995) equated 'corruptly' with the common law element of the offence of bribery that it be 'contrary to the known rules of honesty and integrity'.

A somewhat different perspective is given by Lowenstein, who interprets 'corruptly' as wrongful, in the sense of being against the public interest. 185 He also argues that it serves the purpose of imposing a special stigma upon those who abuse the public trust. 186 Although testing corrupt behaviour on the basis of whether it is contrary to the public interest may throw open the issue to wide ranging views, he does suggest that the process by which a decision is made, as distinct from the decision itself, may be more objectively judged as against the public interest if it 'impairs the citizen's right to participate in politics'.

The special stigma attaching to the label 'corrupt' is well illustrated by the Metherell affair in NSW in 1992 which caused the resignation of the Premier, Mr Nick Greiner. He resigned as a consequence of the Independent Commission Against Corruption (ICAC) finding that he had engaged in 'corrupt conduct' within the broad meaning of that phrase in ss 8 and 9 of the *Independent Commission Against Corruption Act 1988* (NSW). By section 9, a finding of corrupt conduct could be made if the conduct fell within one of the specific categories of conduct in s 8 (such as acting with partiality, breach of public trust or misuse of information) and such conduct constituted or could constitute a criminal or disciplinary offence, or provided reasonable grounds for dismissal. However, this finding was later declared a nullity by the NSW Court of Appeal 188 which expressed its concern 189 over the statutory definition of 'corrupt conduct'.

ICAC's *Second Report on Investigation into the Metherell Resignation and Appointment* 190 queried the view that the labelling of conduct as 'corrupt' should be restricted to those situations where the official derives some personal benefit:

Does the community benefit more by retaining old notions of corruption, or does it benefit by the expansion of these notions to explicitly cover partiality and

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184 Ch 3, at 277.
185 D H Lowenstein, above note 78 at 802.
186 D H Lowenstein, above note 78 at 806.
187 D H Lowenstein, above note 78 at 805.
188 Greiner v ICAC (1992) 28 NSWLR 125.
189 Per Gleeson CJ at 129; per Mahoney JA at 50; per Priestley JA at 180.
dishonesty that nonetheless involves no benefit to the public official? ... It must be remembered that the partial, dishonest or wrongful exercise of public office can be equally dangerous and harmful to the community, irrespective of whether the public official concerned gets a kickback. 191

The difficulty with this view is that a 'kickback' is objectively ascertainable as 'corrupt', whereas other 'dangerous and harmful' effects are not. Given the uncertainty which exists as to the meaning of 'corruption', 'corrupt intent' and 'corruptly', it seems desirable to remove those expressions from the statutory language. This was done by the Gibbs Committee 192 whose recommendations and proposed amendments to the Crimes Act 1914 (Cth) described the 'corruption' offences in terms of their specific elements without reference to a 'corrupt intent'. 193

The scope and effect of the privilege of freedom of speech

The impact of the privilege of freedom of speech on corruption prosecutions of members of Parliament has received scant judicial attention in Australia and the UK, while in Canada and particularly in the US the issue has often been raised. Curiously, in the two significant Australian decisions in this area, R v White 194 and R v Boston 195 apart from an ambiguous reference to the relationship between parliamentary privilege and the common law made by Hargrave J in the former case, 196 no mention is made of any possible argument that art 9 of the Bill of Rights 1689 might preclude the court's jurisdiction.

The issue is essentially the extent to which the freedom of speech which members enjoy during the debates and proceedings of Parliament precludes their prosecution for corruption offences. Obviously, in so far as this freedom has that effect, members remain liable to their House for any criminal conduct, as the 1695 resolution 197 of the House of Commons clearly indicates.

It is necessary to consider separately the effect of parliamentary privilege where a prosecution is brought under the common law and one brought under statute, since in the latter situation the privilege may have been abrogated.

Common law

It is clear that if any element of a corruption offence occurs during the 'debates or proceedings in parliament', no criminal prosecution may be brought at common

191 As above, p 14.
193 See Pt IV, 'Scribery and Corruption'.
194 (1875) 13 SCR (NSW) 322.
195 (1923) 33 CLR 386.
196 (1875) 13 SCR (NSW) 322 at 335.
197 CJ (1693-97) 331.
law. For instance, if one member bribes another member during a parliamentary debate to vote on a motion (the subject of the debate) in a particular way, art 9 precludes the bringing of a criminal prosecution against either member.

Where, however, all the elements of a corruption offence occur outside the ‘debates or proceedings in parliament’, different views have been expressed as to whether art 9 still applies. For example, if a member is offered a bribe outside parliament to vote in a particular way and the member agrees at that time to accept the bribe, the offence of bribery is complete — whether the member actually votes or not is irrelevant to proving the offence of bribery. Yet because the bribe is offered and accepted for voting in parliament, an act clearly within the protection of parliamentary privilege, are there grounds for saying that the member’s bribery is a matter falling within the exclusive jurisdiction of parliament? And can the person who offered the bribe be charged with a criminal offence without infringing the privileges of parliament? There is English authority that parliamentary privilege even precludes prosecution of a member in these circumstances. Such a view is reminiscent of the wide view of the freedom adopted in the Church of Scientology of California v Johnson-Smith and followed by the Judicial Committee of the Privy Council in Prebble v Television New Zealand Ltd and by s 16 of the Parliamentary Privileges Act 1987 (Cth) which precludes any reliance on what occurs within the scope of parliamentary proceedings.

In Ex parte Wason the applicant brought a charge of conspiracy against Earl Russell, Lord Chelmsford and the Lord Chief Baron that they agreed to deceive the House of Lords by denying in the House the truthfulness of an allegation made by the applicant against the Lord Chief Baron. The Court of Queens Bench rejected the charge as disclosing no offence: as their statements made in the House of Lords were protected by parliamentary privilege, parliamentary privilege protected them from any conspiracy charge. Central to the reasoning of the Court was the much quoted principle espoused by Lush J which supports a wide scope for freedom of speech:

I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House.

This principle was cited in Chapter 6 as supporting the view that art 9 precluded any reliance being placed on Hansard to support, even evidentially, other legal

198 This would normally be as words spoken or as a written statement that is, offering, soliciting or accepting a bribe. Whether physical acts are also protected such as assault on a member is unclear, for example, J I Fajgenbaum and P J Hanks, Australian Constitutional Law, Cases, Materials and Text Butterworths Melbourne 1972, p 191 refers to the privilege only extending to ‘things said or written’.


201 (1869) LR 4 Qb 573.

202 At 577.
proceedings. Lush J applied that principle in this case to prevent a corruption prosecution which in his view amounted to an indirect inquiry into the motives of the members’ activities within the debates or proceedings of parliament. Whether art 9 ought to have this scope in relation to corruption offences depends on the extent to which this is necessary to protect the independence of parliament and of its members. While the immunity accorded members under a wide view of the freedom seems harder to justify in relation to corruption offences, the risk is that without it, members are more vulnerable to allegations of corruption in the exercise of their parliamentary duties.

In stark contrast to the (albeit limited) judicial debate in England and Canada and the wider judicial debate in the US, almost no reference has been made in Australian case law to the effect of parliamentary privilege on corruption prosecutions of members. In particular, practically no reference was made to this issue in *R v White* and *R v Boston*, which recognised that bribery of members constituted a common law offence.

In *R v White*, only Hargrave J referred briefly to parliamentary privilege, holding in rather ambiguous terms that it did not exclude common law jurisdiction in that case where a member had been offered a bribe in the lobby of the House to vote in favour of a compensation matter then before the House.203 The remainder of the Court rejected the argument that the matter should be left to the jurisdiction of parliament. Their justification for this view was essentially the existence of the offence at common law.204 Despite the fact all elements of the offence of bribery were committed outside the scope of the freedom, certain US authority, as we shall see, would have precluded prosecution if reference was made to potential action within the Legislative Assembly.205

The position was different in *R v Boston* where the charge was one of criminal conspiracy in which the accused agreed to pay a member of parliament to exert his influence on the executive government to acquire a particular property. Since all of the elements of this charge occurred outside the scope of the freedom and none referred to potential action within its scope, no issue of parliamentary privilege arose.

In view of the limited consideration given to parliamentary privilege in the prosecution of members for corruption offences in Australia, assistance can be gathered from relevant decisions in the US and Canada.

**US position**

The principle quoted earlier from Lush J in *Ex parte Wason* was expressly adopted by the US Supreme Court in *United States v Johnson*206 to describe the effect of the Speech or Debate Clause in art 1 s 6 of the United States Constitution: '... for any

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203 (1875) 13 SCR (NSW) 322 at 335.
204 Per Martin CJ at 330; per Hargrave J at 334.
Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.\footnote{207}

In that case, Johnson was charged with conspiracy to defraud the United States in violation of 18 USC s 371. It was alleged that while a member of the House of Representatives, he had agreed with three others to exert influence on the Department of Justice to dismiss indictments pending against a savings and loan institution and to make a speech in the House favourable to those institutions. Johnson performed both tasks and received payment in the form of a ‘campaign contribution’ and ‘legal fees’. On appeal from his conviction, the Supreme Court affirmed the Court of Appeal’s order of a new trial on the basis that evidence led as to the speech made in the House, who wrote it, and the meaning and intention behind the words used violated the protection of the Speech or Debate Clause.

The Supreme Court rejected the Government’s contention that there was no violation of the Clause ‘because the gravamen of the count was the alleged conspiracy, not the speech, and because the defendant, not the prosecution, introduced the speech’. The Court regarded \textit{any} reference to the speech in the House or to any agreement to make such a speech as completely inadmissible by virtue of parliamentary privilege. To base a bribery charge on an agreement to act in the House in a particular way within the protection of the privilege was to question the motivation of the legislator. Such an inquiry into the motives of legislators was, according to the Court, precisely what the Speech or Debate Clause precluded. However, the Court accepted that the conspiracy charge could be brought in relation to the other activities of the legislator in so far as they fell outside the protection of the Speech or Debate Clause. In this case, the attempts to influence the Justice Department were not regarded as congressional acts and hence could be the basis of criminal proceedings provided no reference was made to the speech in the House.\footnote{208}

Therefore, the principle to be derived from \textit{United States v Johnson} is that a prosecution may be brought provided the elements of the offence occur outside the scope of parliamentary privilege and no reference is made or reliance placed upon any act or conduct which occurs within the scope of the privilege. So if a member or legislator is bribed to influence an executive decision in a particular way, a charge can be brought; but if it is a bribe to vote in the House, then no charge can be brought because this would require reference to an act within privilege.

\footnote{207} Although this article does not expressly refer to the ‘proceedings’ of Congress in the way art 9 includes the proceedings of Parliament, it has been interpreted to do so and to include committee meetings: \textit{Kilbourn v Thompson} (1880) 103 US 168 at 204; \textit{US v Brewster} (1972) 408 US 501 at 519 per Burger CJ.

\footnote{208} There is one aspect of the conspiracy charge in \textit{United States v Johnson} which was not expressly adverted to by the Court but which may have been significant in their reasoning. The charge brought under 18 USC s 371, of conspiracy to defraud the US, required that two or more persons conspire to defraud the US \textit{and that one or more of such persons do any act to effect the object of the conspiracy} — in other words, the elements of the offence were not necessarily completed before the speech was made in the House.
In decisions subsequent to United States v Johnson, the Supreme Court has restricted the scope of the Speech or Debate Clause to allow corruption prosecutions to proceed. The position now appears to be that a prosecution can be brought where all elements of the offence occur outside the protection of art 6 even if they refer to contemplated action within that privilege.

In United States v Brewster,209 a majority of the Supreme Court accepted that a bribery charge under 18 USC s 201 could be brought against a senator for accepting money in order to influence him in the performance of his official duties as a member of the Senate Committee on Post Office and Civil Service. The majority opinion given by Burger CJ adopted a narrow view of the Speech or Debate Clause confining it to 'legislative acts' and the motivation for their actual performance.210 Many activities of members outside the House were political rather than legislative acts, and so not within the scope of parliamentary privilege.211 A distinction needed to be drawn between conduct which is clearly part of the legislative process and thereby protected, and conduct which is merely related to the legislative process and so not protected.212 Into the latter category fell the senator's conduct in accepting money on the understanding that he would act favourably to the briber in future Senate committee meetings. Because the offence was complete upon acceptance of the money, Burger CJ found:

... inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's reasons for paying the money is sufficient to carry the case to the jury.213

in holding that this did not amount to an inquiry into the motivation of the senator, the majority opinion failed to distinguish United States v Johnson where the promise to make a speech in the House was held incapable of being the basis of a prosecution because this would call into question the motivation of the member. They do, however, endeavour to justify their narrow view of the scope of the privilege in protecting only conduct which is clearly part of the legislative process on four grounds:
(i) to avoid the possibility of the privilege being abused;
(ii) otherwise all conduct of members would be protected;
(iii) if Congress were to have in effect exclusive jurisdiction over all its members' activities, this would deprive members of the usual constitutional protections accorded a criminal trial; and
(iv) Congress is not well equipped to adequately regulate and punish its members.214

210 At 517-518.
211 At 517-518.
212 At 519.
213 At 526.
214 At 522.
The minority opinions in *United States v Brewster* followed *United States v Johnson* as indistinguishable. Brennan J (with whom Douglas J agreed) regarded the prosecution as precluded by virtue of its inherent probe into the motivation of legislative acts on the part of the senator.\(^{215}\) White J relied on the authority of *Ex parte Wason* as on 'all fours' with the facts of this case.\(^{216}\)

Both Brennan\(^{217}\) and White J\(^{218}\) supported a wider scope for the privilege than the majority opinion, in order to protect the independence of the legislative branch. White J emphasised the threat posed by the executive if it were empowered to initiate prosecutions against members of Congress, especially in relation to campaign contributions:

... the opportunities for an Executive, in whose sole discretion the decision to prosecute rests under the statute before us, to claim that legislative conduct has been sold are obvious and undeniable. These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behaviour by threats or suggestions of criminal prosecution — precisely the evil that the Speech or Debate Clause was designed to prevent.\(^{219}\)

The majority opinion countered this argument by asserting that the danger of executive abuse in the initiation of prosecutions was no greater than the danger of abuse if the Congress alone were to bring such prosecutions. Any danger of executive abuse could be defused by Congress exempting its members from the scope of federal bribery laws.\(^{220}\)

*United States v Brewster* was followed by a majority of the Supreme Court in *United States v Helstoski*\(^{221}\) which also involved a prosecution under 18 USC s 201. A member of the House of Representatives was alleged to have accepted money from resident aliens in return for promoting private member’s Bills to effect changes to the immigration law enabling them to remain in the US. The majority opinion of Burger CJ affirmed the position taken in *United States v Brewster* that although the Speech or Debate Clause prevented any reference at all to the legislative acts, evidence could be admitted of a promise to perform a legislative act in the future.\(^{222}\) The Chief Justice referred to the actual wording of the Speech or Debate Clause:

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\(^{215}\) At 530.

\(^{216}\) At 544. His Honour also noted the requirement under 18 USC s 201(g) for the prosecution to establish an 'official act' which in this case would be the legislative act.

\(^{217}\) At 539.

\(^{218}\) At 544.

\(^{219}\) At 544.

\(^{220}\) At 523.

\(^{221}\) (1979) 442 US 477; 99 S Ct 2432.

\(^{222}\) At 479.
... it is clear from the language of the Clause that protection extends only to an act that has already been performed. A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate'. Likewise, a promise to introduce a bill is not a legislative act.223

In a partial dissent, Stevens and Stewart JJ adopted a more liberal view of the evidence; their Honours would permit evidence which merely refers to legislative acts but does not go to proving the legislative act itself.224 Brennan J225 dissented on the same grounds as in Brewster.

Unlike art 9 freedom of speech in Australia, the Speech or Debate Clause is entrenched in the US Constitution. In United States v Heistoski,226 the majority opinion of Burger CJ looked at this issue from the perspective whether 18 USC s 201 was a congressional waiver of the Speech or Debate Clause. While concluding the legislation did not effect a waiver, the Chief Justice hinted that Congress lacked any power to waive such a privilege.227

The current position in the US appears to be that members of Congress are liable to criminal prosecution in respect of conduct which occurs outside the debates of Congress provided no reference is made to conduct which actually occurs within those debates. The fact any outside conduct may refer to future conduct within those debates does not matter: such contemplated conduct may be introduced into evidence. Evidence of actual conduct within the debates is, however, precluded.

**Canadian position**

The position at least in the Province of Ontario is established by R v Bunting228 which upheld an indictment for conspiracy to bribe members of the Ontario Legislative Assembly to vote against the Government in the Assembly in order to force its resignation. A majority of the Court of Queen's Bench (Wilson CJ and Armour J, O'Connor J dissenting) upheld the indictment on the basis that there was a common law offence of bribery of members of Parliament. Wilson CJ, who delivered the principal judgment, distinguished Ex parte Wason229 on the technical basis that the alleged conspiracy in that case was to do an illegal act, namely, to lie to the House of Lords, whereas in this case the conspiracy was to do an innocent act by illegal means, all the elements of which occurred outside the Legislative Assembly.230

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223 At 496.
224 At 494.
225 At 500.
226 At 500.
227 At 493.
228 (1885) 7 Ont L R 544.
229 (1869) L R 4 Q.S 573.
230 (1885) 7 Ont L R 544 at 555.
On the other hand, O'Connor J delivered a detailed dissenting judgment which explored the relationship between parliament and the courts, the criminal law and parliamentary privilege. His Honour relied upon *Ex parte Wason* as establishing that there was no common law offence of bribery of members of parliament in relation to acts within the scope of parliamentary privilege. Moreover, his Honour regarded the conspiracy charge in this case as indistinguishable from that in *Ex parte Wason*. Although in both cases, the offence was complete on reaching agreement outside parliament, the prosecution of the offence ‘would, however, pertain or have reference to a matter which might take place in the House in the course of its proceedings, and in that way only could it be said that the proceedings in the House might be brought in question, and so the mere possibility of interference was held sufficient to debar the Courts from jurisdiction’.

In the course of his judgment, O'Connor J rejected the view that a member of parliament is a public officer, preferring the designation of ‘legislator’:

... a member of Parliament is not a public officer. He is a legislator — a representative immediately of a certain body of people limited to a certain portion of territory within the realm, and indirectly of the realm. His duties are neither executive, nor administrative, but deliberative. His mission is to discuss, deliberate, and legislate. To do this properly his intercourse with his constituents and the public, in the most extensive sense of the term, must be free and unrestrained. He is therefore necessarily the sole judge of what he may hear and entertain, and how he may be persuaded, subject only to such limits and regulations as are imposed by the law and the usage of Parliament for the preservation of the honour of the member, and the dignity of Parliament; and herein the Courts are not permitted to interfere.

O'Connor J also recognised that the nature of a member’s legislative duties in terms of the use of influence and the striking of political bargains makes it difficult to draw the line between legitimate and illegitimate political behaviour by way of the standards of the criminal law:

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231 At 570.
232 At 569.
233 At 576. It has been suggested by G Zellick, above note 26 at 49, that O'Connor J differed from the majority in *R v Bunting* by viewing the conspiracy charge in that case as one to effect an illegal act, namely, to interfere with the course of justice, and hence, was of the same type of conspiracy as in *Ex parte Wason*. But the reasoning of O'Connor J demonstrates a commitment to a broad application of the principle of Lush J in *Ex parte Wason* that parliamentary privilege is designed to prevent the motives of members being enquired into by the Courts. His Honour's decision and reasoning were not based upon any technical analysis of the particular nature of the conspiracy in that case. Rather, they were based upon the need to adequately protect members from judicial interference in view of their particular responsibilities.
234 At 568-9.
The difficulty is, doubtless, in drawing a line between what is necessary or permissible, and what ought to be criminal — the difficulty of drawing any line which may under no circumstances interfere with that free intercourse between members and the public which ought to and must exist. A further consideration with reference to such a line is the extreme difficulty, if not the impossibility, of preserving intact the privilege necessary to members of speaking and voting according to the dictates of their several judgments without any restraint except that of public opinion, and without feeling themselves accountable to any authority except that of their several constituents. Hence Parliament has kept the matter in its own hands, and instances are not wanting wherein it has meted out severe punishment for bribery and other offences against the law and privileges of Parliament.235

Summary of overseas position

In the absence of Australian authority on this issue, the UK, Canadian and US authorities are particularly helpful in isolating the various considerations involved in deciding on the likely impact of art 9 freedom of speech on corruption prosecutions of members. From those authorities, three propositions can be derived of which only the third is contentious.

1. Freedom of speech precludes a prosecution where any element of the offence occurs within the ‘debates and proceedings’ of parliament.
2. Where all elements of the offence occur outside the ‘debates and proceedings’ of parliament, freedom of speech still precludes any reference to what the member has done within that privilege for the purpose of assisting in the proof of the elements of that offence.236
3. The contentious issue is whether, in the second proposition, freedom of speech also precludes reference being made to an element of the offence which contemplates that an act might be done within that privilege by the member in the future. In this case, no reference is made to what actually occurs within parliament. Here, there are opposing judicial opinions, each of which relies on persuasive grounds.

The wide view of freedom of speech precludes reference to an act which might be committed within the scope of the privilege because of the need to protect the independence of parliament and of its members, in particular, by not allowing the motives or intentions of members to be questioned. A further justification relied on by O’Connor J in R v Bunting237 was the difficulty the law has in prescribing appropriate standards for members given their unique role as legislators. Judicial support for this wide view exists in the UK but it has only minority support in Canada and the US.

235 At 566-567.
236 Church of Scientology of California v Johnson-Smith [1971] 3 WLR 434 at 437-9. Reference is permitted to what is said or done in the parliament only to establish the fact that what was said, was said in parliament on a particular day by a particular person (439); see also Dingle v Associated Newspapers Ltd [1960] 2 QB 406.
237 (1885) 7 Ont LR 544 at 566-567.
The narrow view of the freedom does not preclude reference to such an act because neither the parliamentary process nor the motives of members are directly called into question. Further reasons are cited in the US authorities: to avoid abuse of the privilege; to accord them the safeguards of a criminal trial; the legislature is not well equipped to investigate corruption; and the language of the privilege refers to protecting conduct which has already occurred within the scope of the privilege. This is the position taken by the US Supreme Court and in Ontario.

The critical issue is the extent to which the independence and integrity of members of parliament may be adversely affected by a criminal prosecution which refers to but does not rely on conduct of a member falling within art 9 immunity. There is certainly a danger that the actions of a member may be indirectly questioned by a prosecution, but this hardly justifies the inability to prosecute those engaged in such corrupt activities. The High Court decisions in *R v White* and *R v Boston* seem to support that assessment. However, the adoption of a narrow view here as to the scope of the freedom contrasts with the wide view which has prevailed in defamation and other civil proceedings to prevent any reliance being placed on statements made under art 9 (see Chapter 6). Are these different perspectives reconcilable? An obvious basis is the seriousness of corruption prosecutions compared with other legal proceedings. The latter warrant fewer safeguards against the indirect questioning of the motives of members than the former. Yet as Chapter 6 indicates, even the basis of this wide view of the freedom in non-criminal proceedings is open to question.

**Statutory offences**

The enactment of statutory corruption offences for members of Parliament raises two issues in relation to parliamentary privilege. The first concerns the extent to which these offences may have overridden art 9 freedom of speech. The second is whether they have abrogated the power of each House to discipline its members for corrupt activities.

As to the first of these issues, as noted earlier, the position in the US is unclear, although indications have been given that the protection of the Speech or Debate Clause as a constitutionally entrenched provision cannot be abrogated by Congressional legislation which delegates the punishment of corrupt conduct to the courts. But in both the UK and generally in Australia, parliamentary privilege is

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238 In *Arena v Nader* (1997) 42 NSWLR 427 at 436 the NSW Court of Appeal and, it would appear, also the High Court (1997) 71 ALJR 1604 at 1605 rejected the argument that any alteration to the privileges of the Legislative Council required a referendum pursuant to s 7A of the *Constitution Act 1902* (NSW) as an alteration of its powers. Both judgments confined that manner and form provision to an alteration of the legislative powers of the House as distinct from its privileges. Presumably, this is also the position under s 10 of the *Constitution Act 1934* (SA) in relation to the South Australian Legislative Council. There appears to be no manner and form requirement applicable to statutory variations to the privileges of the other State Parliaments.
not constitutionally entrenched, and therefore it remains vulnerable to the
overriding sovereignty of parliament. So, if parliament enacts a general bribery
offence which applies, inter alia, to its members, does this abrogate the protection
of art 9 to enable a member to be prosecuted for accepting a bribe during the course
of parliamentary proceedings?

Despite judicial comments at times that parliamentary privilege is only abrogated
by express statutory provisions, it is suggested in Chapter 5 that parliament can
express its intention here either expressly or impliedly. However, a court will require
a clear indication from the statute to derive an implied intention from parliament to
abrogate its members' most valued privilege. In other words, provided parliament enacts in clear terms its intention to override parliamentary
privilege and so delegate to the courts jurisdiction in relation to matters otherwise
within the exclusive jurisdiction of each House, then this intention can be and must
be given effect to by the courts. The statutory offences for bribery of members of parliament in the Australian States and the Northern Territory and the ACT are
examples of this clear statutory delegation of jurisdiction. This was also the view of
the Bowen Committee which, given the uncertainty of a bribery offence in relation
to members of parliament at common law, recommended the insertion of what is
now s 73A into the Crimes Act 1914 (Cth) to provide expressly for such an offence in
relation to members of the Commonwealth Parliament. The Committee was clearly
of the opinion that such a statutory offence overrode any protection afforded by parliamentary privilege:

For Parliament to introduce bribery legislation for Members and Senators is entirely
consistent with its privileges. In doing so, Parliament is simply recognising that it
is better to delegate such matters to the courts, as it has done with disputed
returns.

On the other hand, in South Australia express provision is made in the Criminal
Law Consolidation Act 1935 (SA) that nothing in those sections dealing with public
officers derogates from parliamentary privilege.

The second issue is whether each House retains its power to punish its members
for corrupt activities despite the enactment of specific offences. The Western
Australian Parliamentary Standards Committee in 1989 accepted the view of the
Clerk of the Legislative Council, Mr Laurie Marquet, that concurrent jurisdiction
existed in that State in relation to ss 55 to 61 of the Criminal Code (WA) and
recommended that no criminal prosecutions be commenced unless the relevant

239 Bradlaugh v Gossett (1884) 12 QBD 271.
Law Journal 345 at 348; L Marquet, 'Commonwealth and State — A Privileged Compact?'
(1986) 1 Legislative Studies 20 at 21.
242 Section 240.
243 See note 54 in vol.1 para 3.6.1 at 22.
member's House has passed an appropriate resolution. There is no reason for this not to be the position under the statutory provisions. An analogy arises with the concurrent jurisdiction in relation to the qualifications of members discussed in Chapter 4.

Conclusions and recommendations

If one begins with the premise that members of Parliament are fiduciaries of the public trust, the distinction between unethical conduct and criminal misconduct on the part of members may be drawn at that point where the misconduct constitutes a serious abuse of trust warranting a criminal sanction. What constitutes a serious abuse of trust cannot be comprehensively defined but the essence of such conduct would seem to be:

- the receipt of a significant personal or political benefit by the member
- on account of his or her position as a member of Parliament,
- being a benefit for the member personally or for some other person or entity,
- at the direction of or with the agreement of the member, without the express or tacit consent of the community.

This formulation contains certain key elements.

- A ‘benefit’ covers both a positive benefit and a detriment, whether from positive conduct or omission on the part of the member.
- A ‘significant’ benefit precludes trivial or technical lapses incurring a criminal sanction. A mere conflict of interest is also insufficient to warrant a criminal charge.
- The nature of the benefit is initially very broad, encompassing every form of benefit — pecuniary, non-pecuniary, proprietary, personality, and most importantly, political benefits. But the final element of a lack of community consent recognises the legitimacy of certain benefits which flow from the political process and exempts them from the formulation of criminal misconduct.
- The most significant omission from the above formulation is the absence of any requirement that the receipt of the benefit be on account of any past or future conduct of the member whether this falls within or outside the ‘duties’ or ‘functions’ of the position. Certainly, proof of a quid pro quo, while not essential for a criminal prosecution of a serious abuse of trust, establishes a stronger case of such abuse, but it is not essential, for the abuse of trust occurs simply by virtue of the receipt or enjoyment of some significant benefit not sanctioned by the community as a whole. Benefits in the nature of campaign contributions ‘without strings attached’ are acceptable, while those accepted with knowledge of any expectation of favourable treatment in the future are clearly unacceptable by community standards.
- Although no quid pro quo is required, the benefit still needs to be given on account of the member’s position. Current political practice must assist in identifying what that position entails but it clearly extends beyond the legislative process to include the representational role on behalf of constituents in their dealings with the executive and other governmental agencies.
A comparison of this formulation with the current state of the law, especially statutory law, reveals how serious abuse of public trust is inadequately subject to the criminal law. Not only is the coverage inadequate but where it does apply it is draconian, since little accommodation is provided for legitimate benefits arising from the political process. The preferable approach is to have one offence of abuse of office in relation to members of parliament which incorporates the formulation given above.

All statutory provisions dealing with members of parliament in this context should expressly state whether parliamentary privilege is retained or not. Where it is retained, as in s 240 of the Criminal Law Consolidation Act 1935 (SA), the criminal provision simply complements the role of the member's House. If the conduct falls within the debates or proceedings of the House, it is adjudged solely by the House. If the conduct falls outside those debates or proceedings it comes within the jurisdiction of the courts.

If parliamentary privilege is retained, one option is to adopt the approach of the US Supreme Court by confining the protection to conduct which actually occurs within the debates or proceedings of the parliament. Where conduct occurs outside that zone, it becomes more difficult to justify any wider scope to such privilege in order to prevent the motives of members being questioned in the courts. If a bribe is offered to and accepted by a member outside the House to speak in the House in support of a particular measure, is the independence of members put in jeopardy if in a bribery prosecution evidence is given of what the member actually said within the House? The motives of the member are certainly questioned, but is that not justified where such a serious abuse of trust is alleged?

The more radical option is to dispense with parliamentary privilege in relation to conduct of a criminal nature occurring within the scope of art 9. This is the course recommended by the 1999 Report of the UK Joint Committee on Parliamentary Privilege, with the proviso that any prosecution requires the consent of the Attorney-General. While it is an attractive proposition for holding members to account for their criminal conduct, the occasions will be rare when such conduct occurs solely within the protection of art 9. Accordingly, the benefits from this approach do not appear to be outweighed by the very significant erosion of privilege it causes and the risk of politically motivated and unjustified prosecutions against members. That risk may be lessened in the UK by the need to have the Attorney-General's approval, but given the political nature of that office in Australia, such a measure is unlikely to have that effect here.

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244 See rec 13 and Ch 3.
Duty of confidentiality

Introduction

The duty of confidentiality owed by members of parliament derives primarily from the common law. Unlike other public officers, there is no general duty or obligation of secrecy imposed by statute on members. At least two reasons account for this: members are usually not privy to sensitive government information (except in a ministerial capacity) and they have immunity under art 9 freedom of speech. Yet members are often privy to highly sensitive information provided by constituents, colleagues and others seeking their assistance, especially through their ministerial contacts. In these circumstances, they may become subject to the common law duty of confidentiality.

This chapter explores the legal and ethical obligations of members in relation to confidential information. Their position both under the general law and the privilege of freedom of speech is considered. These obligations focus on two situations: the unauthorised disclosure of information and the misuse of information. The conclusion is reached that members should observe their general law duty whether they are acting within or outside their privilege of freedom of speech. Significantly, the scope of that duty is not as wide in relation to government information as it is with personal information, given the fundamental right of the people to be informed of the operations of government.

Types and sources of confidential information

In the course of performing their parliamentary and extra-parliamentary functions, a member of parliament will receive information of a confidential nature. Such information is likely to fall within one or more of the following four broad categories.

1. Personal information. Constituents, other persons, businesses and organisations may give information in seeking the member’s assistance to make representations to a minister, a government department or other authority, or simply to obtain the member’s advice. It may also be given in the member’s ‘whistle blowing’ role.

2. Government information. A member may be advised of certain government
information by ministers or public servants. At times this information may be provided in response to inquiries or representations made by a member on behalf of others.

3. Parliamentary information. This may include evidence given to and the deliberations of parliamentary committees, as well as party room discussions and communications between members.

4. Unauthorised information. Information may be acquired by a member as a result of another person’s unauthorised or unlawful disclosure.

Nature and scope of member’s duty of confidentiality

The common law provides the primary basis for the duty of confidentiality owed by members of parliament outside the scope of their freedom of speech. In addition, a number of specific rules have been adopted by Australian Houses to restrain members from revealing certain information; in particular, the sub judice convention and the rules in relation to parliamentary committees. These rules are usually found in standing orders, although some can now be found in codes of conduct and in statute. Unlike the common law duty of confidentiality, these parliamentary rules apply irrespective of the freedom of speech.

An attempt is made here to explore the common law duty of confidentiality owed by members in relation to the various categories of information identified above. Then consideration is given to the duties of members when acting within their freedom of speech.

The common law duty of confidentiality

The general duty of confidentiality at common law has been expressed as follows:

A person who receives or acquires information in confidence cannot use or disclose that information for any purpose other than that for which it was received or acquired without the consent of the person or body from whom or on whose behalf it was received or acquired, unless that use or disclosure (a) is authorised or required by law; or (b) is justified in the public interest.

In applying this common law duty of confidentiality, it is necessary to distinguish between those situations which fall within the immunity of art 9 freedom of speech and those which do not. Members are not liable at law for any disclosure or misuse of confidential information which occurs within the scope of that freedom, but they remain liable otherwise. While the boundaries of art 9 immunity were explored in

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1 In some cases, statutory obligations of confidentiality are imposed on members of parliamentary committees: see for example s 70 of the Independent Commission Against Corruption Act 1988 (NSW); s 132(3) and (4) of the Criminal Justice Act 1989 (Qld).

2 P Finn, Integrity In Government Project Interim Report I: Official Information Australian National University Canberra, p 120.
Chapter 6, it is convenient to outline them briefly again in this context.

Members are immune from the general law in respect of anything they do or say in the course of parliamentary debates, speeches and proceedings. It is the last of these which provides an extension of members' immunity to activities which, although they occur outside the House, are intimately connected to the internal proceedings of the House: communications between members and possibly even between a member and a minister in relation to matters arising in the House. Although communications between a member and a constituent have been regarded as not protected, judicial support exists for their inclusion when they are acted up on by the member with a view to being raised in the House.3

The following categories attempt to identify (1) those activities which are included in 'proceedings in Parliament'; (2) those activities which are not included; and (3) those activities for which the position is unclear.

(a) Included:
   (i) tabling of motions and amendments to motions or bills;
   (ii) tabling, asking and answering of Questions to ministers and other members;
   (iii) formal proceedings of standing and select committees; and
   (iv) strangers giving evidence to select committees or petitioning the House.

(b) Not included (subject to (c) below):
   any activity of a member not relating to parliamentary duties whether performed in the House during the course of parliamentary proceedings or within the precincts of the House or outside.

(c) Position unclear:
   any activity of a member relating to parliamentary duties occurring within the precincts of the House or outside the House.4

A wide statutory definition of 'proceedings in Parliament' is provided in s 16(2) of the Parliamentary Privileges Act 1987 (Cth) which declares for the avoidance of doubt that for the purposes of art 9 of the Bill of Rights 1689:

'proceedings of Parliament' means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes —

(a) the giving of evidence before a House or a committee, and evidence so given;

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3 O'Chee v Rowley (1997) 150 ALR 199 (Qld Court of Appeal).
4 See Commonwealth Joint Select Committee on Parliamentary Privilege Report (7 June 1984), PP 87/1984, p 41 and following.
The presentation or submission of a document to a House or a committee;

the preparation of a document for purposes of or incidental to the transacting
of any such business; and

the formulation, making or publication of a document, including a report, by
or pursuant to an order of a House or a committee and the document so
formulated, made or published.

Personal information

Personal information is often given to members in confidence. Accordingly, they
are only allowed to disclose or use that confidential information if: (1) authorised;
(2) required by law; or (3) it is in the public interest. At times, the member will be
authorised to disclose this information for certain purposes, for example, when
making representations on behalf of constituents or other persons.

The difficult exemption to determine is whether the disclosure or use was justified
in the public interest. To satisfy this test, the public interest in disclosure or use must
outweigh the individual's right to privacy or the commercial value of the
confidential information. It is a difficult onus to fulfil, given the possibility of
injury being inflicted or loss being suffered by any unauthorised disclosure.5

However, at least two grounds have been identified as warranting the disclosure or
use of confidential information in the public interest:
(1) the confidential information relates to serious wrongdoing which it is in the
public interest to disclose; or
(2) disclosure of the confidential information will avert apprehended harm to the
public or members thereof.6

These grounds of public interest appear sufficient to cover those circumstances
in which a member may need to disclose confidential information without
authorisation. In order to justify disclosure in the public interest, it is also
important to ensure that disclosure is made to those having the appropriate
interest to receive it: "An emerging theme in the case law is that, if disclosure is
justified at all, it must be to a proper authority having an interest in receiving the
information."7

If a member is in doubt as to whether disclosure is justified in the public interest
on either of those grounds above, other courses of action may be available.
• The factual situation may be revealed without disclosing the identity of the parties
involved.

5 See The Commonwealth of Australia v John Fairfax & Sons Ltd (1980) 147 CLR 39 per Mason
J at 51-52.
6 P Finn, above note 1, p 47.
7 P Finn, above note 1, p 148.
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- The appropriate minister may be persuaded to deal with the issue if it concerns a matter within the minister's portfolio. (The need to ensure the extension of parliamentary privilege to communications between a member and a minister is canvassed in Chapter 6.)
- If appropriate complaint procedures within government administration are in place, a member should utilise these procedures rather than make a public disclosure.
- The member could disclose the information in the House under parliamentary privilege.

Members are most likely to adopt this last option because it resolves any concern they may have about whether disclosure is in the public interest. Nevertheless, it would seem that the guidelines provided by the common law for determining whether disclosure of personal information is in the public interest should be adopted by members even when exercising this privilege.

Government information

Most government information acquired by members will not be confidential. However, information obtained from ministers or public officials in response to inquiries made on behalf of constituents and others may be given in circumstances where its disclosure is limited to the member. In those cases, a prima facie duty of confidentiality arises.

The issue then is to what extent the public interest exemption applies to confidential governmental information. Some assistance may be gained from the common law position in relation to public officials and government generated information. The principle here is that "[u]nless disclosure is likely to injure the public interest, it will not be protected." This principle reflects contemporary concern for more accountable and open government. It also contrasts sharply with the approach outlined above in relation to personal information, where the public interest factor is used to justify an exception to confidentiality; in the case of government generated information, it is used to justify protection of confidentiality.

In what circumstances is the unauthorised disclosure of confidential governmental information likely to injure the public interest? In *Commonwealth of Australia v John Fairfax & Sons Ltd*, Mason J provided this guide:

If ... it appears that disclosure will be inimical to the public interest because national security; relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finally balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality [emphasis added].

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8 The *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 per Mason J at 51-2.
9 At 51-2.
That case concerned the publication of classified documents relating to Australia's foreign and defence policy, publication of which was not regarded by Mason J as likely to injure the public interest. While it is relatively easy to imagine cases of disclosure which would be prejudicial to national security or to Australia's foreign relations, how serious must the situation be for it to be prejudicial 'to the ordinary business of government'? This justification for disclosure poses a particular dilemma given a member's significant role (especially those from the non-government side) in monitoring and questioning government policy and action. Obviously, government embarrassment is insufficient to deny disclosure by a member in the public interest. Where the threshold lies is particularly difficult to say, especially with members of parliament. It certainly is drawn at a point which allows maximum freedom of disclosure to a member without undermining the institutional structure of government and its capacity to function as such — clearly, the law here must yield to the nature of the political process.

Of assistance in identifying potential situations where disclosure of confidential governmental information may not be in the public interest are the categories of government documents exempted from disclosure by the Freedom of Information Act 1982 (Cth) and similar State and Territory legislation. Apart from documents relating to defence, national security and international relations, the Act exempts, inter alia, cabinet and Executive Council documents, certain internal working papers, and documents relating to the enforcement and administration of the law, the economy and the financial and property interests of the Commonwealth. If a member obtains confidential information within any of these categories, it would be prudent to consider carefully the public interest factor justifying disclosure.

Parliamentary information

There appears to be little scope for the application of the common law duty of confidentiality in relation to parliamentary information. Members of parliamentary committees are required by standing orders of every Australian House not to divulge any evidence given or documents presented to parliamentary committees. These rules are considered further below.

As for the confidential deliberations of party room discussions, any unauthorised disclosure will most likely be dealt with by the party itself. This is also likely to be the case with any unauthorised disclosure of confidential communications between members. Therefore it seems unnecessary to consider the public interest exemption in these circumstances.

Unauthorised information

In relation to unauthorised information where a member receives information from a person who has imparted this information in breach of confidence, once the
member knows or has reason to know of that breach, the member becomes subject to the same duty of confidentiality at common law.\(^\text{10}\) This principle is of particular importance given the frequency with which members receive confidential information from undisclosed sources. However, if the information has become public no duty of confidentiality arises with the member.\(^\text{11}\)

The basis upon which the public interest exemption might apply to the disclosure of unauthorised information depends on the nature of the confidential information itself. If it relates to the private and personal interests of an individual, disclosure is less likely to be justified on public interest grounds than if the disclosure is of government information.

**Judicial discretion**

Even in a case where a member, acting outside the protection of parliamentary privilege, threatens to breach or does breach the common law duty of confidentiality, the court may refuse to grant discretionary relief by way of an injunction, especially if it might operate within the precincts of parliament or affect the performance of parliamentary duties by the member. In such cases, the court may be concerned not to interfere with the power of a House to control its own members or to intrude on the authority of the presiding officer who controls the physical operations and arrangements of each House.

This was the approach taken by Kennedy J in relation to the 'Zircon Affair'\(^\text{12}\) which involved an attempt by certain members of the House of Commons to screen a film in one of the meeting rooms of the House. The BBC had agreed not to screen the film which, according to the British Government, posed a threat to national security for revealing details of a secret defence project, codenamed 'Zircon', and the High Court had granted an injunction preventing one of the directors of the film, Mr Duncan Campbell, from revealing directly or indirectly any details of the Zircon project. Accordingly, the Attorney-General sought an injunction to prevent the members concerned from screening the film in the House of Commons. Kennedy J was not prepared to grant discretionary relief by way of an injunction in this case for fear that such an order would infringe 'the spirit' of the privilege of freedom of speech and of the privilege of the House to control its own members. Indeed, subsequently, with some reluctance, the Speaker after being advised by the Attorney-General on Privy Counsellor terms of the threat to national security posed by the film, issued an order prohibiting the screening of the film. This order was later adjudged by the Committee of Privileges to be proper, being within the authority of the Speaker to control that area of the Parliament allocated for use by the House of Commons.

\(^{10}\) See *A G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545.
\(^{11}\) See *A G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545.
This case indicates that a court may well be reluctant to grant discretionary relief to prevent the disclosure of confidential information by members within the precincts of parliament. However, there would appear to be no reason why relief ought not to be granted if the disclosure were to occur outside the precincts of parliament, unless, perhaps, it interfered with the member's performance of parliamentary duties.

Standing orders and parliamentary practice

Consistent with the importance placed on the privilege of freedom of speech by parliament itself, no general duty of confidentiality on the part of members while debating or engaging in parliamentary proceedings is recognised by the practices, rules or procedures of parliament. Nevertheless, there are certain parliamentary rules of limited scope which purport to restrict the disclosure of information by members both within and outside the House. A breach of these rules is not actionable at law but constitutes contempt of the relevant House.

The following rules or customs, originally derived from those of the House of Commons of the United Kingdom, are adhered to by the Australian Houses.

Committee proceedings

The standing orders of most Houses of Parliament in Australia impose on members and other persons an obligation of secrecy not to publish or disclose evidence given or documents presented to a committee and not yet reported to the House. According to Erskine May, this obligation of secrecy was a custom of parliament from the middle of the 17th century until in 1837 it became a resolution of the House of Commons:

... according to the undoubted privileges of this House, and for the due protection of the public interest, the evidence taken by any select committee of this House and the documents presented to such committee and which have not been reported to the House ought not to be published by any Member of such Committee, or by any other person. 13

This resolution has been adopted with modifications by the standing orders of the Australian Houses for both select and standing committees. 14 Usually the committee


may authorise disclosure. In those instances where evidence is given in public hearings, no secrecy attaches to it unless this is ordered by the committee.

Where evidence is given or documents presented to a Senate committee and not published, then unless the Senate otherwise orders, the Continuing Orders of the Senate\textsuperscript{15} permit anyone to examine and copy that evidence or documentation if it has been in the custody of the Senate for 10 years, or for 30 years in the case of in camera evidence or documents presented on a confidential or restricted basis.

In relation to the Commonwealth Houses, further protection is afforded by s 13 of the \textit{Parliamentary Privileges Act 1987} (Cth) which prohibits anyone, unless authorised by the House or committee, from publishing or disclosing documents or evidence given to a House or committee and directed by them to be treated as given in camera. Penalties in the nature of a fine or imprisonment for up to six months are prescribed.

Unauthorised disclosure of committee proceedings constitutes a breach of privilege whether this occurs within or outside parliamentary privilege. The privilege of freedom of speech only protects members from being questioned by the Courts and by other outside bodies. They remain, however, subject to the jurisdiction of their own House.

\textbf{The sub judice convention}

The most significant restriction on members' freedom of speech is the \textit{sub judice} convention which prevents references being made in motions, debates or questions to matters currently before the courts or awaiting adjudication in both criminal and civil matters.\textsuperscript{16} The rationale of the convention is to ensure that the judicial process is not undermined by parliamentary proceedings:

\begin{quote}
Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented or tested.\textsuperscript{17}
\end{quote}

The basis and scope of this convention in Australia are still guided by resolutions of the House of Commons of 23 July 1963\textsuperscript{18} and 28 June 1972.\textsuperscript{19} The convention prevents references being made to both criminal and civil proceedings unless its application is waived at the discretion of the Chair. However, the latter resolution permits the lifting of the convention in relation to civil proceedings 'in so far as such matters relate to a ministerial decision which cannot be challenged in court except

\begin{flushleft}
\textsuperscript{15} See Resolution of 6 September 1984, J 1086.
\textsuperscript{17} 1999 UK Report of the Joint Committee on Parliamentary Privilege at para 192. The Report noted at para 190 that the convention accommodates Parliament's right to legislate on any matter even if this affects judicial proceedings. In Australia, see for example \textit{Bachrach (HIA Pty Ltd v Queensland} (1998) 195 CLR 547.
\textsuperscript{18} CJ (1962-63), 297.
\textsuperscript{19} CJ (1971-72), 407-408.
\end{flushleft}
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on grounds of misdirection or bad faith, or concern issues of national importance such as the national economy, public order or the essentials of life' provided that 'the Chair should not allow reference to such matters if it appears that there is a real and substantial danger of prejudice to the proceedings'.

In Australia, the *sub judice* convention was at the centre of the highly controversial affair over the 'Westpac Letters' in 1991. These confidential letters to Westpac from its solicitors concerned the bank's liability to its customers for losses suffered by them in accepting foreign currency loans between 1984 and 1987. It would appear that these letters and other confidential bank documents were unlawfully obtained and distributed from European sources. Senator Paul McLean sought to table copies of these letters in the Senate on 12 February 1991. The President of the Senate, Senator Kerry Sibraa, ruled that the matter was *sub judice* in view of pending court proceedings brought by Westpac to restrain the disclosure of those letters in the press. Before making his ruling, the President indicated in a letter addressed to Senator McLean, the discretionary nature of the *sub judice* convention:

It is apparent that any decision I make on this matter will rest on an assessment of whether the public interest in the matter and the Senate's freedom to debate it should outweigh the possible prejudice to the legal proceedings.  

The President applied the convention in this case for two reasons:

In the present case I believe that judgment should be exercised in favour of non-disclosure for the following two reasons. The very subject matter of the case immediately before the courts, and in respect of which the *sub judice* claim is made, is the question as to whether the documents involved should be suppressed. To disclose the documents now would ipso facto abort that case. No clearer example of real and present danger to current legal proceedings could be imagined. Indeed, it is not merely a matter of the present proceedings being prejudiced, but rather a particular litigant's rights being denied absolutely.

While the subject matter of the documents may raise public interest issues, as Senator McLean strongly argues, there is equally a very clear public interest in judicial proceedings being able, and being seen to be able, to be brought to conclusion without being aborted by the Senate. From this point of view, it is not pertinent that a different situation may be thought to apply in practice once the present proceedings are complete.

Not only were there current legal proceedings between Westpac and various media organisations to prevent the disclosure of the letters, other legal proceedings were contemplated against Westpac by former customers for losses incurred as a result of

20 See D Limon and W R McKay (eds), above note 12, pp 383-384.
21 Senate Debates (Senate) Vol S 143 at 357.
22 At 356.
accepting foreign currency loans. The disclosure of the contents of those letters in the Senate may have removed any legal professional privilege they might otherwise have enjoyed. This consequence was not directly recognised by the President of the Senate but the issue of legal professional privilege was one of two other factors the President took into account:

There are two other matters to which I have given consideration. Firstly, it is arguable also that the claim of legal professional privilege which has been made in court in relation to these documents itself raises a public interest question, namely, that the Senate should not lend itself to a breach of this privilege being perpetrated. This, in my judgment, is a matter to be given some consideration, but should not be regarded as decisive.

Secondly, it is also arguable that other proceedings current or pending could be prejudiced or at least ‘coloured’ by the public disclosure of the material in question, even though such material would presumably not be admissible, on legal professional privilege grounds, in those proceedings. On balance, however, this is not a matter, I believe, that needs to be addressed at this stage. It can be considered if and when the matter arises again following the conclusion of the present court proceedings relating to the suppression of the documents.

For the reasons I have spelt out I rule, accordingly, on *sub judice* grounds that the contents of the two documents in question should not be revealed to the Senate.24

The sequel to this drama occurred on 20 February 1991 in the South Australian Legislative Council, when Mr Ian Gilfillan MLC read into Hansard substantial parts of the Westpac letters. A summary of these letters was published the following day in The Canberra Times.

The 1999 Report of the UK Joint Committee on Parliamentary Privilege recommended a new resolution for the *sub judice* convention which improves on the present rules by confirming their application to the proceedings of select committees and defining as precisely as possible the period during which the convention must be observed. In relation to criminal proceedings, this begins when a person is charged and ends when a verdict is given and sentence imposed. With civil proceedings, it begins when the matter is set down for trial until judgment or discontinuance.25

**Codes of conduct**

An obligation in respect of confidential information is included in the codes of

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23 Public disclosure of the contents of the privileged letters probably cancels their privileged status: *A v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545* at 596.
24 Senate Debates (Senate) Vol S 143 at 356-7.
conduct adopted by both Houses of the NSW and Victorian Parliaments, as well as by the Tasmanian House of Assembly (see Appendices 5 and 6).

In the only statutory code of conduct, s 3(1)(b) of the Members of Parliament (Register of Interests) Act 1978 (Vic) requires:

Members shall not advance their private interests by use of confidential information gained in the performance of their public duty.

Infringement of this obligation constitutes contempt of parliament and in addition to any penalty which either House may impose, a fine of up to $2000 may be imposed by the member’s House, non-payment of which renders the member’s seat vacant.26 While potentially broad in scope in banning the use of confidential information, it is limited to where the members’ interests are advanced by the disclosure.

The same restriction arises under cl 5 of the NSW codes and under SO 2A of the Tasmanian House of Assembly, both of which refer to disclosure for a ‘private benefit’. This requirement should not be interpreted to indicate that the disclosure or use of confidential information for other than personal benefit is acceptable — these code provisions are merely focusing on the most serious case in respect of which it is very unlikely that there would be any lawful justification for disclosure or use. Indeed, only the NSW provisions require the information to be used ‘knowingly and improperly’. In cases where no personal benefit is obtained, the disclosure or use may be justified on the common law grounds discussed earlier. Otherwise, disclosure or use of confidential information for any purpose is unlawful and unethical whether it confers a benefit or disadvantage on the member.

Statute

No member of parliament in Australia is subject to the range of criminal and disciplinary offences applicable to public officials for breach of confidentiality. Statutory penalties are prescribed, however, under the Parliamentary Privileges Act 1987 (Cth) for the unauthorised disclosure of information submitted as in camera evidence to either House of the Commonwealth Parliament or to one of their committees.27 Similarly, under the Victorian Code of Conduct, any member who advances his or her interests by using confidential information is guilty of contempt of parliament and is liable, in addition to any other penalty, to a fine of up to $2000.28

Misuse of information

The second limb of the common law duty of confidentiality prohibits members from misusing confidential information. The misuse of confidential information

26 Sections 9 and 10 Members of Parliament (Register of Interests) Act 1978 (Vic).
27 Section 13: $5000 and imprisonment for 6 months; $25,000 for a corporation.
28 Section 9 Members of Parliament (Register of Interests) Act 1978 (Vic).
need not involve its disclosure to anyone — as exemplified by insider share trading — nor does it necessarily require an intention to use that information for anyone’s benefit.

There is a related legal obligation which derives from the status of a member as a public officer which prevents any information obtained in the course of their public duties from being used for their personal benefit. Although the information need not be confidential, the focus is on whether the member obtains a private benefit. The basis of this obligation is the fiduciary duty of loyalty and fidelity which has been described in these terms:

Officials and employees may not use their position, or knowledge or opportunity obtained by reason of it:

(a) to their own or to a third party’s possible advantage; or
(b) to the possible disadvantage of any person or body (including the authority under which the office or employment is held)

where that use is likely to injure the public interest.29

An obligation similar at least to the first of these legal obligations is found in the codes of conduct in NSW and Tasmania.

Clause 5 of the NSW Codes provides:

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

Standing Order 2A of the Tasmanian House of Assembly provides that a member:

must not take personal advantage of or private benefit from information that is obtained in the course of or as a result of their official duties or positions and that is not in the public domain.

Both require members not to use for a private benefit any information obtained in the course of their parliamentary duties which is not in the public domain. The Victorian Code provision is expressly confined to ‘confidential information gained in the performance of their public duty’.30

These code provisions appear to be deficient in the following respects:

- none seem to apply to information obtained other than in the member’s capacity as a member;


30 Section 3(1)(b) Members of Parliament (Register of Interests) Act 1978 (Vic).
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- apart from the NSW provision, it is unclear whether they cover a situation where a benefit is sought for others;
- they do not appear to cover the misuse of official information even if it is not confidential; and
- they do not extend to misuse occasioning any prejudice to other parties which is covered by the fiduciary duty of loyalty outlined above.

Accordingly, it would seem desirable to prescribe twin standards dealing with the disclosure of confidential information and the misuse of official information.

The Bowen Committee in its Report on Public Duty and Private Interest recommended both disciplinary and criminal provisions against the misuse of official information. For inclusion in a code of conduct for members of parliament (as well as for other public officials), it recommended that:

\[\text{an officeholder should not use information obtained in the course of official duties to gain directly or indirectly a pecuniary advantage for himself or for any other person.}\]

A provision which combines that recommended by the Bowen Report with the points raised earlier, might provide:

A member of Parliament shall not make improper use of information obtained in the course of performing the member's official functions:

1. to gain, directly or indirectly, an advantage for oneself, for any other person or body; or
2. to prejudice any person or body.

Criminal liability for misuse

There are no criminal offences which directly render members liable for obtaining any pecuniary gain from the misuse of confidential or non-confidential information obtained by way of their official position. There is the possibility, though, that members in non-Criminal Code jurisdictions may be liable in these circumstances to the common law offence of official misconduct, in particular, one species of that offence known as fraud in office. Essentially, it would be necessary to prove that the member wilfully misused the confidential information under colour of his or her office.

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32 At para 4.9.
33 Adapted from the Information Misuse Rule proposed by P D Finn, above note 1, p. 1.
Both the Bowen Report\textsuperscript{35} and the Gibbs Committee\textsuperscript{36} recommended the adoption of a criminal offence but, as Professor Finn (as he then was) pointed out, both specific recommendations were flawed.\textsuperscript{37} The recommendation of the Bowen Report proscribed all misuse of official information without restricting it to cases where either private gain was derived or some prejudice incurred. The Gibbs Committee restricted its recommended offence to the ‘unauthorised disclosure of official information for private gain’ and therefore exempted the misuse of official information for private gain.

Members of parliament ought to be subject to criminal prosecution for misusing confidential information for pecuniary gain, irrespective of whether this occurs within or outside the scope of parliamentary privilege. This is just as serious an abuse of their public office as any criminal offence of corruption or bribery.

Freedom of speech and confidentiality

It is evident from Chapter 6 that the privilege of freedom of speech provides members with an immunity from all legal proceedings (whether criminal or civil) in respect of any thing they say or do in the course of the debates, speeches or proceedings of their House. Accordingly, no legal action can be taken against a member for breach of a duty of confidentiality, either by way of unauthorised disclosure or misuse of information, which occurs within the scope of the art 9 privilege. It is readily apparent how a breach of a duty of confidentiality could arise within the scope of the privilege by way of a disclosure of confidential information in the debates or speeches of a House. Less easy to imagine is how a breach of this duty could occur within the scope of the privilege by way of the misuse of confidential information for the benefit of a member or another.

Although members are immune from legal liability in these circumstances, there is, as Erskine May notes, a clear duty on every member ‘to refrain from any course of action prejudicial to the privilege’.\textsuperscript{38} If a member wishes to disclose, under parliamentary privilege, information which the member believes is of a confidential nature, the member should first consider the scope of the common law duty of confidentiality. Disclosure will be authorised at common law, as noted earlier, if it is authorised by the person from whom it was acquired, authorised or required by law, or justified in the public interest. These are the standards which should guide members in their handling of confidential information at all times, whether within or outside parliament. Members should satisfy themselves as to whether they are justified in disclosing the confidential information in the manner they propose.

\begin{itemize}
\item \textsuperscript{35} Bowen Report at paras s.9-4.10.
\item \textsuperscript{37} P Finn, above note 1, p 209.
\item \textsuperscript{38} D Limon and W R McKay (eds), above note 12, p 84.
\end{itemize}
The privilege of freedom of speech, if exercised in this way, provides members with the advantage of immunity from legal challenge if it is later revealed that their judgment was erroneous. It is not a privilege to say and do what one likes within the debates and proceedings of parliament. Members must act reasonably and responsibly in exercising this privilege, for, as we have seen, the rationale for the privilege is to enable them to effectively perform their functions of review and representation and hence serve the public interest. Provided the privilege is exercised honestly and reasonably by members, they should be free to say and do what they feel needs to be said in the public interest, without fear of legal challenge by the executive or by any other person or group. To remove this immunity could seriously undermine the capacity of members to exercise their parliamentary functions.

What role should parliament play here? It would appear that its role is restricted to taking disciplinary action against a member who abuses the privilege by disclosing information which the member knows is confidential and when there was no reasonable ground for considering the disclosure to be in the public interest or otherwise authorised. As for the misuse of information to advance a member's interests, this is unlikely to occur within the scope of the privilege, but if it did arise, the member's House should take severe action against a member.

Conclusion — recommended standards of confidentiality

Disclosure outside parliamentary privilege

A member of parliament, when acting outside the scope of the privilege of freedom of speech, should not disclose information imparted to the member in confidence or which is otherwise of a confidential nature unless:

1. the disclosure is required or authorised by law;
2. the disclosure is authorised or consented to by the person from whom or on whose behalf it was received; or
3. (i) subject to (ii) below, the public interest requires disclosure of the information provided that the information is disclosed only in so far as it is necessary to serve the public interest;
   (ii) where the information relates to the private, personal or proprietary interests of any person, group or body in the community, disclosure of this information will usually only be in the public interest if:
   (a) the information relates to serious wrongdoing which it is in the public interest to disclose; or
   (b) the disclosure will avert apprehended harm to the public or members thereof.

Disclosure within parliamentary privilege

A member of parliament when acting within the scope of the privilege of freedom
of speech should carefully consider when disclosing information imparted to the member in confidence (or which is otherwise of a confidential nature), whether the disclosure of that information and the manner in which it is disclosed are in the public interest. (The principles provided in the section above should be taken into account by the member before deciding to disclose confidential information under parliamentary privilege.)

**Misuse of official information**

A member of parliament shall not make improper use of information obtained in the course of performing the member's official functions:

1. to gain, directly or indirectly, an advantage for him or herself, or for any other person or body; or
2. to prejudice any other person or body.

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39 This requires the nature of the political process to be considered in deciding whether the use is improper. Political benefits will often need to be accommodated and distinguished from other personal benefits.
Conflict of interest

Introduction

Put in its simplest terms, a conflict of interest arises when the private interests of a member clash — or even coincide — with the public interest. Such a conflict of interest only raises an ethical dilemma when the private interest is sufficient to influence or appear to influence the exercise of official duties. This constitutes an ethical dilemma, for it tends to undermine public confidence in the integrity of the member, and ultimately of parliament itself, to act only in the public interest. A classic example of such a conflict of interest is where a member approaches a minister on behalf of a company in which the member is a shareholder. How can the public be assured that the member is acting in its interests rather than those of the company and the member? A more serious conflict of interest is, of course, where a minister retains financial interests in an industry within his or her portfolio. Ministers often lose their positions on account of such a conflict of interest, although some survive. Although the nature of a conflict of interest does not vary in any significant respect between members and ministers, the resolution of ministerial conflicts of interest fall outside the scope of this work.

Central to an understanding of conflict of interest in relation to members of parliament is the effect it has on public perception. Whether or not the member has furthered his or her own personal interest is irrelevant. An allegation of a conflict of interest cannot be defended on the ground that one did not seek any personal benefit. It is the appearance of having so acted which harms or undermines public confidence in the integrity of parliament — and it is that erosion of public confidence which may prompt action by parliament.

2 Those who lost their ministerial positions recently include Senator Short (Assistant Treasurer) and Senator Gibson (Parliamentary Secretary to the Treasurer) in 1996 on account of certain shareholdings.
3 Those who survived allegations of conflict of interest include Senator Parer (Minister for Resources) in 1998 and Mr Entsch MP (Parliamentary Secretary to the Minister for Industry) in 1999.
confidence which renders a conflict of interest ethically unacceptable. Whether the
perception of a betrayal of the public trust is reasonably based is, unfortunately, not
one which can be verified by any objective test. There is in the end no other umpire
other than public opinion.

Members of parliament potentially face numerous conflicts of interest. So serious
are some of these that they developed into grounds of disqualification, the most
significant being: foreign allegiance; membership of another House; holding a
public office; and being interested in a government contract. However, as the Bowen
Report noted, these grounds deal with 'only a small, and increasingly peripheral,
part of the problem'.

Conflicts of interest arise in many forms, both pecuniary and
non-pecuniary. This chapter examines the nature of these conflicts of interest and
then considers the two most prevalent mechanisms to deal with them: ad hoc
disclosure and a register of interests.

Before doing so, it is worth considering briefly the connection which exists
between conflict of interest and corruption. Of the two phenomena, corruption
arouses the greater concern, with most people able to give an example of corrupt
conduct more readily than they can a conflict of interest. The link between the two
is that all cases of corruption involve a conflict of interest, but the reverse cannot be
maintained. More specifically, corruption involves a clash between the official's
private and public interests where, usually, a financial benefit is knowingly obtained
or sought at the expense of the public interest. A conflict of interest requires no such
benefit. Consequently, corruption constitutes a serious crime whereas a conflict of
interest merely describes a broad spectrum of conduct. At one extreme of this
spectrum lies corruption and at the other end lies mildly unethical behaviour.
Where along the spectrum particular conduct falls depends on the circumstances of
each case and the manner in which the conflict has been dealt with.

Nature of a conflict of interest

Members probably face the widest range of potentially conflicting interests:
personal, representational and other private pecuniary and non-pecuniary interests.
Certain interests are personally inherent: as a resident of a town or city, State or
Territory, as a parent, spouse, or child, as female or male, as indigenous or non-
indigenous and so on. Other interests arise from their representative role: as a
member of parliament, as the representative of an electorate and as a member of a
political party. Further interests arise from outside activities: as a member of a non-
political organisation, as a businessman, professional, farmer or employee. These
wide ranging interests include therefore both pecuniary and non-pecuniary
interests.

4 Report of the Committee of Inquiry established by the Prime Minister on 15 February 1978.
at para 7.4.

5 These conflicts have been discussed in M Young, Conflict of Interest Rules for Federal
Yet despite all these potential conflicts, the High Court has held that a member must endeavour to act only and always in the 'public interest'. In *Wilkinson v Osborne* the two members of the NSW Legislative Assembly agreed with a land agent, for a fee, to influence the NSW Government to purchase certain land. In holding this undertaking to be void for being contrary to public policy, Griffith CJ concluded:

> There cannot be a plainer case of a man attempting to serve two masters. They owed to their employer, the appellant, the duty to press forward the contract regardless of the interest of the public, and as members of the Legislature it was their duty to consider the matter impartially before voting upon it.\(^6\)

Isaacs J similarly condemned the agreement:

> Paid advocacy of that kind by a member of the Legislature having the duty of supervision and a possible veto is a position in which he allows his interest to conflict with his duty, and, therefore, is a position which the law will not allow. ... And so I put this case primarily on that principle, that it is one in which the bargain raises a conflict between interest and the duty of considering whether the purchase should be finally approved, and is therefore against public policy.\(^8\)

His Honour later warned in *Home v Barber* that 'it is inherently dangerous that a man in such a position should place himself in a situation of temptation'.\(^9\)

These judicial descriptions of the fundamental obligation of members are appropriate in the context of avoiding a conflict of interest between the personal interests of a member, particularly those of a pecuniary nature, and the member's official duties.\(^10\) The rules are appropriately strict in that context. But in other contexts they are too simplistic, because they fail to explain how members should decide issues in the public interest within the confines of their political party and as representatives of their constituents. So which has primacy: the party, the electorate, or the nation? Even within the electorate, the conflicting interests of the constituents need to be handled. Indeed, it can be said that the primary function of a member is to reconcile all these competing representational interests.\(^11\)

Little guidance has been given to members on how to handle these competing interests. For instance, the UK *Code of Conduct for Members of the House of Commons*

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6. (1915) 21 CLR 89.
7. At 93-94.
8. At 102-103.
9. (1920) 27 CLR 494 at 501.
10. This duty was described by Lord Lyndhurst in *Egerton v Brownlow* 4 HLC 1 at 161: 'In the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, at least of all by those of a pecuniary nature.'
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only acknowledges the duty of members ‘to act in the interests of the nation as a whole; and a special duty to their constituents’. But Professor Paul Finn highlighted the difficulty of accommodating the pressures of a party system in his submission to the NSW Parliamentary ICAC Committee in 1992:

We have to realise that public office is based on a conflict between duty and interest. We would be deluding ourselves if we did not start on the premise that politics is concerned about compromise, partiality and self interest behaviour. The problematic question is where on the spectrum does that behaviour become unacceptable? 12

A hypothetical example illustrates the range of competing interests which can arise with members. How does a member decide whether to support proposed legislation which restricts the logging of timber when his or her political party supports a policy of environmental protection, a significant part of the electorate represented depends on a forestry industry, and the member’s family operates a transport business in connection with that industry?

The last of these considerations, a personal or private interest, should be declared in any debate the member engages, whether inside or outside the House. Such an interest should be given no special weight other than that which it deserves as part of assessing the effect of the proposed legislation on ancillary industries. As for the other two interests, it is not simply a case of deciding which is the more important to the member; each should be carefully weighed in an endeavour to achieve the best outcome for the local and Australian community. This might entail reaching a compromise which allows the forestry industry to operate within ecologically sustainable development guidelines. But none of the mechanisms considered in this book provides detailed guidance as to how to resolve a conflict between party and electorate interests. Although a few ethical dilemmas may be covered by codes of conduct or other rules, such as those in relation to the use of electorate facilities for party purposes or re-election, it is clearly not feasible to provide detailed guidance to cover every ethical dilemma. On the other hand, more specific rules have been developed to deal with the conflict between the pecuniary or personal interests of members and their official duties. To these we now turn.

Mechanisms dealing with a conflict of interest

Mechanisms dealing with a conflict of interest have one or more of three objectives: avoidance, declaration or resolution.

Avoidance

Preventive mechanisms to avoid a conflict of interest arising require that the personal interest be disposed of or the individual be disqualified from public office.

12 P Finn, oral submission to the NSW Parliamentary ICAC Committee 1992.
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In relation to members of parliament, the latter approach was favoured by the prescription of grounds of disqualification (see Part I). Those grounds are premised on the view that to owe a foreign allegiance, be a government contractor, or hold another public office raises such a serious conflict of interest to warrant disqualification from parliamentary office.\(^{13}\)

The alternative approach of dispensing with the personal interest is a more contemporary response. For instance, in most States the public office ground of disqualification permits a newly elected member to renounce that office or lose it automatically on being elected. However as a general rule members, unlike ministers, are not asked to dispense with their personal interests. Instead, a conflict of interest is allowed to arise provided this is declared at the appropriate time.

**Declaration**

Essentially, there are two ways a declaration may be made. The first is described as an ad hoc declaration which ought to be made whenever a member finds that a personal interest conflicts with his or her duties as a member. The other way is by way of a declaration of personal interests to a register of interests. Both of these mechanisms are considered further below.

**Resolution**

Where a conflict of interest arises (whether identified by declaration or otherwise), it is imperative that there be some well-established procedure to ensure that the conflict is removed or resolved and that any decision made or action taken is not tainted by it. Basically, there are two possible responses:

1. divest the member of his or her public duty or decision-making power; or
2. authorise the member to perform his or her public duty despite the personal interest.

The second of these is the one usually adopted at the parliamentary level because the first approach would effectively disenfranchise the member’s electorate. The Bowen Report warned of this danger:

> [O]nly in exceptional circumstances of an immediate and substantial conflict of interest should a Member of Parliament be required to abstain from voting or speaking. To require otherwise would effectively disfranchise his electors in relation to the matter under debate.\(^{14}\)

This chapter examines both the extent to which members in Australia are under an obligation to declare their personal interests and the manner in which such conflicts of interest are resolved.

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\(^{13}\) The other grounds of disqualification (bankruptcy and criminal conviction) are concerned principally with the integrity of members rather than with conflicts of interest.

\(^{14}\) Bowen Report at para 7.17.
The initial ethical response to the realisation that a conflict of interest has arisen between one's public duties and personal interests is to declare that conflict to the appropriate authority or party. Essentially, two mechanisms have been developed to facilitate the declaration of a conflict of interest by members. The first, referred to as an ad hoc declaration, simply involves the making of a declaration each time a member becomes aware of a conflict of interest between his or her personal interests and official duties. The other mechanism is a register of interests which comprises the declarations of a range of interests made by members on entering parliament. These declarations of personal interests are usually made even before any conflict of interest arises. Hence, they differ from ad hoc declarations in that they tend not to reveal a conflict of interest but merely provide a database from which future conflicts may be detected. Given this difference, there is much to be said for adopting both of these mechanisms.

Ad hoc declarations

In relation to members of parliament, one of the simplest mechanisms available in order to help avoid or resolve conflicts of interest is that of ad hoc disclosure of one's personal interests whenever they conflict or appear to conflict with the duties of public office. This mechanism of ad hoc disclosure strikes at the very heart of a conflict of interest by revealing the personal interest which is or appears to be in conflict with a member's public duties — and it does so at the precise moment when a decision is made or other action is to be taken by the member. Obviously, a register of interests cannot have the same immediate impact.

Yet in Australia, as elsewhere within the Commonwealth, many members are under no specific obligation to declare their personal interests whenever they conflict or appear to conflict with their public duties. Rather, the most common requirement is to abstain from voting or sitting in parliament on matters in which they are interested. However, provision is made for some members to declare their personal interests not only in parliament, but appropriately in any situation in which a conflict of interest arises while performing an official duty.

Before considering more closely the duties of Australian members in relation to a conflict of interest, it is necessary first to trace the earlier development of the obligation of ad hoc disclosure in the United Kingdom.

United Kingdom

There are no formally recognised standards for ad hoc disclosure of interests by members of the House of Lords other than the House having agreed in 1969 'if a Peer decides that it is proper for him to take part in a debate on a subject in which he has a direct pecuniary interest he should declare it'.15 The position in the case of members of the House of Commons is quite different. It is important to appreciate

15 HL Debates (1968-69), 302, c 523.
that two distinct rules evolved to govern the conduct of the members of that House. The earlier of the rules is that a member cannot vote in the House on a matter in which the member has a direct pecuniary interest.\textsuperscript{16} The narrow operation of this rule to voting in the House still permits participation in debate without any obligation of disclosure. Unfortunately though, the interpretation of a 'direct pecuniary interest' by Mr Speaker Abbott in 1811 and by subsequent Speakers' rulings restricted the operation of this rule so as to render it almost redundant. The 1969 Report from the Select Committee on Members' interests (Declaration) (the Strauss Committee Report)\textsuperscript{17} described the rule as 'for practical purposes null and void'.\textsuperscript{18} The often quoted ruling of Mr Speaker Abbott in 1811 is:

This interest must be a direct pecuniary interest, and separately belonging to the persons whose votes were questioned, and not in common with the rest of his Majesty's subjects, or on a matter of state policy.\textsuperscript{19}

Consequently, no member is prevented from voting on public Bills which are matters of 'state policy' and only occasionally have members been prevented from voting on personal Bills.\textsuperscript{20}

On only one occasion has a vote been disallowed on a public Bill.\textsuperscript{21} This was in 1892 when three members voted financial assistance for an East African railway company of which two of them were directors and shareholders and the third a shareholder. This disallowance of their votes is difficult to justify in terms of Mr Abbott's ruling.

If an objection is to be made to a vote on the basis of this rule from the 17th century, it must be made as soon as the result of a division is declared. This rule merely prevents a member from voting; it requires no actual disclosure, nor does it prevent the member from participating in debates of the House.

The second rule of the House of Commons which actually required ad hoc disclosure of a personal interest is of more recent origin, having appeared early this century as a custom of the House: namely, to declare personal interests in the House when making a speech and to Standing Committees.\textsuperscript{22} This requirement of ad hoc disclosure remained a custom or convention until 1974. The only other obligation

\begin{itemize}
  \item \textsuperscript{16} D Limon and W McKay (eds), \textit{Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament} (22nd ed) Butterworths London 1997, p 361.
  \item \textsuperscript{17} 4 HC (1969-70), 57.
  \item \textsuperscript{18} Para 31.
  \item \textsuperscript{19} HC Parl Debates (1811) 20, cc 1001-1012.
  \item \textsuperscript{20} See the Strauss Committee Report at para 28.
  \item \textsuperscript{21} D Limon and W McKay (eds), above note 15, p 362.
\end{itemize}
to make an ad hoc disclosure was in relation to personal Bills under SO 120 (Personal Business) where each member of a Committee on an opposed personal Bill was required to sign a declaration disclaiming any local or personal interest in the Bill before voting in Committee.

This second rule, to declare private interests when making a speech within the House, was seen as inadequate by the Strauss Committee in 1969 for a number of reasons: its limited application to only the House and Standing Committees; the uncertainty over the nature of the interest to be disclosed; and the lack of reference to the rule in such manuals as Erskine May. Accordingly, the Committee proposed a resolution for the House of Commons which the House finally adopted as a resolution on 22 May 1974:

That in any debate or proceeding of the House or its Committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.

The effect of this resolution was to upgrade the custom for ad hoc disclosure within the House to a rule of the House, to which attached the penal sanctions of contempt if the rule were breached. Importantly, disclosure was required not only while participating in debate but in all other proceedings of the House and of its committees which included, of course, voting within the House. At least equally significantly, the obligation to disclose extended to all informal dealings which a member may have had with ministers, other members and civil servants. There was also a rather demanding requirement to declare not only those interests which a member had, but also those the member had had or may be expected to have.

In view of the limited interpretation of ‘direct pecuniary interest’ in the earlier rule of the House of Commons which rendered it useless (at least in the case of public Bills), the 1974 resolution adopted a different and wider expression: ‘a relevant pecuniary interest or benefit of whatever nature, whether direct or indirect’. Notably, the obligation was still limited in terms of pecuniary interests. The Strauss Committee preferred to leave undefined this type of interest, relying instead on the common sense of members to interpret and apply the rule. However, the Committee did state:

An interest should be declared whenever a specific and relevant financial connection exists which might reasonably be thought to affect the expression of a Member’s views on the matter under debate or other activity.

23 4 HC (1969-70), 57, paras 38-42.
24 At para 14.
26 Now The Guide to the Rules relating to the Conduct of Members (of the UK House of Commons) at para 38 requires a ‘reasonable expectation’.
27 4 HC (1969-70), para 92.
28 At para 92.
Hence, remunerated employment, real estate holdings, shareholdings, financial investment, hospitality and sponsored travel were the types of financial interests which the Committee considered ought to be declared if relevant to the matters under discussion.²⁹

Apart from escaping the narrow interpretation of 'direct pecuniary interest' in the earlier rule of the House of Commons, this second rule also applied to any discussions between members and other members, ministers and even civil servants. The use of the word 'proceeding' in the second rule ensures that disclosure within the House is required, not only during debates or voting, but also when asking a question — a time when disclosure of one's personal interest can be just as essential as it is in debates. The position in the UK in practice is that provided a member declares his or her interest to the House, the right to participate in debate and to vote remains unaffected. Only if the earlier rule applies, which would occur in exceptional circumstances, is the member deprived of the right to vote.

The adoption in 1996 of the Code of Conduct for Members of Parliament and The Guide to the Rules relating to the Conduct of Members made little change to these rules. The Code of Conduct requires that members 'always draw attention to any relevant interest in any proceeding of the House or its Committees, or in any communications with Ministers, Government Departments or Executive Agencies'. The Guide provides quite valuable assistance to members. In particular, it states the test as to when a declaration should be made: 'if it might reasonably be thought by others to influence the speech, representation or communication in question.'³⁰

**Declaration of interests in UK select committees**

The detailed rules for ad hoc disclosure in relation to select committees are those contained in the First Report of the Select Committee on Members' Interests,³¹ which were later adopted by the House by resolution on 13 July 1992. Essentially, a member is obliged to withdraw from the committee's proceedings where the inquiry may directly affect a pecuniary interest of the member. Disclosure of other pecuniary interests must occur at the commencement of the committee's proceedings and at other relevant times, such as when the member asks a question of a witness which is directly related to those interests.

**Commonwealth**

Only since 1994 has the Senate required its members to make ad hoc disclosure of a conflict of interest. Such a requirement existed for a short period in the House of Representatives before it was revoked in 1988. Unfortunately, this occurred because ad hoc disclosure was seen as unnecessary with a register of interests in place. However, the House of Representatives retained the disqualification from voting which was first adopted by the House of Commons. The positions in the Senate and in the House of Representatives are considered separately.

²⁹ At para 92.
³⁰ At para 39.
³¹ House of Commons Paper No 108; Session 1990-91.
House of Representatives

The obligations of members of the House of Representatives to disclose personal interests and refrain from certain conduct are prescribed by SO 196 and SO 335 and by various resolutions of the House. Until 1984, the only requirements were those prescribed by SO 196 and SO 326. The former simply adopts the first of the two rules discussed above of the House of Commons, with the express addition of the limiting requirements of Mr Speaker Abbott's 1811 ruling:

196. No member shall be entitled to vote in any division upon a question (not being a matter of public policy) in which he has a direct pecuniary interest not held in common with the rest of the subjects of the Crown. The vote of a Member may not be challenged except on a substantive motion moved immediately after the division is completed, and the vote of a Member determined to be so interested shall be disallowed.

It is clear that the restricted and almost defunct nature of the first rule of the House of Commons has been transcribed into the standing orders of the House of Representatives by SO 196. The need to remedy the deficiencies of SO 196 was recognised by the Bowen Report. This report recommended the adoption by the Australian Parliament of a resolution in substantially the same terms as those of the House of Commons resolution of 22 May 1974. However, it questioned the House of Commons requirements to disclose interests the member 'may be expected to have' as possibly too stringent and unnecessary. On the other hand, it suggested that non-pecuniary interests should also be disclosed. In making these recommendations, the Bowen Report relied much more on the mechanism of ad hoc disclosure than on a register of interests:

... in much of the public debate on the disclosure of interests, there has been confusion between declaration and registration. As a consequence, in the public mind, the advantages of registration have been overvalued and the benefits of declaration not sufficiently appreciated. It is not sufficiently recognised as the Strauss Committee did in relation to members of Parliament, that a general register is directed to the contingency and that an interest might affect an officeholder’s actions. The proper practice should be aimed at revealing an interest when it does so.

Although no resolution of the kind recommended by the Bowen Report was adopted by the Senate until 1994, a more limited obligation for ad hoc disclosure of certain personal interests was adopted by resolution of the House of Representatives on 9 October 1984. This was the fourth resolution adopted by the House on that
date. The preceding three resolutions established a public register of pecuniary interests of members of the House. The fourth resolution provided as follows:

(4) Declaration of interest in debate and other proceedings

That, notwithstanding the lodgment by a Member of a statement of the Member’s registrable interests and the registrable interests of which the Member is aware (1) of the Member’s spouse and (2) of any children who are wholly or mainly dependent on the Member for support, and the incorporation of that statement in a Register of Members’ Interests, a Member shall declare any relevant interest —

(a) at the beginning of his or her speech if the Member should participate in debate in the House, committee of the whole House, or a committee of the House (or of the House and the Senate), and

(b) as soon as practicable after division is called for in the House, committee of the whole House, or a committee of the House (or of the House and the Senate) if a Member proposes to vote in that division, and the declaration shall be recorded and indexed in the Votes and Proceedings or minutes of proceedings (as applicable) and in any Hansard report of those proceedings or that division:

Provided that it shall not be necessary for a Member to declare an interest when directing a question seeking information in accordance with standing order 142 or 143.

The obligation to declare ‘any relevant interest’ arose only when the member intended to participate in debate or to vote in the House or in committee. Unlike the 1974 resolution of the House of Commons, no requirement of ad hoc disclosure arose outside the House in discussions with ministers or the public service.

Furthermore, the nature of the interest to be declared — ‘any relevant interest’ — was left undefined, in contrast with the detailed definition of ‘registrable interests’ which were required to be declared to the Register of Members’ Interests. Instead of interpreting ‘relevant interest’ to refer to any interest which is or appears to be in conflict with a member’s public duties, it was interpreted by the House of Representatives Committee of Members’ Interests to mean those ‘registrable interests’ declared to the register.37 Yet this interpretation ignored the meaning of ‘relevant’; surely the interest is only relevant if it raises or appears to raise a conflict of interest. The Committee of Members’ Interests recommended to the House of Representatives either the revocation of the fourth resolution or its amendment so as to require only the declaration of pecuniary interests which could conceivably bring the member into a potential conflict of interest situation.38

Unfortunately, the House of Representatives adopted39 the former recommendation

35 At para 12.
39 HR Debates 30 November 1988, at 3511, 3518.
on 30 November 1988 by revoking the fourth resolution as unnecessary duplication, given the obligation to declare the same interests to the Register of Members' Interests. If these interests had already been declared, there was no justification for requiring their disclosure again on an ad hoc basis. The House obviously overlooked the benefit of an ad hoc declaration at the very moment when a member is speaking. It is submitted that the prudent approach would have been for the House to amend the fourth resolution to require the disclosure of only those interests which could conceivably bring the member into a potential conflict of interest situation.

Consequently, there is presently no obligation on the part of members of the House of Representatives to declare ad hoc any personal interest which is or appears to be in conflict with their public duties. Standing Order 196, as noted earlier, is of no practical effect. The declaration of registrable interests to the public register occurs only once after being elected to the House (that is, within 28 days of making and subscribing the oath or affirmation as a member), although any change to these interests must be notified within 28 days of their occurrence.

**Senate**

A decade after the House of Representatives adopted both mechanisms of ad hoc disclosure and a register of interests, the Senate resolved to follow suit in 1994. Despite the House of Representatives revocation of the fourth resolution, the Senate passed a resolution requiring the disclosure of any 'relevant interest' on an ad hoc basis in terms practically identical to those of the House of Representatives' fourth resolution. Disclosure is required when a member first begins to participate in debate and before voting in any division. As submitted earlier, this is clearly the most desirable approach. Significantly, the obligation is merely to disclose the interest; the member retains the capacity to participate fully in the deliberations of the Senate.

 Appropriately, the requirement to declare any 'relevant interest' has been interpreted by the Registrar of Senators' Interests to mean any interest from those required to be declared to the register which raises a conflict of interest. This is a judgment to be made sensibly by each senator.

40 Resolution on Registration and Declaration of Senators' Interests: Senate Debates 3 March 1994, Vol s 163, at 1417-1423. This resolution was adopted in 1994 following the resignation of the Minister for Environment, Sport and Territories, Ros Kelly, over her role in the 'Sports-Rorts Affair': see H Evans (ed), *Odgers' Australian Senate Practice* (9th ed) Department of Senate Canberra 1999, p 161.

41 See para 5 of the Resolution on Registration and Declaration of Senators' Interests.

42 See the Advice from the Registrar of Senators' Interests (Peter O'Keefe) to the Committee of Senators' Interests entitled 'Oral Declaration of Relevant Interests in the Senate' (July 1998) in Appendix 6 to the 1998 *Annual Report of the Committee of Senators' Interests* (Report 1/1999) at 30-31: 'Interests ... which a reasonable person would consider capable of being advanced by the outcome of a particular debate or vote so that there is a risk that the senator's natural concern to advance them may influence performance of their duty to act in the public interest'.
Committees

By SO 335 no member of the House of Representatives can sit on a committee if he or she has 'any direct pecuniary interest' in the subject of the inquiry. This, like SO 196, adopts the terminology which was so narrowly interpreted by Mr Speaker Abbott to require no disclosure on matters of public policy. But where a conflict of interest arises outside the narrow scope of SO 335, the practice is for members to declare this to any committee on which they serve. This is despite the revocation in 1988 of the fourth 1984 resolution which required ad hoc disclosure both in the House and its committees. 43

Similarly, by SO 27(5) no senator can sit on a committee 'if the senator has a conflict of interest in relation to the inquiry of the committee'. However, this is interpreted narrowly to apply only where there is 'a real, immediate and personal conflict' such as an inquiry into the affairs of the senator. 44

In less direct instances of a conflict of interest, para 5 of the 1994 resolution merely requires senators to declare their interest at the commencement of the committee's deliberations and at the time of any division — preserving the right to participate fully in the committee's deliberations. Such a disclosure would be required where, for instance, there is an inquiry into the oil industry and a senator owns a relatively small parcel of shares in an oil company. On the other hand, if the inquiry is into the operations of that company, SO 27(5) would probably apply to prevent the senator from sitting on that committee.

States and Territories

The ad hoc declaration of a conflict of interest at the State and Territory level is governed primarily by standing orders. Most State Houses have simply adopted the first rule of the House of Commons with its restricted scope of operation to private Bills and its prohibition against voting. There is in Victoria, however, a statutory requirement for ad hoc disclosure of personal interests, 45 while codes of conduct in NSW and Tasmania impose additional requirements of disclosure. The obligations of State members vary between the upper and lower Houses.

Members of the lower Houses

Members of the lower House of each of the State Parliaments are prevented from voting in the House if the member has a direct pecuniary interest in the matter. This prohibition against voting only is found in the Standing Orders of the lower Houses of NSW, 46 Queensland, 47 South Australia, 48 Tasmania, 49 Victoria, 50 and Western

45 Members of Parliament (Register of Interests) Act 1978 (Vic), s 3 (1)(d).
46 Legislative Assembly of NSW, SO 186-187.
47 Legislative Assembly of Queensland, SO 158.
48 House of Assembly of South Australia, SO 170.
49 House of Assembly of Tasmania, SO 203.
50 Legislative Assembly of Victoria, SO 2.
It is, of course, based on the first rule of the House of Commons discussed above, and hence, like SO 196 of the House of Representatives, attracts the same restricted interpretation accorded to the House of Commons' rule by Mr Speaker Abbott's 1811 ruling.

Notably, in Western Australia, the description of the interest is somewhat wider, but in substance no different from a direct pecuniary interest — namely, 'an immediate direct personal pecuniary interest and does not include such an interest which is general'. Similar provision is also made in Tasmania.

In 1946, Mr Speaker Brassington in the Queensland Legislative Assembly made a Statement on Pecuniary Interest in relation to the former SO 158, which provided:

A Member shall not be entitled to vote either in the House or in a Committee upon any question in which he has a direct pecuniary interest, and the vote of any Member so interested shall be disallowed.

The Speaker adopted the definition of direct pecuniary interest given by Mr Speaker Gully of the House of Commons in 1898:

There must be a direct pecuniary interest of a private and particular and not of a public and general nature, and where the question before the House is of a public and general nature and incidentally involves the pecuniary interest of a class, which includes Members of the House, they are not prevented by the rule of the House from voting.

This interpretation was followed in the Legislative Assembly of Western Australia in 1935 when the Speaker ruled that members who belonged to the legal profession were entitled to vote on proposed amendments to the Legal Practitioners Act establishing a legal indemnity assurance fund.

A further useful definition was given by the Queensland Members' Ethics and Parliamentary Privileges Committee in 1996:

The definition of what constitutes a 'direct pecuniary interest' is not easy. In this Committee's view it constitutes a direct financial benefit accruing to the Member or a trust company or other business entity in which the Member has an appreciable interest. It would also extend to such an interest held by a Member's spouse, domestic partner or dependent child.

51 Legislative Assembly of Western Australia, SO 2, SO 195-196.
52 As above.
53 House of Assembly of Tasmania, SO 203.
55 A new SO 158 was substituted on 4 June 1999 in similar terms.
57 WA Parl Debates, 21 November 1935, at 1936.
However, it is not to be taken to extend to interests held in common with the public, or a large section of the public; or to vocational interests or matters of public policy.\textsuperscript{58}

The Committee noted that it was a 'rare occurrence' when this definition was satisfied.

The general rule in relation to disallowing a member's vote is that a motion needs to be put to disallow the vote.\textsuperscript{59} This of course gives the House the option to allow or disallow the vote. Express provision to this effect is found in SO 204 of the Tasmanian House of Assembly and SO 158 in Queensland.

An interesting issue which is now confined to the NSW Parliament is whether its Houses possess, by virtue of the principle of necessity, the power to disallow the vote of a member pursuant to a standing order. Despite the seriousness of disallowing a vote and depriving the relevant constituents of their parliamentary representative, direct conflicts of interest are equally of concern. The avoidance of the latter appears necessary to protect the integrity of the parliamentary process.

\textit{Territories}

The position in the two Territories differs from that in the States. Members of both Legislative Assemblies are prevented not only from voting but also from participating in any debate. However, these restrictions only arise in circumstances where they are party to or have a direct or indirect interest in a contract with the Territory.\textsuperscript{60}

\textbf{A wider obligation}

While no obligation of ad hoc disclosure is prescribed by any of these standing orders, such an obligation is prescribed in Victoria by s 3(1)(d) of the \textit{Members of Parliament (Register of Interest) Act 1978} (Vic):

\begin{quote}
A Member shall make full disclosure to the Parliament of —
\begin{enumerate}
\item any direct pecuniary interest that he has;
\item the name of any trade or professional organization of which he is a member which has an interest;
\item any other material interest whether of a pecuniary nature or not that he has in or in relation to any matter upon which he speaks in the Parliament.
\end{enumerate}
\end{quote}

A wider duty of ad hoc disclosure is also prescribed by codes of conduct in NSW and Tasmania. In the codes of both the NSW Houses,\textsuperscript{61} cl 1 requires members to declare any

\begin{itemize}
\item \textsuperscript{58} Members' Ethics and Parliamentary Privileges Committee, \textit{Review of the Register of Members' Interests of the Legislative Assembly} Report No 2 October 1996, p 4.
\item \textsuperscript{59} Queensland SO 158; Tasmania House of Assembly SO 204.
\item \textsuperscript{60} Section 15 Australian Capital Territory (Self-Government) Act 1988 (Cth), Legislative Assembly of the ACT, SO 156; s 21(3) Northern Territory (Self Government) Act 1978 (Cth).
\end{itemize}
conflict of interest whenever it arises in the execution of their office. Unlike the Victorian requirement, the duty is not confined to matters arising in parliament:

*Disclosure of conflict of interest*

(a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.
(b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or a Committee, or in any other public and appropriate manner.
(c) A conflict of interest does not exist where the Member is only affected as a member of the public or a member of a broad class.

Note that this provision prescribes an effective obligation on the part of members to disclose not only a pecuniary interest but 'any other material interest'.

Similarly, the Code of Ethical Conduct for Members of the House of Assembly of Tasmania in SO 2A requires members to declare a 'pecuniary interest in any matter being considered as part of their official duties as a Parliamentarian'. This is the optimum requirement given the significant role played by members in making representations to ministers and others on behalf of their constituents.

*Members of upper House*

Members of the upper Houses in all States (endowed with a second chamber) except Western Australia are subject to similar obligations to those imposed on members of their respective lower Houses. The same obligation not to vote on any question in which the member has a direct or pecuniary interest exists for members of both Houses in NSW, South Australia, and Victoria. However, the position in Tasmania is quite different. Instead of simply preventing a member from voting on any question in which the member has a direct pecuniary interest, SO 155(1) of the Legislative Council specifically requires the member to declare such an interest to the Council and empowers the Council to decide upon motion whether the member may vote. Standing Order 155(2) disallows any vote of a member who fails to declare such an interest.

Again, the statutory obligation to declare in parliament arises for members of the Victorian Legislative Council. Also, by virtue of their code of conduct, the wider duty of declaration is owed by members of the NSW Legislative Council when performing official duties.

*Committees of lower Houses*

The Standing Orders of the lower Houses of NSW, South Australia and Western

62 Legislative Council of NSW SO 126.
63 Legislative Council of South Australia SO 225.
64 Legislative Council of Victoria SO 155.
65 Legislative Assembly of NSW SO 317.
66 House of Assembly of South Australia SO 321.
Australia disqualify members from sitting on select committees if they are in some way interested in the matter before the committee. The nature of the interest varies: 'a pecuniary interest' in Western Australia; 'a direct pecuniary interest' in South Australia; and in NSW, the member need only be 'personally interested'. No disqualification from sitting on a committee arises in Tasmania or Victoria, although in each State, members are disqualified from voting on matters before the committee in which they have a direct pecuniary interest.

In Queensland, members are neither denied the right to sit on or vote in committees, but SO 203 requires them to 'disclose to the Committee any conflict of interest the Member may have in relation to a matter before a Committee'. Note that the interest is not confined to a pecuniary interest. Similar obligations apply in NSW and Tasmania (by each code of conduct) and in Victoria (by statute).

The standing orders of both the ACT and the Northern Territory prevent members from sitting on a committee in which they have a direct pecuniary interest (ACT) or are 'personally interested' (Northern Territory).

Committees of upper Houses

Members of the upper Houses of NSW, South Australia, Tasmania and Western Australia are prevented from sitting on committees if they have an interest in the subject of the inquiry. The nature of the interest again varies from being 'pecuniarily interested' in NSW, 'personally interested' in Western Australia (select committees only), to a direct pecuniary interest in South Australia and Tasmania. Members on standing committees of the Western Australian Legislative Council are only prevented from voting if they have a direct pecuniary interest. Similarly, in Victoria, SO 155 simply denies the right to vote. However, here again the statutory requirement to declare a conflict of interest arises under s 3(1)(d) of the Members of Parliament (Register of Interests) Act 1978 (Vic).

Nature of a pecuniary interest

The concept of a 'pecuniary interest' arises not only in this context of ad hoc disclosure but also occurs in connection with the disqualification of members having a pecuniary interest in a government contract. Further, it often arises in a more general way in relation to a register of interests, which is often confined to the declaration of

67 Legislative Assembly of Western Australia SO 357.
68 House of Assembly of Tasmania SO 205.
69 Legislative Assembly of Victoria SO 2.
70 Legislative Assembly of the ACT SO 224.
71 Legislative Assembly of the Northern Territory SO 263.
72 Legislative Council of NSW SO 238 and 257B.
73 Legislative Council of South Australia SO 379.
74 Legislative Council of Tasmania SO 234.
75 Legislative Council of Western Australia SO 343.
76 Legislative Council of Western Australia SO 326B.
pecuniary interests. In each of these contexts, the distinction may be drawn between
direct and indirect pecuniary interests — and any reference to a pecuniary interest
inevitably raises the distinction between a pecuniary and non-pecuniary interest.
It is important to identify in each of these contexts whether the relevant interest
is in a contract, a matter, an inquiry or something else. This obviously affects the
nature of the interest. Clear definitions of each of these descriptions of interests are
difficult to formulate.

A useful description of a pecuniary interest is given by the Riordan Report: '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.'

The difference between a direct and indirect pecuniary interest is not entirely clear.
The obvious situation to consider is where a member is a shareholder in a company
which possesses a direct pecuniary interest. The nature of a shareholder's interest
was considered in Chapter 4 in relation to the disqualification of government
contractors under s 44(v) of the Commonwealth Constitution. But the issue in that
context is whether the member as a shareholder has an indirect interest in the
government contract to which his or her company is a party. That is a narrow
inquiry compared with whether the member has a pecuniary interest per se.

In the context of ad hoc disclosure and a register of interests, the focus is broader.
Appreciating the challenge, as noted earlier, the Queensland Members' Ethics and
Parliamentary Privileges Committee attempted to define a 'direct pecuniary interest'
for the purposes of Mr Speaker Abbott's 1811 ruling:

[I]t constitutes a direct financial benefit accruing to the Member or a trust company
or other business entity in which the Member has an appreciable interest. It would
also extend to such an interest held by a Member's spouse, domestic partner or
dependent child. ... However, it is not to be taken to extend to interests held in
common with the public, or a large section of the public; or to vocational interest
or matters of public policy.

The Western Australian Commission on Government also considered that an
indirect pecuniary interest arose where the official's family, rather than the official,
receives the financial benefit. The Commission recommended that the obligation
of ad hoc disclosure extend to the disclosure of family interests in so far as they are
'a part of the financial arrangements of the member'.

Since the purpose of disclosure obligations is to deal with an apparent or actual
conflict of interest, technical legal interpretations of 'pecuniary interest' should be
eschewed in favour of a practical definition which looks to see if the member stands
in any way to benefit financially or materially from the situation. Any interests

77 Report of the Commonwealth Joint Committee on Pecuniary Interests of Members of
78 Members' Ethics and Parliamentary Privileges Committee, above note 59, p 4.
80 At para 9.2.4.5(2).
which fall outside this test must therefore constitute non-pecuniary interests. The alternative solution is to prescribe in some detail the nature of the interests required to be disclosed. This approach has been adopted in Canada where, for instance, in Manitoba, The Legislative Assembly and Executive Council Conflict of Interest Act 1983 presumes an ‘indirect pecuniary interest’ to exist where a member is sufficiently connected to a person, corporation, partnership or organisation which (or a subsidiary of which) has a direct pecuniary interest in the matter. The connection can be as a partner, guarantor or creditor of the other party, or in relation to corporations, as a shareholder (with 5 per cent of the issued capital stock), director or officer of the corporation.81 Overriding these intricate relationships is an exemption in respect of any interest valued at less than $50082 or, in the case of an interest in a government program, contract or service, valued at less than 1 per cent of the value of the program.83

Although the preferable course is to avoid complex definitions of this nature, unless members declare a conflict of interest in appropriate cases, detailed rules may become necessary.

Enforcement

If a member fails to comply with a standing order by voting in parliament when disqualified from doing so, a motion needs to be passed by the House to disallow that vote.

In Victoria, enforcement of the obligation of disclosure under s 3(1)(d) of the Members of Parliament (Register of Interests) Act 1978 lies with the appropriate House. By s 9 of the Act, a wilful contravention constitutes contempt of parliament and the member may be fined up to $2000 in addition to other sanctions able to be imposed for contempt. Failure to pay the fine within the prescribed time renders the member’s seat vacant.

Failure to comply with the obligation of disclosure found in the codes of conduct in NSW and Tasmania would constitute contempt of parliament even though this is not expressed in any of the codes. The sanctions for contempt lie with each House (see Chapter 5). However, in NSW, the Independent Commission Against Corruption (ICAC) is also empowered to make a finding of ‘corrupt conduct’ where there is a substantial breach of either code.84 Obviously this will not be the case with every failure to make an ad hoc disclosure.

Recommendations for reform

Only members of the Commonwealth Senate, of the NSW and Victorian Parliaments, and of the Tasmanian House of Assembly are obliged to make ad hoc disclosure of their interests. Indeed, the more common obligation prescribed by the

81 Section 3(1) The Legislative Assembly and Executive Council Conflict of Interest Act 1983.
82 Section 3(6).
83 Section 3(3).
84 Section 9 Independent Commission Against Corruption Act 1988 (NSW).
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standing orders of the Australian State Parliaments is merely to abstain from voting rather than one of disclosure, and even then the nature of the interest must be a direct one. Consequently there appears to be a need in Australia for an effective obligation of ad hoc disclosure to be imposed on members.

Apart from the sanctions able to be imposed, it is probably unimportant whether the obligation is imposed on members by a House resolution, standing orders or statute. What is important is that the obligation is drafted in sufficiently wide terms to cover the conflicts of interest which may arise in public office. For an effective obligation of ad hoc disclosure, the following need to be addressed: (1) when disclosure is required; (2) the nature of the interest to be disclosed; (3) consequences of disclosure; and (4) sanctions.

When disclosure is required

There seems to be no reason why an obligation of ad hoc disclosure is not appropriate in relation to all dealings which members have with each other within or outside parliament and with other public officials. To confine the requirement to parliamentary proceedings fails to address the many dealings members have with the executive branch and the private sector. This was recognised by the Nolan Committee in the United Kingdom:

It is particularly important to emphasise that this obligation exists on each and every occasion when a Member approaches other Members or Ministers on a subject where a financial interest exists. Such contacts are often informal and private, and are therefore where the greatest risk of impropriety arises.85

Nature of interest to be disclosed

The approach adopted here in Australia in relation to the limited obligations of disclosure and in the UK is to define the interest generally, leaving it to the members to decide whether they possess such an interest. The degree of specificity of interests to be disclosed will to some extent be dependent upon the particular sanctions imposed for non-disclosure. Where specific and severe penalties are prescribed for imposition by the courts, a far greater degree of specificity is needed than would be the case where the enforcement role is left to a parliamentary committee or to the House itself.

How, then, should this interest be defined? Should the interest be limited to one of a pecuniary nature or should it also cover a non-pecuniary interest? The 1974 resolution of the House of Commons refers only to pecuniary interests, as do the standing orders of most of the Australian State Parliaments and the codes of conduct in NSW and Tasmania. The notable exception is the statutory requirement in Victoria to declare not only ‘any direct pecuniary interest’, but also ‘any other material interest whether of a pecuniary nature or not’.86 Non-pecuniary interests cover personal interests which arise in assisting or promoting

85 Committee on Standards in Public Life First Report at para 63.
86 Members of Parliament (Register of Interests) Act 1978 (Vic), s 3(1)(d).
the interests of a relative or friend, or the interests of an organisation or association such as a sporting, cultural or charitable body of which the member of parliament is a member. Also included would be the case where a member has made a complaint to the House of a breach of privilege. That member should not sit on any committee which investigates that complaint and should probably abstain in any vote in the House on that matter. There is a clear need for these interests to be disclosed.

A further aspect to consider is whether the interests of a member’s family should also be disclosed. This is likely to be a controversial issue in the same way that the obligation to disclose the interests of one’s immediate family to a register of interests has been controversial. Whatever view is taken on the one mechanism would presumably apply to the other. Despite the invasion of privacy suffered by a member’s family, there are sufficient examples in public life where at least an appearance of a conflict of interest has arisen to justify such an intrusion. Significantly, the now revoked fourth resolution of the House of Representatives also required a member to disclose any ‘relevant interests’ of the member’s spouse and dependent children. It is essential that this obligation to declare family interests be confined to those interests of which the member is aware.

It is, of course, necessary to maintain a sense of balance and proportion in judging whether the nature of the personal interest involved raises or even appears to raise a conflict of interest. If a member or a member’s spouse happens to be a member of the St Vincent de Paul Society, this is not to say that such an interest must be disclosed in a debate on homelessness in Australia; only if the member feels that their degree of involvement in the Society could be seen to influence their stance on the issue is disclosure of that interest necessary. If in doubt, disclosure is the preferable option. In many cases, a simple statement that one is a member or associate of a particular organisation is all that is required. Ultimately, the responsibility rests with the member.

87 See Demicoli v Malta (1992) 14 EHRR 47, where the proceedings of the Maltese House of Representatives which found the editor of a magazine guilty of contempt were held by the European Court of Human Rights to infringe art 6 of The European Convention on Human Rights because the two members of the House who had made the complaint of contempt had participated.


89 As above.

90 It was this same test which Lord Hoffman was held to have failed to apply correctly to himself which caused the setting aside of the decision of the House of Lords allowing the extradition of Senator Pinochet from the UK in 1999. It was held that Lord Hoffman ought to have disqualified himself from hearing the matter on account of his chairmanship of Amnesty International Charity Ltd which was connected with Amnesty International, an intervener in the proceedings: R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte (No 2) [1999] 1 All ER 577 (HL).
Consequences of disclosure

Mere disclosure of a personal interest reveals but does not necessarily resolve a conflict of interest. Further action may be necessary to ensure that the public interest is protected. However, in most situations it is sufficient for members to disclose their personal interest in the course of performing their official functions. The one obvious exception is when sitting on a parliamentary committee which is inquiring into a matter in which the member has a direct personal interest. In such cases, the member ought to disclose the interest and abstain from sitting on that committee. Otherwise, members who have made appropriate disclosure should be permitted to continue to perform their official functions, whether this be in parliamentary debates, committee proceedings, or in making representations to ministers or other individuals or bodies. To require members to abstain from performing these functions unnecessarily deprives their constituents of parliamentary representation, nor is it likely that their continued participation will confer improper benefits on themselves or others. At this point a distinction can be drawn between members and ministers. Ministers are usually required to abstain from exercising their executive powers in matters in which they are personally interested because of the risk of self-aggrandisement. On the other hand, the functions of members do not provide the same opportunity or risk.

A more robust approach is taken in Canada where certain Provinces go well beyond merely requiring members to declare their personal interests. They are required to disclose not only the nature of any direct or indirect pecuniary interest but must also withdraw from the proceedings and not attempt to influence their determinations. The Provinces which have adopted this approach are Manitoba, Nova Scotia, and Prince Edward Island. Of particular interest is the approach adopted in Manitoba where, by virtue of s 4 of The Legislative Assembly and Executive Council Conflict of Interest Act 1983, members are obliged:

(i) to disclose the general nature of any direct or indirect pecuniary interest or liability, which they or their dependents have in any matter which arises at a meeting of the Legislative Assembly, a committee thereof or a Crown agency;
(ii) to withdraw from the meeting immediately with no right to participate or vote; and
(iii) to refrain from influencing the determination of the matter in any way.

Even if a member misses one of these meetings at which they would have had to disclose their interest, they are still required to disclose that interest at any subsequent meeting and to refrain from influencing the determination of the matter.

90 Section 4 The Legislative Assembly and Executive Council Conflict of Interest Act 1983.
92 Section 2 Members' Integrity Act 1994, ss 7 and 10 Conflict of Interest Act 1986.
93 Section 9 The Legislative Assembly and Executive Council Conflict of Interest Act 1983.
Sanctions

The most potent sanction for members is that of adverse publicity. A failure to make an ad hoc disclosure within parliament or elsewhere, if discovered, will severely embarrass a member. Preferably, infringements of the obligation to disclose or to act afterwards in the prescribed manner should be dealt with as contempt of parliament by the House to which the member belongs. Consistent with the more stringent approach found in Manitoba, there enforcement lies with the Legislative Assembly and with the courts upon complaint from a voter.

Members as ‘public officers’

The position of a ‘public officer’ attracts certain duties and liabilities at common law and in equity. It would appear that in Australia, both members of parliament and ministers are public officers within the definition given in *R v Whitaker*:

> an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.

Various common law offences and equitable remedies attach to misconduct by public officers. Of these, at least two rules of law may connect with a failure to disclose a personal interest in the execution of one’s public duties. First, public contracts and any other official action may be set aside or avoided where they have been negotiated or decided upon by a public officer who fails to disclose a personal interest in the matter. This principle operates irrespective of any corrupt or wilful intent on the part of the officer. It is more likely to arise with ministers in administering their departments than with members of parliament. Parliamentary proceedings are not within the scope of this principle. Second, private contracts which tend to create a conflict of interest with a member’s duty are illegal on grounds of public policy: *Wilkinson v Osborne; Home v Barber.*

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95 Section 23(5).
96 Section 20.
97 See P D Finn, ‘Public officers: some personal liabilities’ (1977) 51 ALJ 313.
98 In the United Kingdom, ministers but not members of parliament are regarded as ‘public officers’ — see the *Report of the Royal Commission on Standards of Conduct in Public Life 1976* (the Salmon Report), Cmnd 6524, paras 307 and 308.
99 *R v White* (1875) 12 SCR (NSW) (L) 322; affirmed by a majority of the High Court in *R v Boston* (1923) 33 CLR 386 at 392-393, 401-402 and 408.
100 *Smith v Christie* (1920) 55 DLR 68.
101 [1914] 3 KB 1283 at 1296.
102 P D Finn, above note 97 at 316-317; see *R v Hendon RDC; Ex parte Chorley* [1933] 2 KB 969, and *Dimes v Grand Junction Canal* (1852) 3 HLC 759; 10 ER 301.
103 P D Finn, above note 97 at 316 note 38.
104 (1915) 21 CLR 89.
105 (1920) 27 CLR 494.
Although reliance on the first of these rules in Australia appears to have been minimal, it is worth retaining. These rules do not make redundant the formal mechanisms of ad hoc disclosure which encourage the actual disclosure of personal interests. Hopefully, they set in place procedures whereby action can be taken untainted by any real or apparent conflicts of interest.

Conclusion on ad hoc disclosure

A fundamental standard of ethical behaviour of members is to disclose conflicts of interest whenever they arise in the performance of their official duties. A failure to do so at the critical moment when a member speaks or makes representations undermines the public trust which members must so jealously protect. It is an obligation which arises as much outside as inside the parliamentary chamber. In most situations, disclosure of the conflict is all that is needed, for this allows the persuasiveness of the member's views to be more accurately assessed. The adoption of a register of interests, which is considered next, provides no justification for dispensing with an obligation of ad hoc disclosure. Both mechanisms are needed to ensure that all conflicts of interest are revealed.

Register of interests

A register of members' interests has been adopted by every House in Australia at the Commonwealth, State and Territory level. The popularity of this mechanism of declaration is due in part to the ease with which it may be implemented and the clear message it sends of transparency in parliamentary affairs. Their adoption at the parliamentary level is generally matched at the executive level with ministers and public officials also declaring their personal interests to some form of register.

In the past, debate has waged over the merits of this mechanism. The arguments for and against a register were closely examined in both the Riordan Report and the subsequent Bowen Report. The principal arguments against a register are that it:

- constitutes an invasion of privacy;
- renders members vulnerable to political attack;
- deters people from entering public life;
- is too easy to avoid;
- denigrates parliament and impugns the integrity of members;
- is unnecessary, as it is sufficient to rely on the opposition and the media; and
- duplicates information already available from other sources.

On the other hand, a register of interests has been supported on several grounds including that it:

allows proper weight to be given to the views expressed by members;
• increases the likelihood of detection of conflicts of interest;
• consequently enhances public confidence; and
• avoids fabricated conflicts of interest.

The advantages on their face outweigh the disadvantages, especially if the latter are addressed in the specific requirements of the register. The invasion of privacy can be reduced by limiting public access to those details which relate to the member’s family. Avoidance of the register’s requirements may be thwarted by careful and specific prescriptions of interests to be declared.

Although the Riordan Report recommended the adoption of a register of interests for members of the Commonwealth Parliament, the Bowen Report preferred to rely on the mechanism of ad hoc declaration. However, in the end, the arguments in favour have obviously won through, as there is a register of interests in place in every Australian legislature. Yet to what extent their adoption has reinforced the integrity of members is difficult to assess. A cynical reviewer would argue that registers of interests provide an opportunity to undermine that integrity by exposing deficient declarations.

On the other hand, declarations to a register are likely to remind members of their obligation to be constantly aware of potential and actual conflicts of interest. That deterrent effect is impossible to measure.

A comparison of the various Australian registers for members involves a consideration of several key aspects: the method of establishing the register; the declaration of family interests; access to the register; interests to be declared; frequency of declarations; and enforcement. Each of these is considered in turn.

Establishment of register

Various means have been adopted to establish a register of interests. The most prevalent is by legislation which was used in NSW,108 South Australia,109 Tasmania,110 Victoria,111 Western Australia112 and the Northern Territory.113 For the House of Representatives,114 the Senate,115 Queensland116 and the ACT,117 the

108 Parliamentary (Disclosure of Interests) Act 1996 (Tas), made pursuant to s 14A Constitution Act 1902 (NSW).
110 Parliamentary (Disclosure of Interests) Act 1996 (Tas).
111 Members of Parliament (Register of Interests) Act 1978 (Vic).
113 Legislative Assembly (Register of Members’ Interests) Act 1982 (NT).
114 Three resolutions adopted on 9 October 1984, amended on five occasions up to 1997.
115 Standing Orders 22A and resolution of 17 March 1994 (J 1421).
116 Resolution for Members’ Register of Interests (as of 1 July 1999).
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registers were established by resolution.
The two most significant advantages of establishing a register by legislation are that it usually ensures a common regime for both Houses of a bicameral parliament and any change to or abandonment of a register requires the approval of both Houses. It is noted below that a statutory basis does not necessarily mean that the Houses lose control of the register.

Declaration of family interests

In Australia, four different approaches have been adopted to the declaration of family interests.
The first is the disclosure of family interests, so far as the member is aware, with full public access — the position in the Commonwealth House of Representatives, South Australia and the ACT (note that in South Australia that family interests need not be distinguished from those of the member).118 In the ACT, access is given through the Clerk's Office on request, provided the member concerned is advised of the name of the person seeking access and the reason for doing so.
The second approach is to require disclosure of family interests with limited access. This is the position for the Senate and in Queensland. The declaration of senators' family interests are kept separate, with public access only permitted on the direction of the Committee of Senators' Interests. In Queensland, members declare their own interests to a public register and those of their family to a 'Register of Related Persons' Interests' but only in so far as they are aware of such interests. Access to the latter register is limited to various officials for monitoring purposes.119
Thirdly, there is partial disclosure of family interests to which full public access is given — the position in Victoria and the Northern Territory. In Victoria, the only family interest expressly required to be disclosed is that under the general catch-all category of any other substantial interest 'of a member of [the member's] family of which the member is aware' which may result in a conflict of interest.120 A similar provision exists in the Northern Territory in addition to the disclosure of any beneficial family interests in a trust.121
Finally, no specific disclosure of family interests is required in NSW, Tasmania or Western Australia. In NSW, ICAC recommended the disclosure of family interests so far as the member is aware.122 At present it is within each member's discretion to

119 The Members' Ethics and Parliamentary Privileges Committee, above note 58, in the absence of any obvious problems, recommended no change to this position (rec 9) although it recommended fuller disclosure of family trusts (recs 19 and 20).
120 Section 6(2)(a) Members of Parliament (Register of Interests) Act 1978 (Vic).
121 Section 5(1)(b) and (e) Legislative Assembly (Register of Members' Interests) Act 1982 (NT).
122 See the First Report of the Legislative Assembly Standing Ethics Committee (October 1997) at 30; ICAC, Investigation into Parliamentary and Electorate Travel: Second Report — Analysis of administrative systems and recommendations for reform December 1998 which refers to a case where members of the NSW Parliament booked travel arrangements with a particular travel agent associated with a member's family.
disclose family interests under the general catch-all category of interests which might appear to raise a conflict of interest.\textsuperscript{123} Similarly, in Western Australia, the general catch-all category appears wide enough to include family interests.\textsuperscript{124} Less clear is the comparable category in Tasmania which appears to be confined to other such interests of the member.\textsuperscript{125}

Given the invasion of privacy, the declaration of family interests is the most controversial aspect of a register of interests. Critical in this debate is the definition of ‘family’ and whether public access is permitted. All registers requiring the declaration of family interests include those of the member’s spouse and dependent children. Others also include de facto spouse, children whether dependent or not, and other dependents. The widest definition is that given in Queensland\textsuperscript{126} to a ‘related person’:

‘related person’, in relation to a member, means —

(a) the spouse of the member;
(b) a child of the member who is wholly or substantially dependent on the member; or
(c) any other person —

(i) who is wholly or substantially dependent on the member; and
(ii) whose affairs are so closely connected with the affairs of the member that a benefit derived by the person, or a substantial part of it, could pass to the member.\textsuperscript{127}

‘Spouse’ is defined to include a de facto spouse. ‘Child’ is defined to include ‘an adopted child, a step-child or an ex-nuptial child’.

The South Australian register uses the expression ‘a person related to a Member’ which, while not defined as widely in some respects as the Queensland definition, goes further by including family companies of members and trustees of family trusts.\textsuperscript{129}

The declaration of the interests of a member’s dependents is more easily justified than those of a financially independent spouse. In the latter case, some amelioration can be provided by confining the member’s obligation to declare only those interests

\textsuperscript{123} Clause 16 Constitution (Disclosures by Members) Regulation 1983 (NSW).
\textsuperscript{124} Section 15 Members of Parliament (Financial Interests) Act 1992 (WA). Note that the WA Commission on Government Report No 4 (July 1996) recommended in para 9.2.4.5 that there be a requirement to register the financial interests of (the member’s family ‘in so far as they are part of the financial arrangements of the member’).
\textsuperscript{125} Section 9 Parliamentary (Disclosure of Interests) Act 1996 (Tas).
\textsuperscript{126} The ACT register is also widely drafted to include all ‘who are wholly or mainly dependent on the Member for support’.
\textsuperscript{127} Clause 1 Resolution for Members’ Register of Interests (Qld).
\textsuperscript{128} Section 2(1) Members of Parliament (Register of Interests) Act 1983 (SA).
of which the member is aware. Members are less likely to have any detailed knowledge of the business affairs of their spouses engaged in significant business undertakings or professional practices.

The arguments against the declaration of family interests are principally twofold: the invasion of privacy and the difficulty for a member in knowing of the relevant interests. On the other hand, their declaration can be justified on two grounds: first, that family interests are just as capable of raising an actual or apparent conflict of interest as the member's own interests and second, that their exclusion would leave open an avenue of avoidance, the mere existence of which could undermine public confidence in the register.

Access to the register

Public access is available to all registers except in Victoria and in relation to the details of family interests in the Senate and in Queensland. Access is granted in two ways. First, the register may be inspected at the office of the Clerk of the House (or that of the appropriate official) during normal business hours. Secondly, the register is tabled in each House within 14 to 21 days of its compilation and published as a parliamentary paper. Any changes to the register are also tabled. Provision is usually made permitting at least parts of the register to be copied manually or by photocopying. Restrictions are often imposed on the publication of the details obtained to ensure that they are fair and accurate. In the Northern Territory, conditions are attached to public access: access is not given to the whole register but only in respect of a particular member and family, and the person inspecting must provide his or her name and address, which is recorded and publicly available.

Similarly, access is given to the ACT register only through the Clerk's Office on request provided the member concerned is advised of the name of the person seeking access and the reason for doing so.

The necessity for public access to the register is beyond question: it is essential if the register is to achieve its twin objectives of enhancing public confidence in the integrity of members and providing a means of monitoring any potential conflicts of interest. A closed register is incapable of achieving the first of those objectives, while the second would require an expensive monitoring authority which is unlikely to be as effective as public monitoring. It would seem to be only a matter of time before the registers are made available on the internet.

In Victoria, public access is confined to a summary of the register's details published as a parliamentary paper. Access to the Senate register is confined to the members of the Committee of Senators' Interests and the Registrar unless the Committee tables those details in the Parliament. In Queensland, the Register of Related Persons' Interests may only be inspected by the Speaker, the Premier, other

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129 This is provided in cl 5 of the Resolution for Members' Register of Interests (Qld).
130 Section 8(1) Legislative Assembly (Register of Members' Interests) Act 1982 (NT).
131 Sections 7(4) and 8 Members of Parliament (Register of Interests) Act 1978 (Vic).
parliamentary Leaders, the Chairman and members of the Members' Ethics and Parliamentary Privileges Committee, and the Criminal Justice Commission. 132

**Interests to be declared**

The prescription of the interests requiring declaration is both critical and difficult. Unless all interests capable of raising a conflict of interest are covered, public confidence is unlikely to improve. Yet prescribing all interests creates a list of such complexity and legality that it confuses both members and the public. In the end, members must comply within the spirit of the register, and correspondingly, the public must at times make allowances for the difficulties of compliance.

Significantly, none of the Australian registers requires a declaration of the value of the various interests disclosed. This endeavours to ensure that the register is not one of wealth but merely one of interests. 133

The emphasis of most registers is on the pecuniary interests of members (and of their families). However, conflicts of interest are capable of arising also with non-pecuniary interests. 134 Therefore, it is desirable that there be a declaration of interests under four categories: assets; liabilities; sources of income and other benefits; and other interests. All the Australian registers cover these four categories except those in Victoria and the Northern Territory. 135

The most comprehensive list of interests was first prescribed for the House of Representatives. The following provides a mere outline of the various interests to be declared under those four categories:

- **assets** — shareholdings, company positions, beneficial interests in trusts, trusteeships, partnership interests, real estate, debentures and other investments;
- **liabilities**;
- **sources of income and other benefits** — for example, gifts and hospitality; and
- **other interests** — for example, memberships of organisations.

There is also a catch-all category which covers any other interests where a conflict of interest with a member's public duties could foreseeably arise or be seen to arise. Three different approaches can be found at the State and Territory level for disclosing other interests which may appear to give rise to a conflict of interest. The

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132 Clause 13.
133 The WA Commission on Government Report No 4 (July 1996) recommended that no value be disclosed: para 9.2.3.5.
135 Although liabilities not expressly included, the catch-all category in each (s 6(2)(l) Members of Parliament (Register of Interests) Act 1978 (Vic) and s 5(1)(c) Legislative Assembly (Register of Members' Interests) Act 1982 (NT)) would cover them if they are likely to raise a conflict of interest.
least demanding is that adopted in NSW,\textsuperscript{136} Tasmania\textsuperscript{137} and Western Australia,\textsuperscript{138} where a member has a discretion whether or not to disclose such an interest. Next is the approach in South Australia,\textsuperscript{139} Victoria,\textsuperscript{140} the ACT\textsuperscript{141} and the Northern Territory,\textsuperscript{142} where disclosure is required if a member forms the view that such an interest may appear to raise a conflict of interest. Finally, the most stringent requirement is that for the Senate and in Queensland,\textsuperscript{143} where a member must disclose an interest where objectively a conflict of interest arises, appears to arise or could foreseeably arise. The last of these is the most appropriate, particularly because it complements the optimum obligation of ad hoc disclosure.

\textbf{Tracing interests}

The disclosure of shareholdings often goes no further than disclosing the name of the company and the fact that shares are held by a member or by his or her family. However, the Resolution of the Legislative Assembly of Queensland of 1 July 1999 requires further disclosure where the disclosed shareholding constitutes a controlling interest or where it is in a private company.\textsuperscript{144} In the case of a controlling interest, that company's own shareholdings must be disclosed. With a private company shareholding, disclosure of that company's investments or beneficial interests is also required and, in the case of a holding company, its subsidiaries and their subsidiaries must also be disclosed along with their investments and beneficial interests. These details contrast with the meagre requirements of other registers which, for example, only require a description of the principal objects of a private company.\textsuperscript{145} Significantly, only the Victorian register sets a threshold minimum value of $500 before shareholdings need be disclosed.\textsuperscript{146}

The disclosure requirements of the Queensland register, effective from 1 July 1999, include for the first time the disclosure of details of the investments and beneficial interests of family and business trusts and private companies. This gives effect to the recommendation of the Members' Ethics and Parliamentary Privileges Committee to ensure that those trusts and private companies were not used to circumvent the disclosure requirements. The Committee's report noted that there was no evidence before it of such a practice but wished to provide for greater transparency.\textsuperscript{147}

\begin{footnotes}
\begin{itemize}
\item 136 Clause 16 \textit{Constitution (Disclosures by Members) Regulation 1983} (NSW).
\item 137 Section 9 \textit{Parliamentary (Disclosure of Interests) Act 1996} (Tas).
\item 138 Section 15 \textit{Members of Parliament (Financial Interests) Act 1992} (WA).
\item 139 Section 4(3)(g) \textit{Members of Parliament (Register of Interests) Act 1983} (SA).
\item 140 Section 6(2)(i) \textit{Members of Parliament (Register of Interests) Act 1978} (Vic).
\item 141 Clause 14 Resolution of 7 April 1992 entitled Declaration of Private Interests of Members (amended 27 August 1998).
\item 142 Section 5(1)(e) \textit{Legislative Assembly (Register of Members' Interests) Act 1982} (NT).
\item 143 Clause 7(o) \textit{Resolution for Members' Register of Interests} (Qld).
\item 144 See ch 7(a) and (b).
\item 145 See for example cl 12(c) \textit{Constitution (Disclosures by Members) Regulation 1983} (NSW); s 6(e) \textit{Parliamentary (Disclosure of Interests) Act 1996} (Tas).
\item 146 Section 6(2)(o) \textit{Members of Parliament (Register of Interests) Act 1978} (Vic).
\item 147 Members' Ethics and Parliamentary Privileges Committee, above note 58.
\end{itemize}
\end{footnotes}
Frequency of declarations

All registers require an initial declaration, usually to be made within the first month or so of subscribing the oath or making an affirmation on being sworn-in as a member. In Queensland, the initial declaration covers those interests held at the date of being elected.148 In relation to subsequent declarations, four different approaches are found in Australia:

1. Annual declarations of all relevant interests (required in NSW, South Australia and Tasmania);
2. Annual declarations only of changes to the initial declaration (required in Victoria and Western Australia);
3. An initial declaration with all changes notified within a prescribed period of their occurrence (required in both federal Houses and the ACT); and
4. Full annual declarations with all changes notified within a prescribed period of their occurrence (required in Queensland149 and the Northern Territory).

For those registers which require the details to be updated, notification must be given of changes within a period of 28 days for the House of Representatives and Senate, one month for Queensland and 60 days for the Northern Territory. Updates of a register within a prescribed period seems the preferable approach since it allows the register to be as accurate as possible. However, this benefit comes at an administrative cost to the member who must remember to make the necessary notification. This becomes more onerous when there are changes to the declared interests of the member's family. Appropriately, the obligation is confined to those changes of which the member is aware. The Queensland Members' Ethics and Parliamentary Privileges Committee has adopted the practice of writing to the members of the Legislative Assembly twice a year to remind them of their obligation to update their declared interests within a month of their occurrence.150 This practice has also been implemented in the Senate.

None of the Australian registers requires a member, on ceasing to be a member, to file a declaration of those changes which occurred since the last declaration. Certain overseas registers require an annual declaration to be lodged for the year in which the member left parliament, or a declaration to be lodged within a prescribed period of leaving.151 This is an appropriate requirement which ought to be adopted in Australia.

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148 See cl 5(1) of the Resolution of Members' Register of Interests.
149 In requiring any changes to 'the last statement of interests given by the Member', cl 5(2) of the Resolution of Members' Register of Interests is unclear as to whether it applies to both the statement of the member's own interests and that of the member's family.
150 Members' Ethics and Parliamentary Committee, above note 57, 5(d).
151 This was the position in British Columbia under the Financial Disclosure Act 1979. See also Integrity in Public Life Act 1987 (Trinidad and Tobago).
Enforcement

The nature of the enforcement regime of any register depends on the register’s legal basis and the particularity of the register’s requirements. It is clear that some enforcement regime is necessary to ensure public confidence in this mechanism of disclosure.

The enforcement regimes of the Australian registers regard a failure to comply with their respective requirements in the following ways:

1. A contempt of the parliament — House of Representatives, Senate, Queensland, Tasmania, Victoria, Western Australia and the Northern Territory;
2. An offence in South Australia; and
3. If warranted, the member’s seat is liable to be declared vacant by his or her House — NSW.

In Victoria, each House is empowered by statute to impose a fine not exceeding $2000 for contempt of the House. Failure to pay the fine within the period ordered by the House renders the member’s seat vacant. The resolution establishing a register in the ACT omits to refer to any consequence on failure to comply with its terms, but such a failure to comply with a resolution of the Legislative Assembly is still likely to constitute contempt of the Assembly.

The inherent defect of vesting the enforcement power of a register in the member’s House is the danger of bipartisanism, whether in the protection of government members or in the pursuit of opposition members. This danger can be reduced in a number of ways. The first is to prescribe an infringement as a summary offence, as in South Australia. Another approach is to establish a procedure for public complaints to be considered by a parliamentary committee which supervises the register. At the federal level there is the House of Representatives Committee of Members’ Interests and the Committee of Senators’ Interests which has a majority of non-government members to reflect the composition of the Senate.

153 Resolution of 17 March 1994, para 1(2) — a ‘serious contempt’.
154 Clause 18 Resolution of Members’ Register of Interests.
155 Section 24 Parliamentary (Disclosure of Interests) Act 1996 (Tas) which also empowers the relevant House to admonish, fine (up to $10,000) or suspend the member.
156 Section 9 Members of Parliament (Register of Interests) Act 1978 (Vic).
158 Section 10 Legislative Assembly (Register of Members’ Interests) Act 1982 (NT).
159 Section 7 Members of Parliament (Register of Interests) Act 1983 (SA) — liable to a penalty not exceeding $5000 to be tried summarily.
160 Section 14A Constitution Act 1902 (NSW).
161 Section 10 Members of Parliament (Register of Interests) Act 1978 (Vic).
162 Section 7 Members of Parliament (Register of Interests) Act 1983 (SA).
163 Standing Order 28A.
164 Standing Order 22A.
In Queensland a detailed procedure is in place, similar to that prescribed by the House of Commons, whereby an allegation of infringement by a member may be made to the registrar by another member or by a member of the public. Complaints made by the former must be referred to the Members’ Ethics and Parliamentary Privileges Committee, while those made by the public must be referred to the Committee only if the registrar believes on reasonable grounds that there is evidence to support the complaint. Public complainants are advised that their complaints do not attract parliamentary privilege. The Committee must investigate all complaints referred to it, affording the member concerned the opportunity to be heard. It appears to have a discretion whether to report to the Legislative Assembly on a complaint made by another member, but it is obliged to report on public complaints. The Committee must include in its report its recommendation as to what action the Legislative Assembly should take.

The administrative arrangements which develop within each House play a crucial role in members’ compliance with the register’s requirements. Rarely does a member of an Australian parliament or legislature fail to lodge a declaration within the prescribed time. In practice, advice is readily available from the registrar for completing the declaration. This practice has been formalised in Queensland, where the registrar must endeavour to advise a member who seeks a ruling on whether a matter should be declared or not. If the registrar is unable to determine the issue, the matter is referred to the Members’ Ethics and Parliamentary Privileges Committee for a determination. The identity of the member is not revealed without the member’s consent. The Committee is required to report the matter to the Legislative Assembly if the member disagrees with the Committee’s determination.

Candidates and members’ staff

None of the Australian registers requires candidates for parliamentary elections to make any declaration of personal or pecuniary interests. The benefit of being aware of potential conflicts of interest does not appear to outweigh the inevitable invasion of privacy. Nonetheless, it would seem prudent for candidates to declare significant potential conflicts of interest and how they propose to resolve them if elected. Otherwise, competing candidates may capitalise on any non-disclosure as a weakness in ethical standards.

Although it seems unnecessary for the staff of members to disclose their personal interests to a parliamentary register, it is prudent, as the Bowen Report

165 Clauses 14-17 Resolution for Members’ Register of Interests (Qld).
166 The WA Commission on Government Report No 4 (July 1996) recommended at para 9.2.5.5 an approach similar to the Queensland one: that the Members of Parliament (Financial Interests) Act 1992 (WA) prescribe penalties (including forfeiture of one’s seat) and establish a standing committee on privilege in each House to monitor and enforce the provisions of the Act.
167 Clause 8 Resolution for Members’ Register of Interests (Qld).
168 Not recommended by the Bowen Report at para 7.29.
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recognised,\textsuperscript{169} to require them to disclose to the member for whom they work those interests which are likely to create a conflict of interest. The Bowen Report also recommended that members instruct their staff to declare ad hoc such interests and those of the member whenever making representations on behalf of the member.

Conclusion on registers of interests

It is evident that a declaration of interests to a public register is an inadequate substitute for the fundamental obligation of members to make ad hoc disclosure of interests in the course of performing their official functions. This is so for several reasons. First, the crucial time at which the member should disclose a personal interest is when exercising or prior to exercising those public duties which may conflict with the member's personal interest. Ad hoc disclosure achieves this, unlike a public register which must be physically consulted. Second, there is the danger that the register will not be sufficiently up to date since alterations are usually notified, at the earliest, on a monthly basis. Third, the range of interests to be declared to a public register may not be sufficiently broad. Fourth, declaration to a public register does not resolve a conflict of interest when one arises. Finally, there is the danger that a member might be lulled into thinking that once a declaration has been made to a public register there is no longer any need to be concerned with conflicts of interest.

In Australia, the primary focus of both mechanisms of ad hoc disclosure and a register of interests is on the declaration of the member's pecuniary interests. The focus needs to shift, however, to include non-pecuniary interests and, in some jurisdictions, family interests. It was considered too difficult to define those non-pecuniary interests which might raise a conflict of interest, but this narrow focus appears to reflect a correspondingly narrow appreciation of the nature of a conflict of interest. Financial and proprietary benefits are not the only temptations to betray the public trust. Social and political ambitions are equally alluring. Recognising all these forms of conflict of interest needs to be encouraged not ignored. Otherwise, there is the danger, as John Uhr warns, that a one sided view of conflict of interest may emerge:

The vices of representation can encompass self-interested use of money but the basic ethical defect is not financial self-interest but the external purchase of a member's conscience to any number of causes, ranging from political parties to social movements. The preoccupation with conflict of interest schemes, such as registers of financial interests, threatens to distort our analysis of the ethics of political representation by making us believe that the primary role of the elected member derives from untied interests — when the real challenge is what one might call the problem of untied responsibilities.\textsuperscript{170}

\textsuperscript{169} At para 7.39.

\textsuperscript{170} J Uhr, 'Democracy and the Ethics of Representation' in N Preston and C Sampford (eds), \textit{Ethics and Political Practice — Perspectives on Legislative Ethics} The Federation Press Sydney 1995, p 23.
Other standards

So far consideration has been given to those standards of conduct of members of parliament which are enforced by the general law and those which deal with a conflict of interest. There are, of course, other standards which relate to the integrity of members but fall into neither of these categories. Some are found in the various codes of conduct adopted or proposed for members. Their existence, although reinforced by their inclusion in such codes, is not dependent on that fact. They are all based, like the other standards already discussed, on the fundamental obligation of members to act always in the public interest. These standards address a range of situations in which members may be tempted to act out of self-interest. They offer practical rather than merely aspirational guidance.

This chapter considers the following standards:

(1) the acceptance of gifts and hospitality;
(2) the use of public resources;
(3) on leaving public office;
(4) personal conduct;
(5) compensation for services rendered as a member;
(6) the improper use of influence;
(7) the acceptance of political donations; and
(8) the conduct of members in the House:
   (a) disorderly conduct;
   (b) not to abuse freedom of speech; and
   (c) not to mislead parliament.

Acceptance of gifts and hospitality

When a member accepts a gift or hospitality, the minimal ethical requirement is to ensure that no apparent conflict of interest arises. This means that the value of the gift or hospitality, the circumstances of its conferral, and the relationship between the member and the donor must be such as not to arouse in a fair-minded person any suspicion that the member may be influenced in the performance of his or her official duties. Obviously this test cannot be applied narrowly. A gift or hospitality conferred on a relative or friend in gratitude for a member's assistance is
subject to the same test. All forms of benefit must be capable of being viewed as a
gift or hospitality, whether they be in the nature of sponsored travel, a loan on
preferential terms or the waiving of a fee.

Although the disclosure of gifts and hospitality is required by most registers of
members’ interests, this does not, in every case, adequately deal with the conflict of
interest aroused by their acceptance. Indeed, a mere requirement of disclosure may
be viewed as implicitly condoning the unethical acceptance of a gift or hospitality.
Accordingly, an obligation of disclosing their acceptance should be accompanied by
a clearly understood standard to reject their offer in circumstances where this may
arouse the suspicion that the member is being ‘bought’.

The NSW and Tasmanian codes specifically address the receipt of gifts. The NSW
codes, in cl 3, require disclosure of all gifts as part of the disclosure of pecuniary interests
and impose an obligation on members, similar to that stated above, not to accept gifts
that ‘may pose a conflict of interest or which might give the appearance of an attempt
to corruptly influence the Member in the exercise of his or her duties’ (cl 3(b)).
Expressed in this form, cl 3 provides minimal guidance to members in deciding whether
they ought to accept a gift. It also appears not to extend to hospitality.

Better guidance is provided under the broader standard in the Tasmanian House
of Assembly Code, where members ‘must not accept gifts, benefits or favours except
for incidental gifts or customary hospitality of nominal value’. Gifts and hospitality
outside this exception are likely to give the appearance of a conflict of interest and
so ought to be declined. Of course, an exception must apply to bona fide gifts from
family and close friends. How far the exception extends is likely to be disputed,
however, the nomination of a monetary limit would be of advantage, like the $50 limit
prescribed for a single gift to a United States senator.¹

The Australian Senate resolution on declaration of gifts covers gifts intended by the
donor to be ‘a gift to the Senate or the Parliament’ rather than to an individual senator.
However, where a senator accepts a gift in excess of $500 from an official or in excess
of $200 from a private donor, it is deemed to be for the Senate or the Parliament.

Although quite detailed rules in relation to the acceptance of gifts and hospitality
are prescribed for members of the United States Congress,² this is not the case with
the UK House of Commons. Such detailed rules seem unnecessary, given the very
limited discretionary powers of members of parliament, unlike those of ministers.
However, members need to be careful when accepting gifts or hospitality, especially
if there is a possible connection with their committee work.

The dividing line between an ethical and unethical receipt of a gift or hospitality
is a difficult one to draw. However, in Queensland the Electoral and Administrative
Review Commission (EARC) managed to incorporate the distinction in its draft code
of conduct in these terms:

A Member shall not solicit or accept for personal benefit, any form of benefit
whatsoever (eg gifts, loans, discounts, considerations, etc) in connection with the

¹ Rule 35 of the US Senate Code.
performance of official duties, except as may be provided:

(a) as part of their determined entitlements in accordance with their terms and conditions of remuneration as Members;
(b) by other public officials on the Member's resignation, retirement, or on similar occasions.

A Member may accept, in an official capacity, any gift or benefit provided that the Member is satisfied in each instance that —

(a) acceptance of the benefit will not bring their integrity into question; and
(b) acceptance of the gift or benefit is in the public interest.

Use or disposal of such gifts shall be in accordance with the procedures determined by Parliament. 3

The position in relation to the acceptance of political donations is considered separately below. Reference might also be made to the discussion in Chapter 8 on the criminal liability of members in relation to the acceptance of gifts and political donations.

Use of public resources

Members are under an ethical obligation to use the public resources made available for their official use efficiently and not in a wasteful manner. These resources usually include allowances for parliamentary and electorate expenses and travel entitlements.

Any use of those resources which is other than for official use is unlawful and likely to attract criminal sanction. 4 The most obvious and prevalent instances of criminal conduct in this regard have been fraudulent claims for travel expenses. In any event, any use of public resources for personal reasons unconnected with official use is unethical and may in cases of serious abuse constitute a criminal offence. An obvious example of improper use is where a member uses or allows family or friends to use electorate office facilities or staff for private business purposes. Another blatant 'rot' is the use of travel warrants to fly to holiday destinations on 'official business'. 5

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4 There is the common law offence of fraud and statutory offences such as s 408C of the Criminal Code (Qld) to cover the misappropriation of public resources such as the making of false travel claims. Section 408C provides for the offence of fraud whenever a person dishonestly applies to his or her own use, or to the use of any person, property belonging to another.
5 See ICAC, Investigation into Parliamentary and Electorate Travel: Second Report December 1998, Table 1 at 18.
The rules in relation to the official use of public resources are usually prescribed by detailed guidelines. The codes of conduct in NSW include a provision which requires members to comply with any guidelines or rules in relation to the use of public resources (cl 4). In Tasmania, members are warned not to use them for personal gain. For practical reasons, the extensive rules which normally regulate members' allowances and other benefits are not included in a code of conduct, but a reminder of their obligation to observe those rules ought to be included.

Two important reports have been issued in NSW by the Independent Commission Against Corruption (ICAC) which make extensive recommendations in relation to parliamentary allowances. The general thrust of those recommendations is to provide members with clear and detailed guidelines as to their entitlements and to establish adequate auditing procedures to ensure transparency and accountability. Significantly, the public needs to be informed of the extent of these benefits, the safeguards in place, and the use to which these benefits have actually been put.

The second of these ICAC reports lists the following ethical guidelines for members in relation to their use of public resources:

(a) Members must be open in the use of public resources and disclose any conflict of interest in utilising entitlements, be it pecuniary, personal, familial or as a result of any association;
(b) in the interests of transparency, Members use entitlements on the understanding that this use may be made public;
(c) ultimately, Members are personally accountable for the use of entitlements. This accountability cannot be delegated. Even though authorisation to incur expenditure may be delegated to electorate staff;
(d) Members must use entitlements to achieve appropriate value for money while meeting parliamentary and electorate obligations;
(e) Members must use entitlements with integrity, that is in an efficient, effective and ethical manner and in accordance with any relevant guidelines.

These principles assume the obligation of members to use their entitlements only for their parliamentary and electorate purposes and not for party political purposes. Obviously, a State member is not entitled to use parliamentary or electorate office facilities to support a federal candidate, even if that federal candidate is themselves.

6 See for example the Commonwealth Department of Finance and Administration Guidelines.
7 This was recommended by the Queensland Members' Ethics and Parliamentary Privileges Committee, Report on a Draft Code of Conduct for Members of the Queensland Legislative Assembly (Report No 21) at para 6.2.3.
8 ICAC: Investigation into Parliamentary and electorate Travel: First Report April 1998 and 1ICAC, above note 5. A Third Report (November 1999) deals with the implementation of the recommendations made in these two earlier reports.
9 ICAC, above note 5, rec 20.
10 An extreme application of this rule was when a federal member was asked to remove from his electorate office window election posters for a State Parliament candidate.
However, at times this distinction between party and official purposes becomes blurred. For instance, is a member entitled to use a travel warrant to attend the annual State or federal party conference?

In NSW, both Codes of Conduct and legislation recognise that the official role of members extends to party activities. Clause 6 of each Code provides:

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

Similarly, the Parliamentary Renumeration Act 1989 (NSW) recognises that the ‘parliamentary duties’ of members include ‘participation in the activities of recognised political parties’. ICAC’s Second Report on parliamentary and electoral travel expressed concern that this might encourage the transfer of expenses previously borne by political parties to the public purse. Accordingly, the Report recommended that the following not be permitted out of members’ allowances:

(a) activities such as those associated with membership drives;
(b) funding of mail distributions for non-electorate or non-parliamentary activities;
(c) costs associated with election campaigning for an individual Member;
(d) fund raising for other party political Members (such as the purchase of raffle tickets, raffle prizes or tickets to attend functions etc);
(e) costs previously borne by political parties which are not principally related to a Member’s parliamentary or electorate duties.

Similarly, in Queensland, members’ travel entitlements may be used for party political purposes.

On leaving public office

The basic ethical obligation which arises when a member leaves parliament is well described in the Tasmanian House of Assembly Code:

Members of the Assembly, when leaving public office and when they have left public office, must not take improper advantage of their former office.

The Tasmanian Code leaves undefined what is contemplated by ‘improper’. Presumably, it is designed to guard against members seeking or obtaining outside positions on the basis of providing confidential information or access to influence. It also warns members not to use their present parliamentary position to promote

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11 Section 10(1)(b).
12 ICAC, above note 5, rec 24.
13 See the Members’ Salaries, Allowances and Services Handbook.
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their opportunities for future employment.\textsuperscript{14} As opportunities of this nature are less likely to arise with members than with ministers, it is the latter who are often prevented from obtaining employment in fields related to their former official duties for a number of years.

Nonetheless, unethical practices may arise with members. This standard would prevent a member, for example, from obtaining a consultancy to an organisation on the basis that information would be provided concerning a parliamentary committee inquiry on which the member previously served. While disclosure of any confidential information would probably infringe the member's common law duty of confidentiality (see Chapter 9), this standard goes further by preventing the procurement of future employment on that basis. It also prevents a member advocating the creation of a position with the intention to be appointed to it on leaving parliament.

The appointment of members to the executive branch may also raise an ethical dilemma, but this is more likely to be for those who make the appointment rather than the former member. As noted earlier in Chapter 7, this issue arose in NSW in 1992 after Dr Terry Metherell resigned from the Legislative Assembly to accept an appointment to a senior public service position.

The relevant aspect here of what is known as the 'Metherell Affair' is that it would seem that part of the motivation for the appointment of Dr Metherell was that his resignation from Parliament would most likely provide the Government with one more Liberal member in the Legislative Assembly. Dr Metherell represented a safe Liberal seat but resigned from the Liberal Party after losing his ministerial portfolio and continued to sit as an independent until his resignation. At that time, the Government parties and the ALP held an equal number of seats, with five independents, including Dr Metherell.\textsuperscript{15} This potential benefit for the Government was gained by an unorthodox process of appointment of Dr Metherell to a senior position in the Premier's Department, followed by secondment to the Environment Protection Authority. This plan was devised to avoid the requirements to advertise the position with the Authority. ICAC found that this process, which ignored the principle of merit, constituted corrupt conduct within the terms of the ICAC Act. As noted earlier, this finding was declared a nullity by the NSW Court of Appeal on the basis that it had not been arrived at by an objective standard.\textsuperscript{16}

Subsequently, ICAC issued a report entitled Integrity in Public Sector Recruitment—the third report\textsuperscript{17} to arise out of the Metherell Affair. This report recommended a process to fetter the prospect of future appointments of members to the executive branch for a period of two years following their resignation from parliament:

\begin{itemize}
  \item Quite stringent restrictions are imposed on members of the United States Congress by art I sec 6 of the US Constitution, which prevents them from holding positions created by Congress during their term in office.
  \item See the account of facts given in ICAC, Report on Investigation into the Metherell Resignation and Appointment July 1992 at 2.
  \item Greiner v ICAC (1992) 28 NSWLR 125.
  \item ICAC, Integrity in Public Sector Recruitment March 1993.
\end{itemize}
An independent committee of eminent persons should be established pursuant to statute to scrutinise the process followed for the filling of each public sector job where one of the applicants was a Member of Parliament within the preceding period of two years.\footnote{Recommendation 9.}

Alternative approaches which included a ban or a moratorium on a member's employment by the executive were rejected.\footnote{ICAC, above note 17, pp 23-24.}

**Personal conduct**

This standard is concerned with the conduct of members in their personal, as distinct from their official, lives. The practice in Australia seems to be that unless their personal conduct directly impacts on their official duties, it is a matter solely for the electorate's judgment; parliament is only involved where a connection exists with a member's official duties. Personal conduct of a criminal nature is usually pursued through the courts and, if a guilty verdict results, resignation or disqualification will often be the consequence.

Nor has the electorate or even the media taken a very keen interest in the personal lives of members. Two reasons may account for this: the limited relevance of personal conduct to their public role, and the danger of acting on unsubstantiated allegations. Consequently, scandals involving members' extramarital affairs have not been as prevalent in Australia\footnote{One incident occurred in Victoria where a minister resigned over allegations by a former staffer that he had assaulted her and threatened to remove her from her position if she refused to abort her fourth pregnancy by him: *Australian Financial Review* 1 June 1995.} as in the UK where they have caused the resignation of numerous ministers. On the other hand, alleged sexual offences by members in Australia are prosecuted in the courts and usually lead to resignation.\footnote{In Queensland in 2000, calls to resign were ignored by an unnamed member who faced committal proceedings for child sex offences. Just prior to being committed for trial and his name being released, Mr Bill D'Arcy MLA resigned his seat.}

It would be regrettable if the media pursued the personal lives of members where no obvious link exists with their official duties — particularly where the facts are in dispute.\footnote{Yet Mr John Anderson MP, the leader of the federal parliamentary National Party, was quoted in *The Sydney Morning Herald* 18 January 2000 as saying 'If a man's family can't trust him, why should the nation?'}

A standard in relation to personal conduct is recognised by both the Tasmanian House of Assembly Code and the Victorian Code. The latter provides in s 3(1)(a) that members shall:

1. (ii) ensure that their conduct as Members must not be such as to bring discredit upon the Parliament.
in contrast, the focus of the Tasmanian Code is on the avoidance of a conflict of interest:

Members of the Assembly must not engage in personal conduct that exploits for private reasons their positions or authorities or that would tend to bring discredit to their offices.

In Queensland, EARC recommended the following provision in its draft code of conduct for members:

Members shall ensure that their personal conduct does not adversely affect —
(a) their ability to perform their official duties;
(b) the ability of other Members or other public officials to perform their official duties; and
(c) public confidence in the integrity of the system of government and public sector management.23

The obvious value in this type of provision is that it operates, in effect, as a catch-all standard to cover any conduct which technically falls outside the other standards. It therefore deters any attempt by members to vindicate their unethical conduct on the basis that it is not specifically addressed in the code. On the other hand, it does little to resolve unfair allegations against members.

Compensation for services rendered as a member

Given the fundamental obligation of members to perform their official duties always in the public interest, it is evident that they should not accept any payment or benefit for themselves, their family or their friends in return for any service provided as a member. At best, such a payment or benefit creates an apparent conflict of interest which raises a suspicion that the service was provided not in the public interest but for the mutual benefit of the member and the provider thereof. At worst, it constitutes bribery. The spectrum between these points can become very murky — as Chapter 8 indicates! This standard differs from that in relation to the acceptance of unsolicited gifts and hospitality because the benefit is received for a service.

Since a version of this standard was possibly the earliest integrity rule of the House of Commons, it is worth considering the history of this standard in that House.

House of Commons

On 2 May 1695, the House of Commons adopted the following resolution:

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The Offer of any Money, or other Advantage, to any Member of Parliament, for the promoting of any Matter whatsoever, depending, or to be transacted in Parliament, is a high Crime and Misdemeanour, and tends to the Subversion of the Constitution.24

This resolution followed the expulsion of the Speaker, Sir John Trevor, for accepting a bribe of 1000 guineas from the City of London. A further resolution made on 22 June 1858, was prompted to prevent members who were barristers from advocating issues on behalf of their existing or former clients in the House:

it is contrary to the usage and derogatory to the dignity of this House, that any of its Members should bring forward, promote or advocate, in this House, any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward.

Then on 15 July 1947, the House adopted another resolution over concerns with members being engaged as advocates for trade unions:

... it is inconsistent with the dignity of the House, with the duty of a Member to his constituency, and with the maintenance of the privilege of freedom of speech, for any Member of the House to enter into any contractual agreement with an outside body controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituency and to the country as a whole, rather than to any particular section thereof.

This resolution was later amended on 6 November 1995 by the addition of the following:

... and that in particular no Members of the House shall, in consideration of any remuneration, fee, payment, or reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received is receiving or expects to receive —

(i) advocate or initiate any cause or matter on behalf of any outside body or individual, or
(ii) urge any other Member of either House of Parliament, including Ministers, to do so.

by means of any speech, Question, Motion, introduction of a Bill or Amendment to a Motion or a Bill.

Consistent with the amended 1947 resolution, the 1996 UK Code of Conduct for Members of Parliament provides that 'No Member shall act as a paid advocate in any proceeding of the House'. The effect of this rule is prescribed by The Guide to the Rules relating to the Conduct of Members in Part 3: ‘The Advocacy Rule’.25

Essentially, members cannot agree to advocate an issue or initiate a matter within parliament in return for payment. The original 1947 rule was tightened after the report into the Al Fayed scandal26 to cover cases where the benefit is paid to the member's family, or was given in the past or there is an expectation of one in the future. Under the Advocacy Rule, a member is prevented from acting in two respects: first, from initiating any parliamentary proceedings which relate directly to any person from whom the member expects to receive a financial benefit; and second, the member is prevented from advocating any matter in any parliamentary proceedings which will confer an exclusive benefit on such a person. In the absence of an exclusive benefit, no restriction on participation arises provided the member's interest is properly registered and declared. This Rule has led to a dramatic drop in the number of paid consultancies among members of the House of Commons.

Significantly, none of these UK rules covers paid advocacy outside parliament, for example, in dealings with ministers and other officials. Despite acknowledging that there is 'a substantial body of opinion which holds that it is wrong in principle for Members to accept money for any services, even purely advisory services rendered in their capacities as Members', the Nolan Committee concluded that 'an immediate ban in that form, would be impracticable' given that it would affect long standing, lawful arrangements with three-fifths of the members of the House of Commons.27 Although the Committee recommended further thought be given to this issue, the Code and Guide do not refer to it. However, the Committee did recommend a ban on members being engaged to provide paid parliamentary advice as consultants to multi-client lobbying organisations or their clients.28 This recommendation also appears not to have been acted on.

Australian position

The clearest position is at the Commonwealth level where s 45(iii) of the Constitution disqualifies any member of the Commonwealth Parliament who '[d]irectly 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'.

Only in one respect does this ground, which was considered in detail in Chapter 4, extend beyond the rules of the House of Commons — it prevents members acting on

25 Compare the South African Code cl 6.1 which prohibits members from 'lobbying for remuneration'.
27 First Report of the Committee of Standards in Public Life Vol 1 at paras 51-52.
28 At para 55.
behalf of the Commonwealth outside the House. Otherwise it applies, like the House of Commons rules, only to services performed for anyone within parliament. But the major difference between the two Parliaments is, of course, that infringement of the rule constitutes contempt of the House of Commons, whereas members of the Commonwealth Parliament lose their seat! This dramatic difference has probably deterred Commonwealth members, unlike those of the House of Commons, from becoming paid consultants and advocates. A similar ground of disqualification applies in both Territories.29

At the State level, Queensland and Victoria prescribe restrictions on members to prevent them from acting for the Crown. Section 7B of the Legislative Assembly Act 1867 (Qld) denies members any fees for transacting any business or performing any service for the Crown and allows the Legislative Assembly to decide whether the member's seat should become vacant. In Victoria, a member is disqualified if engaged to act as an agent of the Crown.30

The standing orders of Australian Houses have not adopted provisions similar to those of the House of Commons Resolutions and Code.31 However, standards similar to the House of Commons Resolutions of 1695 and 1858 are found in both the NSW Codes and the Victorian Code.

Clause 2 of the NSW Codes, entitled 'Bribery', provides:

Members must not promote any matter, vote on any bill or resolution, or ask any question in the Parliament or its Committees, in return for payment or any other personal financial benefit.

The title of this provision is surprising. Where to draw the line between bribery and unethical conduct falling short of bribery is difficult to determine — and yet this clause appears to reject any dividing line. (Further consideration was given to this difficult aspect in Chapter 8 which deals with the corruption offences of members.)

It should be noted, however, that cl 2 of the NSW Codes is unduly narrow in two important respects. First, it is confined to financial benefits provided only to the member.32 It should cover benefits whether financial or not, and whether given to the member or to any other person with his or her knowledge. Second, as with the House of Commons rules, it is confined to performing a service in parliament, not

29 Section 21(2)(e) Northern Territory (Self-Government) Act 1978 (Cth); s 14(c) Australian Capital Territory (Self-Government) Act 1988 (Cth).
30 Section 55 Constitution Act 1975 (Vic).
31 There appears to be no basis for suggesting that these resolutions were adopted by the Australian Parliaments when they adopted the 'powers, privileges and immunities' of the House of Commons — because they are not of that kind. Nor were they adopted as part of the 'Rules, Forms or Usages' of the House of Commons, which appear to be confined to those rules concerned with the procedure of parliament: see for example SO 333 Queensland Legislative Assembly.
32 See ICAC, above note 5, at 26 (rec 56).
outside. No such restriction exists under the Victorian Code which extends to all situations in which a member acts as such:

A Member shall not receive any fee, payment, retainer or reward, nor shall he permit any compensation to accrue to his beneficial interest for or on account of, or as a result of the use of, his position as a Member.33

Note that as the benefit must accrue to the member's beneficial interest, benefits to others and possibly the member's family may not be caught.

Apart from this weakness, the Victorian standard adequately protects the public interest by making it clear that no member should accept any benefit on account of performing official duties whether inside or outside parliament. Accordingly, no benefits ought to be accepted for any official speeches or representations made even outside parliament.34 Paid advocacy is clearly unethical because of the conflict of interest it raises. Nor should any benefits be given on account of any advice provided by a member on matters connected with official duties, as this would undermine the member's primary obligation to represent the people. That is not an easy role; it requires considerable judgment to assess the competing views and evidence in order to arrive at a position on many issues. The objectivity required in this process is clearly jeopardised if benefits are provided or accepted in these circumstances. The fact that a service is provided outside parliament is irrelevant.

All of the standards or rules discussed here apply whatever the source of the benefit. Hence, benefits provided by foreign governments or organisations are caught as well. This accords with the US Constitution, which prohibits all those who hold any government office of profit or trust from accepting any remuneration from any foreign government or foreign governmental organisation.35

Employment unrelated to parliament

Finally, there is the issue of members who are employed in positions unconnected with their parliamentary office or who engage in private business enterprises. Such positions and enterprises should have no connection with the public sector if the grounds of disqualification of office of profit under the Crown and government contractors are appropriately drafted and enforced. Moreover, any private sector positions and activities are usually required to be declared to a register of interests and should be declared ad hoc in appropriate situations.

The issue which arises is whether any restriction ought to be imposed on members holding such positions or undertaking business activities while serving as a member of parliament. Restrictions are often imposed on ministers, at least in relation to outside activities which may fall within the scope of their ministerial responsibilities. However,

33 Section 3(1)(c) Members of Parliament (Register of Interests) Act 1978 (Vic).
34 The US Senate Code of Official Conduct, Rule XXXVI(b) prohibits receipt of honoraria for 'an appearance, speech or article' on matters directly related to the member's duties.
35 Article 1, s 9 cl 8.
members can be distinguished from ministers on at least two grounds. First, their official responsibilities do not usually provide them with powers which might affect the activities in which they are interested. And second, ministerial appointments are clearly full-time, allowing no time for holding concurrent employment. Membership of a House has not always been viewed as a full-time occupation, although public perception may have changed in recent times.  

Restrictions of this nature are not found in the UK House of Commons Code or in the codes presently in force in Australia. The Nolan Committee rejected any restrictions of this kind to ensure that members represented a broad cross-section of society and of experience:

We believe that those Members who wish to be full-time MPs should be free to do so, and that no pressure should be put on them to acquire outside interests. But we also consider it desirable for the House of Commons to contain members with a wide variety of continuing interests. If that were not so, Parliament would be less well-informed and effective than it is now, and might well be more dependent on lobbyists. A Parliament composed entirely of full-time professional politicians would not serve the best interests of democracy. The House needs if possible to contain people with a wide range of current experience which can contribute to its expertise.

However, the US Senate Code does impose employment restrictions to avoid conflicts of interest arising and the possibility of improper influence. Rule XXXVI of the Senate Code limits ‘outside earned income’ to 15 per cent of a specific executive office. Rule XXXVII proscribes paid engagement in any business or employment which is ‘inconsistent or in conflict with the conscientious performance of official duties’ (para 2). Limits are also imposed on senators providing paid professional services to firms (para 5) or on serving on the board of any publicly held or regulated corporation (para 6).

Far less onerous is the restriction on members of the German Bundestag, who are prevented from making reference to their legislative position in professional and occupational pursuits.  

In Australia, members have traditionally been free to continue their business and professional activities. Given the obvious benefits for parliaments in terms of their practical commercial and professional experience and so as not to deter them in the first place from seeking a parliamentary seat, there is no reason for overturning this tradition, provided their outside activities do not detract from the performance of their parliamentary duties and any conflicts of interest are satisfactorily declared and resolved.

36 The Bowen Report in 1979 noted at para 2.36 that the Remuneration Tribunal fixed members’ salaries on the basis of a full-time office.
37 Above note 27 at para 19.
38 Code of Conduct for members of the German Bundestag, Rule 5.
Improper use of influence

This is a difficult standard to define for members, part of whose responsibility is to represent the interests of their constituents. Clearly, that involves making submissions to appropriate authorities. But this role, as noted earlier, must be exercised in the public interest. Hence, it is improper to make representations with the objective of procuring personal gain of any sort for oneself. Nor would it be ethical to do so for others unless, according to the public interest, they are entitled to that benefit.

It is at this point that account must be taken of the nature of the political process — the party system — where bargaining and negotiating are the tools of trade. Influence and persuasion play a crucial role in this process. But the overriding principle remains; they must be used solely for what is best for the community. Instances of improper influence include a member seeking from government ministers or public officials an official appointment or a government contract for family members or friends. Improper influence to deter the exercise of power is also unethical.39

A useful formulation of this standard in relation to dealings with the public service was provided by EARC in its Report on the Review of Codes of Conduct for Public Officials:

A Member shall not use improperly their influence in order to obtain appointment, promotion, advancement, transfer or any other advantage within the public sector on behalf of another, or to any other advantage within the public sector on behalf of another, or to affect the proper outcome of any procedure established under legislation for the management of a unit of the public sector.

Members should recognise that a non-elected public official responsible for the making of a decision under legislation governing any aspect of the management of a unit of the public sector, or for a recommendation for the purpose of making such a decision, is required to refuse to take account of any attempt by any person whatsoever to influence the making of such a decision unless the involvement of that person is required by or consistent with the provisions of the relevant legislation.40

The second passage of this quote highlights the existence of a correlative duty on those subjected to influence: to resist any improper pressure in performing their official duties.

It should be noted that even legitimate representations may be improper unless the member discloses any conflict of interest or benefit he or she may have in the matter. It has already been suggested (in Chapter 10) that ad hoc disclosure is

required in these situations even if disclosure has been made to a register of interests. This view was put strongly in a report by the Queensland Auditor-General after an investigation into the granting by the Queensland Government of an interactive gambling licence to a company in which a member had a financial interest. 41 Despite proper declarations having been made to the register of members’ interests, the report expressed significant concern that those officials to whom the representations were made had only ‘general knowledge of their interests in internet gambling’. Formal statements of those interests ought to have been made at the time the representations were made. The report concluded:

Audit considers that on all occasions where Members have personal interests in a subject on which they are making representations, that such interest should be clearly and formally communicated to all concerned. This should be in addition to the declaration of interests in the Register of Members’ and Related Persons’ Interests. 42

Improper influence can also be criminal, as *R v Boston* 43 illustrates. Without unduly repeating what was said in Chapter 8 on this important High Court decision, the case concerned an agreement whereby certain persons would corruptly give to a member of the NSW Legislative Assembly large sums of money in return for persuading the NSW Government, and in particular the Minister for Lands, to acquire certain property. Given that a criminal conspiracy requires an agreement between two or more people to commit an unlawful act, the issue at stake in *R v Boston* was whether the acceptance of money by a member to exert pressure on the executive constituted an unlawful act. The defendant argued that it did not because the agreement contemplated no act on the part of the member which was to be performed in parliament — hence what was to occur fell outside the member’s official duties.

A majority of the High Court rejected this argument. Knox CJ regarded such an agreement as tending to the public mischief and hence capable of constituting a criminal conspiracy:

In my opinion, the payment of money to, and the receipt of money by, a member of Parliament to induce him to use his official position, whether inside or outside Parliament, for the purpose of influencing or putting pressure on a Minister or other officer of the Crown to enter into or carry out a transaction involving payment of money out of the public funds, are acts tending to the public mischief, and an agreement or combination to do such acts amounts to a criminal offence. 44

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42 Auditor-General of Queensland, above note 41 at 79.
43 (1923) 33 CLR 386.
44 At 392-3.
The Chief Justice saw this situation as giving rise in many ways to a public mischief:

It operates as an incentive to the recipient to serve the interest of his paymaster regardless of the public interest, and to use his right to sit and vote in Parliament as a means to bring about the result which he is paid to achieve. It impairs his capacity to exercise a disinterested judgment on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him, instead of a representative of the people.45

His Honour regarded buying a member’s influence over a minister as being just as serious as buying a member’s vote in parliament.46 The other majority Justices, Isaacs and Rich JJ (in a joint judgment)47 and Higgins J,48 expressed similar views.

Despite their hyperbole, Isaacs and Rich JJ outlined most clearly the special ethical obligations of members. Their Honours49 considered a member ‘guilty of a breach of high public trust’ for entering into an agreement to influence a minister, given ‘the fundamental obligation of a member being “the duty to serve” and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community’.50 And so, if a member agrees to promote the interests of another in return for some consideration,

[t]he power, the influence, the opportunity, the distinction with which his position invests him for the advantage of the public, are turned against those for whose protection and welfare they came into existence. He can never afterwards properly discharge in relation to that matter his duties of public service — the parliamentary duty of honest, unbiased and impartial examination and inquiry and criticism which must arise; and he has therefore essentially violated his legal duty to the State.51

The dissent of Gavan Duffy and Starke JJ adopted a strikingly different position. Their Honours accepted that it may not be unlawful for a member in certain cases to act for reward in exerting influence on the executive:

It is perhaps desirable that members of Parliament should under no circumstances accept money to induce them to urge any course of action on the Executive Government, but it cannot be said that an agreement to do so must in every case constitute a criminal conspiracy by the member and those employing him.52

Their Honours indicated no criminal conspiracy arises where a member:

45 At 393.
46 At 394-5.
47 At 402–403.
48 At 409.
49 At 405.
50 At 400.
51 At 403.
52 At 415.
chapter 11: other standards

was to be employed to forward a transaction which he believed to be, and which in fact was, entirely beneficial to the purchasers and desirable in the interests of the community, and which had never been and could never be the subject of parliamentary enactment or discussion. 53

While this may not constitute a criminal conspiracy, it would still be unethical for a member to accept such employment in view of the conflict of interest it creates.

Acceptance of political donations

The basic safeguard provided in relation to the receipt of political donations is their public disclosure. At the Commonwealth level, the Commonwealth Electoral Act 1916 (Cth)54 imposes an obligation on the agent of each candidate to supply, within 15 weeks of polling day, a return detailing the value of all gifts directly received and the total number of donors. In addition, details of each donor and the value or amount of their gift must be given for gifts in excess of $200. Political parties are also required to disclose details of all gifts. Also, returns must be lodged of all election campaign expenditure. 55

For administrative convenience, Queensland has adopted the Commonwealth regime by incorporating the actual provisions of the Commonwealth Electoral Act in a Schedule to the Electoral Act 1992 (Qld). 56 Similar requirements are imposed on candidates in Western Australia. 57 The NSW Codes in cl 3(c) require members to accept political contributions in accordance with Pt 6 of the Election Funding Act 1981 (NSW). 58

Conduct of members in the House

By virtue of its standing orders and privileges, each House has the power to control its members during the course of parliamentary proceedings. Accordingly, the following standards, while not usually found in codes of conduct, are imposed by each House on its members through its standing orders. 59

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53 At 414.
54 See Div 4 of Pt XX, ss 303-307.
55 See Div 5 of Pt XX.
56 See Part 7 Electoral Act 1992 (Qld), ss 126A-126D.
57 Section 1750 Electoral Act 1907 (WA).
58 See s 85 in relation to candidates.
59 This list of standards is taken from the Draft Code of Ethical Conduct for Members of the Queensland Legislative Assembly at 4-6 in the Queensland Members' Ethics and Parliamentary Privileges Committee Report No 21 May 1998 Part B.
**Disorderly conduct**

The power of the House to control its own proceedings so as to protect its capacity to function enables it to suspend and, in serious cases, to expel members whose conduct is disrupting the proceedings of the House.

In most Australian legislatures, the presiding officer is empowered to warn a member for grossly disorderly conduct and, if that conduct continues, to suspend the member for up to a day. In some Houses, the matter is only dealt with by the House. For persistent and wilful obstruction, the Speaker may name the member and the House will vote on whether the member should be suspended. Suspension will be for a prescribed period which in some Houses may be up to 14 days.

**Not to abuse freedom of speech**

The scope of the important immunity of freedom of speech was outlined in Chapter 6. Under this privilege, a member cannot be questioned or called to account in any court or tribunal or by any government official for what the member said or did within parliamentary proceedings. In particular, members may make adverse comments about anyone with complete immunity from legal action. However, members remain accountable to their House for their actions. Essentially, members are entitled to make adverse comments provided they are made fairly in the public interest. Accordingly, a House should not tolerate allegations being made which are reckless and completely unfounded or which were motivated on other than public interest grounds. In such circumstances, a member has misled the House.

The Australian codes of conduct do not include any express standard in relation to freedom of speech, preferring to rely on general aspirational standards. The Queensland Members' Ethics and Parliamentary Privileges Committee considered inappropriate the inclusion of any threshold test in its draft code of conduct.

Some protection is afforded those injured by statements made under privilege by the procedure which confers them a right of reply. This mechanism was considered in Chapter 6.

**Not to mislead parliament**

It is a contempt of the House to deliberately mislead it. There are three elements to the offence: the statement was misleading; the member knew this at the time; and the member intended to mislead the House. Even if the member were unaware the statement was misleading, this is still regarded as a serious matter. In such cases, the member must correct the record and usually apologises to the House. A factually

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60 WA Legislative Council SO 116-120; NT SO 239-245.
61 Legislative Assembly of Queensland SO 123A-125; WA Legislative Assembly SO 42-50; ACT SO 202-209; Queensland was the first State to accord a right of reply, by resolution of 18 October 1995.
62 Draft Code of Ethical Conduct for Members of the Queensland Legislative Assembly, above note 59 at 5.
correct statement may still be misleading where relevant information is deliberately undisclosed.  

Reference has already been made in Chapter 6 to the inquiry established by the NSW Legislative Council into the allegations made by Mrs Franca Arena MLC of a paedophile cover-up. The report by the Hon John Nader QC (dated 7 November 1997) found her allegations to be ‘false in all respects’. The report also concluded that the evidence given to the inquiry ‘strongly suggests Mrs Arena knew she had no such evidence’ and that her conduct was ‘objectively reprehensible’. After consideration of the report by the Standing Committee on Parliamentary Privileges and Ethics, the Legislative Council required a specific apology from Mrs Arena within five sitting days or else be suspended. Instead, a ‘statement of regret’ by Mrs Arena was accepted by the House.

Not to mislead the public

Proposals have been made at times to impose on members an obligation to comply with electoral promises or other political undertakings; that is, not to mislead the public. Proposals of this nature which contemplate legal enforcement are untenable, since courts are not equipped to deal with such political issues. Apart from relying on the ballot box to sanction misleading promises, the only other control available is that provided by the members’ House. This is where a code of conduct can be useful. Surprisingly, the Queensland Members’ Ethics and Parliamentary Privileges Committee rejected the suggestion that a members’ code ought to require members ‘to respond or comment truthfully in all dealings’:

The committee agrees that members should not deliberately mislead the Parliament or the public. However, it would be simplistic and a denial of the political realities to specifically impose an obligation on members to respond or comment truthfully in all dealings, and enforce this obligation through a code of conduct. Electors vote for a particular member of Parliament at election time in good faith, and by virtue of voting for that member the electorate places its confidence in him or her. The electorate in so doing draws a conclusion about the member’s judgment. It would be a derogation of the member’s mandate for any code of conduct to withdraw from the member his or her right to exercise political judgment.

The Committee’s dislike of this proposal is understandable if legal enforcement of the obligation were contemplated. But as this is inappropriate, there is a strong case for the inclusion in a code of conduct of a specific obligation not to mislead.

64 See Report No 4 of the Members’ Ethics and Parliamentary Privileges Committee at 10.
65 This statement was in terms similar to those of the specific apology.
66 See Minutes of the Proceedings of the Legislative Council No 54, Wednesday 1 July 1998 at 634-635.
the public as well as the parliament. Such a moral obligation was recognised by Dr Noel Preston:

There are moral rules which can be applied in politics. Corruption in political office ought never be sanctioned; the deliberate use of misleading information to damage a political opponent is unjustifiable; the public declaration of conflicts of interest is a moral duty.68

Chapter 12

Enforcement of standards

The general approach in Australia to the enforcement of the ethical standards of members is to follow the self-regulatory tradition of the House of Commons, and otherwise rely on the ballot box. The latter is clearly of limited effect in relation to the violation of standards by individual members. Greater reliance has therefore been placed on self-regulation which naturally follows from the privileges of each House to discipline its own members and to determine their qualifications. Even in those few instances where these standards have been prescribed by statute, such as in Victoria, responsibility for their enforcement may still remain with the member’s House.

Consideration has already been given in previous chapters to the enforcement procedure and sanctions currently in place in relation to the range of criminal and civil standards of members. There are those which are enforced by the general law, such as the offences of corruption and bribery, and the duty of confidentiality. The other standards, including those concerned with conflicts of interest, are enforced by each House. A significant departure from this traditional position is the role accorded in NSW to the Independent Commission Against Corruption (ICAC) and in Queensland to the Criminal Justice Commission (CJC), both of which bodies have the power to investigate members for official misconduct.

The central issue is whether this largely self-regulatory approach is the most desirable enforcement model or whether an official external monitor is needed. This debate raises sensitive issues which go to the heart of the privileges of parliament and its independence from the other two branches of government. It also must take account of the difficulty faced when formulating members’ standards, particularly within a political system which subjects members to inevitable conflicts of interest. Additionally, and most importantly, it must assess the most appropriate way of maintaining public confidence in the parliamentary system.

There appear to be at least two prominent criticisms of the present self-regulatory enforcement regime in Australian legislatures. The first is the lack of safeguards against political partisanship when a House or committee judges violations of standards. The second is the punitive powers of each House to punish members and
others by fine or imprisonment. The former concern could be remedied by the adoption of an independent external body such as ICAC in NSW. The latter concern has been partly addressed in relation to the Commonwealth, Queensland and Western Australian parliaments, where the power to commit for contempt is now subject to restrictions.

At a more practical level, avenues of complaint against the conduct of members are obscure and precarious. Understandably, there has been little encouragement from members to establish new complaint procedures. Certainly, there is a risk that they could be abused to mount political attacks against members. Whether this risk outweighs the potential benefit of greater accountability is difficult to assess. Probably the absence of clear complaint procedures has contributed to the lack of public confidence in politicians. The challenge is to construct avenues of communication which will ensure members are called to account by their House for infringements of standards, while at the same protecting them from scurrilous attacks. Whatever is created must accommodate art 9 freedom of speech and respect the responsibility of each House to discipline its own members.

With this challenge in mind, it is proposed here to review the present enforcement regime with a view to considering how this might be improved. Overseas approaches provide a useful comparison for this assessment. The conclusion is reached that the best solution is to appoint an independent parliamentary official and a standing ethics committee.

Current regime

The enforcement regime in relation to the specific criminal and civil standards of members has already been outlined in previous chapters. The following summarises that regime in general terms.

Criminal conduct of a member is a matter for the courts except in those very limited circumstances when art 9 freedom of speech denies the courts jurisdiction (see Chapter 8). The jurisdiction of the courts in relation to the civil standards of members is of very limited scope. Of course, members are subject to the same legal obligations as any other individual, but in respect of their special obligations as members of parliament, they are primarily accountable to their House. However, the general law impacts on members in relation to their duty of confidentiality outlined in Chapter 9 and their liability as public officers, especially in cases where they fail to declare a conflict of interest. Apart from these particular instances, the courts generally play no role in reviewing the conduct of members. This responsibility lies primarily with their own Houses, although it is shared to a degree with their electorates and political parties.

Each House monitors the ethical performance of its members in terms of their various standards in several ways. The first is in determining whether any have incurred disqualification from parliament on any of the grounds considered in Part I of this work. The second way is to exercise its power to discipline members for disorderly conduct, usually pursuant to standing orders, by reprimanding, censoring or suspending them. Serious cases of misconduct will constitute contempt of parliament for which a member may be suspended for a longer period of time,
expelled, fined or imprisoned. The power to punish for contempt and the restrictions on that power were considered in Chapter 5.

The procedure by which public complaints against members are dealt with is fairly primitive. Usually, there is no prescribed procedure by which public complaints can be made to the relevant House. Allegations of a breach of privilege can be raised with the presiding officer who decides whether they are sufficiently serious to warrant referral of the matter to the House or more usually to a privileges committee. The committee investigates the matter and reports to the House on its findings. Except in South Australia, all Australian Houses have a Privileges Committee. Otherwise, complaints against a member will only be raised in the House if another member is prepared to raise the matter. The House then decides whether the complaint is referred to the Privileges Committee or what other action is to be taken. The procedure of that committee usually follows the rules of natural justice (that is, procedural fairness) to protect the rights of witnesses, such as provided for by Resolution 2 of the Senate’s Privilege Resolutions of 1988.

However, a recent innovation is the citizen’s right of reply which enables persons who have been adversely referred to by a member under parliamentary privilege to seek to have a response published in Hansard. This right has been conferred in relation to both Houses of the Commonwealth and NSW Parliaments and as well as in the lower Houses of Victoria and Western Australia and in the upper houses of South Australia and Tasmania (and also in Queensland and the ACT) (see Chapter 6).

The introduction of codes of conduct, registers of interest and in some cases obligations of ad hoc disclosure has provided the opportunity to prescribe new avenues of public complaint, new processes of monitoring, or even to vest jurisdiction in external bodies other than the member’s House or one of its committees — yet few Houses have responded to this opportunity.

Members of those Houses with codes of conduct are liable only for contempt of parliament if they infringe their code of conduct. The exception is in NSW where both codes provide ICAC with the jurisdiction to investigate whether a member has incurred a substantial breach of a code in respect of which a finding of corrupt conduct could be made. Even then, unless that breach constitutes a criminal offence which is referred to the Director of Public Prosecutions, the decision rests with the member’s House as to whether any sanction should be imposed.

A similar position exists in relation to registers of interests and obligations of ad hoc disclosure. In most Houses, failure to observe their requirements constitutes contempt of parliament. Additionally, in NSW, the member’s seat may be declared

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1 See the proposed procedures for the consideration of complaints of a breach of privilege by the Queensland Members’ Ethics and Parliamentary Privileges Committee Report No 36, Attachment A.


3 New South Wales Houses, Tasmanian House of Assembly and both Victorian Houses.
vacant by the member's House, while in South Australia, contempt of parliament constitutes a summary offence with a penalty not exceeding $5000. In Queensland, a detailed procedure is in place whereby complaints can be made to the Registrar by the public as well as by other members which are heard by the Members' Ethics and Parliamentary Privileges Committee. The Committee reports to the Legislative Assembly as to its findings and recommendations.

Also in Queensland, the CJC is empowered to investigate allegations of 'official misconduct' by members of the Queensland Parliament. The term 'official misconduct' has been interpreted by the CJC so as to confine its investigation only to criminal conduct of members. However, the CJC has suggested an extension of its jurisdiction to include non-criminal conduct.

A recent innovation in NSW is the appointment by each House of a Parliamentary Ethics Adviser to advise members on ethical issues arising in the course of their official duties, including advice on their entitlements and on conflicts of interest. As this advice is given only at the request of the member, no investigatory role is conferred. In contrast is the new office of the Queensland Integrity Commissioner who is empowered to give advice on ethical issues on request to the Premier, ministers, all government employees and members of the Queensland Parliament who belong to the government party or parties. As the Premier can seek ethical advice in relation to any of these officials, members of the Legislative Assembly could be the subject of such advice.

It is evident from this brief outline of the enforcement regimes in Australian legislatures that the predominant response is to cite the member for contempt of parliament. The range of punishment for contempt is generally limited to a reprimand or suspension from the House. Expulsion rarely occurs and can only be justified in the most serious cases of misconduct. Indeed, the Commonwealth and the Northern Territory have lost this power. Further, the power to fine is not available unless statutorily conferred and even then, there is a strong case for confining to the courts the power to impose substantial fines and to commit to prison.

What then are the alternative approaches to this reliance on self-regulation and the limited sanctions which a finding of contempt of parliament provides?

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4 Section 14A Constitution Act 1902 (NSW).
5 Section 7 Members of Parliament (Register of Interests) Act 1983 (SA).
7 See Part 7 of the Public Sector Ethics Act 1994 (Qld) inserted in 1999. The first appointment is yet to be made.
8 This has occurred for the Commonwealth, Queensland, Western Australia and the Northern Territory.
Overseas experience

Overseas experience provides several options: a parliamentary ethics committee, a parliamentary ethics official, an independent ethics officer or commission, or a combination of these.

The first of these has been adopted for members of the South African Parliament. A simple procedure is provided whereby all complaints are made to the Committee of Members' Interests, a joint parliamentary committee, which must investigate any alleged irregularity. The Committee is required to report to the appropriate House within 30 days of the lodging of the complaint with its full findings, supported with reasons and recommendation as to sanction. A hearing must be given to both the complainant and the member concerned.

The option of a parliamentary official was adopted in Germany where the President of the German Bundestag may investigate an 'indication' that a member has breached a requirement of the Code of Conduct (Rule 8). The member must be heard and is required to provide 'further information'. If a breach is found, the President confidentially informs the Presidium and the chairpersons of the parliamentary groups, but his final conclusion must be published. Where no breach is found the member can demand publication of that finding. Publication and consequent publicity are the only consequences of a breach.

Following the recommendations of the Nolan Committee for the appointment of an independent monitoring authority, the UK House of Commons established by two resolutions the office of Parliamentary Commissioner for Standards and a Select Committee on Standards and Privileges to monitor a code of conduct for its members. The Parliamentary Commissioner is appointed by the House. The functions of the office are to advise members on the Code, investigate complaints of any breaches, educate members, monitor the Code and make recommendations. The Commissioner investigates complaints received from members and the public, and advises the Committee of any prima facie breaches. The Committee recommends to the House what if any further action is required to be taken.

In Canada, a proposed code for federal members provides for a Jurisconsult who is appointed by Parliament to investigate complaints of infringements of the code and to report to a Standing Joint Committee. Each House then decides on the penalty. Similarly, in Ontario, an Integrity Commissioner has been established as an officer of the Legislative Assembly. The Commissioner is vested with an advisory role and the capacity to investigate whether breaches have occurred, but only when asked by the Assembly, the Executive Council or a member.

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9 *Code of Conduct in Regard to Financial Interests* (1996) Rule 5 — note apart from cl 6.1 re remunerated lobbying, this code is limited to the declaration and registration of financial interests.
11 By resolution on 24 July 1996.
12 Standing Order 150.
13 *Members' Integrity Act 1994* (Ont).
In the Republic of Ireland, public complaints that members failed to comply with the requirements of ad hoc disclosure or a register of interests are made to the Clerk of the House who sifts them before referring them to a Public Offices Commission. On the other hand, complaints made by other members are made directly to the Commission. The Commission may report to the Director of Public Prosecutions any matter which may warrant criminal proceedings. The Commission's determinations are reported to the House which either exonerates the member or official or imposes suspension for up to 30 days, censure or non-payment of salary. The Commission is also empowered to provide guidelines and advice. To discourage frivolous complaints, the Commission may award costs against those who had no reasonable grounds for lodging a complaint.\(^{14}\)

In the United States, both Houses of Congress have their own Ethics Committee to monitor the Code of Official Conduct for Members and Staff of each House.\(^{15}\) Each Committee investigates, makes findings and recommends what action the relevant House should take against a member found to have infringed the Code.

At times, there are certain advantages in establishing an independent commission of inquiry to investigate members, rather than leaving this responsibility solely with the member's House or a committee. A good example is the investigation conducted by a special commission of inquiry in NSW in 1998 into the allegations made by Mrs Franca Arena MLC under privilege that the Premier, Opposition Leader and a judge had conspired to cover-up allegations of paedophilia. As Professor Campbell has noted, the establishment of this independent inquiry by the Legislative Council was appropriate given that it concerned the conduct of members of the other House and a judge, and needed to be resolved speedily in such a way as to maintain public confidence.\(^{16}\)

**Recommendations for Australia**

A version of the model adopted by the UK House of Commons and that proposed for Canada would extend and modify the current enforcement regime of Australian parliaments in such a way as to reduce the risk of political bipartisanship and deliver a complaint procedure for both members and the public. The model suggested here entails the appointment of a parliamentary official by each House (preferably the same individual) to receive complaints from members and the public, to investigate them, and to report to the ethics committee of the appropriate House whether there is a prima facie breach of standards. The committee would be required to investigate such matters to determine whether any breach in fact occurred and to report to the House as to its findings and recommendations. The House would decide on whether a sanction is imposed and its nature.

15 House of Representatives Committee on Standards of Official Conduct and the Senate Select Committee on Ethics.
While the independence of the parliamentary official would need to be guaranteed, it is obviously more difficult to ensure that the ethics committee is not politicised. One suggestion to overcome this difficulty is to expand the function of the parliamentary official to decide whether a breach of standards actually occurred and to confine the role of the ethics committee to decide whether to accept or reject the findings made. In rejecting a finding, the committee would act merely as a review body, overruling the parliamentary official’s findings only in cases of clear legal error.\(^\text{17}\)

The nature of the sanctions imposed obviously depends on the body which imposes them and the particular standards or mechanisms concerned. Where the House retains the power to impose sanctions on its members, these may take the form of a reprimand, suspension, expulsion, a fine or imprisonment.\(^\text{18}\) There is a strong case for denying each House the powers to fine or imprison, leaving these sanctions exclusively to the courts to impose. Other sanctions may be imposed for specific mechanisms. For instance, failure to comply with the requirements of a register of interests might incur cessation of salary until compliance. Loss of an elected position has already been discussed under the grounds of disqualification detailed in earlier chapters. Restitution could be required in respect of any financial benefit obtained in breach of public trust.

It is imperative that a sense of proportion be retained both in the prescription of the penalties and their imposition. Technical or minor infringements of standards may require no more than a warning on the first occasion in view of the adverse publicity which is likely to attach to even the most lenient penalty. Disproportionately severe penalties may deter enforcement at all. The following warning from the Queensland Electoral and Administrative Review Commission (EARC) is apposite:

> While the Commission recognises the need to provide sanctions for breaches or non-compliance with required ethics standards, the Commission is concerned that sanctions may be used inappropriately, for example by over-reaction to a breach in order to make an example of an offender. Ineffective use of sanctions is likely to both encourage others to breach a Code and discourage managers from enforcing the Code’s provisions. Sanctions used unwisely may seriously damage the credibility and usefulness of any ethics regime.\(^\text{19}\)

**Conclusion**

The Bowen Report concluded that self-regulation of members was the most


\(^{18}\) For example, the South Africa Code of Conduct in Regard to Financial Interests of 1996 (note: not legislation, but rules of each House) provides in respect of members of both Houses for a reprimand, suspension for up to 15 days, or a fine or salary cut of a month’s salary. The Committee of Members’ Interests, a joint committee, must report its findings and recommendations or any sanction to the House within 30 days of the lodging of the complaint.

appropriate approach in Australia:

Traditionally in Australia responsibility for standards of conduct in public officeholders has been vested in those responsible for their management. The Salmon Commission, writing in the British context where the traditions of public service are similar to our own, said:

one of the main safeguards against corruption in any institution is the standard set and required by the management from the top downwards. This depends on esprit de corps which can be seriously damaged by systems of regulation and scrutiny so rigorous that they inhibit leadership by management and imply that people working in the organisation are unworthy to trust.20

The Committee agrees, and believes that the point is valid whether the officeholders concerned are elected or appointed. It would go further and say that if a group of officeholders is incapable of ensuring that its members adhere to a set of prescribed or clearly understood standards of right conduct, there is little likelihood that an alien authority can successfully impose those standards on them.21

Since this report in 1979, the integrity landscape of members of parliament has changed. There has been widespread adoption of registers of interests by all Australian parliaments and significant investigation of other mechanisms designed to support the observance of ethical standards of members. Consequently, codes of conduct now exist in three States: NSW, Tasmania and Victoria. Yet the enforcement of these various mechanisms has, on the whole, been left with each House without clear avenues for public complaint. This deficiency needs to be remedied if there is to be any improvement in the level of public confidence in the integrity of the parliamentary system. ●

21 Report of the Committee of Inquiry established by the Prime Minister on 15 February 1978, Public duty and private interest (the Bowen Report) at para 3.15.
List of reports on disqualification

Commonwealth


State


United Kingdom

Report from the Select Committee on Offices or Places of Profit under the Crown, House of Commons, 1941.

Report from the House of Commons Select Committee on Members' Interests (Declaration) (the Strauss Report), 1969.


Appendix 2

Disqualification provisions of the Commonwealth Constitution: ss 43, 44 and 45

s 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.

s 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.

s 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.

Recommendations of the 1981 Senate Report on s 44(iv) (par 5.83)

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 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.

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.

appendix 4

List of Parliamentary Privileges


Powers and Privileges. — The following are among the principal powers and privileges of each House, and of the members of each House, of the Imperial Parliament, as now known to the law:

(i.) The power to order the attendance at the bar of the House of persons whose conduct has been brought before the House on a matter of privilege.

(ii.) The power to order the arrest and imprisonment of persons guilty of contempt and breach of privilege.

(iii.) The power to arrest for breach of privilege by the warrant of the Speaker.

(iv.) The power to issue such a warrant for arrest, and imprisonment for contempt and breach of privilege, without showing any particular grounds or causes thereof.

(v.) The power to regulate its proceedings by standing rules and orders having the force of law.

(vi.) The power to suspend disorderly members.

(vii.) The power to expel members guilty of disgraceful and infamous conduct.

(viii.) The right of free speech in Parliament, without liability to action or impeachment for anything spoken therein; established by the 9th article of the Bill of Rights.

(ix.) The right of each House as a body to freedom of access to the sovereign for the purpose of presenting and defending its views.
BREACHES OF PRIVILEGES. — The following are instances of breaches of privileges:

(i.) Wilful disobedience to the standing rules and orders of the House passed in the exercise of its constitutional functions.

(ii.) Wilful disobedience to particular orders of the House, made in the exercise of its constitutional functions.

(iii.) Wilfully obstructing the business of the House.

(iv.) Insults, reflections, indignities and libels on the character, conduct and proceedings of the House and its members.

(v.) Assaults on members of the House.

(vi.) Interference with the officers of the House in the discharge of their duties.

IMMUNITIES. — The following are instances of Parliamentary immunities:

(i.) Immunity of members for anything said by them in the course of Parliamentary debates.

(ii.) Immunity of members from arrest and imprisonment for civil causes whilst attending Parliament, and for forty days after every prorogation, and for forty days from the next appointed meeting.

(iii.) Immunity of members from the obligations to serve on juries.

(iv.) Immunity of witnesses, summoned to attend either House of Parliament, from arrest for civil causes.

(v.) Immunity of Parliamentary witnesses from being questioned or impeached for evidence given before either House.

(vi.) Immunity of officers of either House, in immediate attendance and service of the House, from arrest for civil causes.


Part I Code of Conduct in Members of Parliament

(Register of Interests) Act 1978 (Vic)

PART I — CODE OF CONDUCT

3. Code of conduct for Members

s. 3

(1) It is hereby declared that a Member of the Parliament is bound by the following code of conduct —

(a) Members shall —
(i) accept that their prime responsibility is to the performance of their public duty and therefore ensure that this aim is not endangered or subordinated by involvement in conflicting private interests;

(ii) ensure that their conduct as Members must not be such as to bring discredit upon the Parliament;

(b) Members shall not advance their private interests by use of confidential information gained in the performance of their public duty;

(c) A Member shall not receive any fee, payment, retainer or reward, nor shall he permit any compensation to accrue to his beneficial interest for or on account of, or as a result of the use of, his position as a Member;

(d) A Member shall make full disclosure to the parliament of —

(i) any direct pecuniary interest that he has;

(ii) the name of any trade or professional organization of which he is a member which has an interest;

(iii) any other material interest whether of a pecuniary nature or not that he has —

in or in relation to any matter upon which he speaks in the Parliament;

(e) A Member who is a Minister shall ensure that no conflict exists, or appears to exist, between his public duty and his private interests;

(f) A Member who is a Minister is expected to devote his time and his talents to the carrying out of his public duties.

(2) Without limiting the generality of the foregoing in the application and interpretation of the code regard shall be had to the recommendation of the Joint Select Committee of the Victorian Parliament appointed pursuant to The Constitution Act Amendment (Qualifications Joint select Committee) Act 1973 presented to the Legislative Assembly on the 23rd day of April, 1974 (D.14/1973-74) contained in paragraph 12 of that report.

PART III — GENERAL

9. Failure to comply with Act

s. 9

Any wilful contravention of any of the requirements of this Act by any person shall be a contempt of the Parliament and may be dealt with accordingly and in addition to any other punishment that may be awarded by either House of the Parliament for a contempt of the House of which the Member is a Member the House may impose a fine upon the Member of such amount not exceeding $2,000 as it determines.

10. Default of payments of fine

In default of the payment of any fine imposed on a Member under section 9 to the Consolidated Fund within the time ordered by the House the seat of the Member shall become vacant.
11. Regulations

The Governor in Council may make regulations prescribing any matters or things authorized or required or necessary to be prescribed under this Act.

Appendix 6

State Codes of Conduct for Members

NSW Legislative Assembly and Legislative Council Resolutions of 26 May 1999: Code of Conduct for Members

That:

1. This House adopt, for the purposes of section 9 of the Independent Commission Against Corruption Act 1988, the following code of conduct:

PREAMBLE

- The Members of the Legislative Assembly and the Legislative Council have reached agreement on a Code of Conduct which is to apply to all Members of Parliament;

- Members of Parliament recognise that they are in a unique position of being responsible to the electorate. The electorate is the final arbiter of the conduct of Members of Parliament and has the right to dismiss them from office at regular elections.

- Members of Parliament accordingly acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.

THE CODE

1 Disclosure of conflict of interest

(a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.

(b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.

(c) A conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.
2. Bribery

Members must not promote any matter, vote on any bill or resolution, or ask any question in the Parliament or its Committees, in return for payment or any other personal financial benefit.

3. Gifts

(a) Members must declare all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests.

(b) Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to corruptly influence the Member in the exercise of his or her duties.

(c) Members may accept political contributions in accordance with part 6 of the Election Funding Act 1981.

4. Use of public resources

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

5. Use of confidential information

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

6. Duties as a Member of Parliament

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

This resolution has continuing effect unless and until amended or rescinded by resolution of the House.

[Minutes of the Proceedings of the Legislative Council No 5, Wednesday 26 May 1999, Entry No 2].

Tasmanian SO 2A Code of Ethical Conduct for Members of the House of Assembly

PREAMBLE

As Members of the House of Assembly we recognise that our actions have a profound impact on the lives of all Tasmanian people. Fulfilling our obligations and
discharging our duties responsibly requires a commitment to the highest ethical standards.

STATEMENT OF COMMITMENT

To the people of this State, we owe the responsible execution of our official duties, in order to promote human and environmental welfare.

To our constituents, we owe honesty, accessibility, accountability, courtesy and understanding.

To our colleagues in this Assembly, we owe loyalty to shared principles, respect for differences, and fairness in political dealings.

We believe that the fundamental objective of public office is to serve our fellow citizens with integrity in order to improve the economic and social conditions of all Tasmanian people.

We reject political corruption and will refuse to participate in unethical political practices which tend to undermine the democratic traditions of our State and its institutions.

DECLARATION OF PRINCIPLES

Members of this Assembly must carry out their official duties and arrange their private financial affairs in a manner that protects the public interest and enhances public confidence and trust in government and in high standards of ethical conduct in public office.

Members of this Assembly must act not only lawfully but also in a manner that will withstand the closest public scrutiny; Neither the law nor this code is designed to be exhaustive, and there will be occasions on which Members will find it necessary to adopt more stringent norms of conduct in order to protect the public interest and to enhance public confidence and trust.

Every Member is individually responsible for preventing potential and actual conflicts of interest, and must arrange private financial affairs in a manner that prevents such conflicts from arising including declaration of pecuniary interest in any matter being considered as part of their official duties as a Parliamentarian.

Members of the Assembly must carry out their official duties objectively and without consideration of personal or financial interests.

Members of the Assembly must not accept gifts, benefits or favours except for incidental gifts or customary hospitality of nominal value.

Members of the Assembly must not take personal advantage of or private benefit from information that is obtained in the course of or as a result of their official duties or positions and that is not in the public domain.

Members of the Assembly must not engage in personal conduct that exploits for private reasons their positions or authorities or that would tend to bring discredit to their offices.
Members of the Assembly must not use, or allow the use of, public property or services for personal gain.

Members of the Assembly, when leaving public office and when they have left public office, must not take improper advantage of their former office.

2B.

CODE OF RACE ETHICS

FOR MEMBERS OF THE HOUSE OF ASSEMBLY

As Members of the Tasmania Parliament we agree:

(1) To act in a manner which upholds the honour of public office and the Parliament.

(2) To respect the religious and cultural beliefs of all groups living within Australia in accordance with the Universal Declaration of Human Rights.

(3) To uphold principles of justice and tolerance within our multicultural society making efforts to generate understanding of all minority groups.

(4) To recognise and value diversity as an integral part of Australia's social and economic future.

(5) To help without discrimination all persons seeking assistance.

(6) To speak and write in a manner which provides factual commentary on a foundation of truth about all issues being debated in the community and the Parliament.

(7) To encourage the partnership of government and non-government organisations in leading constructive and informed debate in the community.

(8) To promote reconciliation with indigenous Australians.

The UK Code of Conduct for Members of the House of Commons

The Code of Conduct for Members of Parliament

Prepared pursuant to the Resolution of the House of Commons of 19th July 1995

I. Purpose of the Code

The purpose of the Code of Conduct is to assist Members in the discharge of their obligations to the House, their constituents and the public at large.
II. Public duty

By virtue of the oath, or affirmation, of allegiance taken by all Members when they are elected to the House, Members have a duty to be faithful and bear true allegiance to Her Majesty the Queen, her heirs and successors, according to law.

Members have a duty to uphold the law and to act on all occasions in accordance with the public trust placed in them.

Members have a general duty to act in the interests of the nation as a whole; and a special duty to their constituents.

III. Personal conduct

Members shall observe the general principles of conduct identified by the Committee on Standards in Public Life as applying to holders of public office:

'Selflessness

Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and example.'

Members shall base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict.
between the two, at once, and in favour of the public interest.

Members shall at all times conduct themselves in a manner which will tend to maintain and strengthen the public’s trust and confidence in the integrity of Parliament and never undertake any action which would bring the House of Commons, or its Members generally, into disrepute.

The acceptance by a Member of a bribe to influence his or her conduct as a Member, including any fee, compensation or reward in connection with the promotion of, or opposition to, any Bill, Motion, or other matter submitted, or intended to be submitted to the House, or to any Committee of the House, is contrary to the law of Parliament.

Members shall fulfil conscientiously the requirements of the House in respect of the registration of interests in the Register of Members’ Interests and shall always draw attention to any relevant interest in any proceeding of the House or its Committees, or in any communications with Minister, Government Departments or Executive Agencies.

In any activities with, or on behalf of, an organisation with which a Member has a financial relationship, including activities which may not be a matter of public record such as informal meetings and functions, he or she must always bear in mind the need to be open and frank with Ministers, Members and officials.

No Member shall act as a paid advocate in any proceeding of the House.

No improper use shall be made of any payment or allowance made to Members for public purposes and the administrative rules which apply to such payments and allowances must be strictly observed.

Members must bear in mind that information which they receive in confidence in the course of their parliamentary duties should be used only in connection with those duties, and that such information must never be used for the purpose of financial gain.
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