Members of Parliament:
law and ethics

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Part I

Qualifications & Disqualifications

& 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 Certain grounds, at least in their current form, are now outdated, based on notions from the 19th century which are no longer current.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).

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. 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 and the denial of the franchise to women and Aborigines and Torres Strait Islanders were the most prominent issues. 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. 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 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. 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 (ss 12 and 21 Constitution Act Amendment Act 1893 — unless they held the freehold qualification).
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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.12

Commonwealth

While the Constitution prescribed the initial qualifications for election to the
Commonwealth Parliament, s 34 empowered the Parliament thereafter to determine
the qualifications for election to the House of Representatives. By s 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.13

The voting age was reduced in 197314 from 21 to 18 years, while the requirement
of Australian citizenship was introduced15 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 1984.16 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 Hill17 in
1999 that they were disqualified under s 44(i) for owing allegiance to a ‘foreign

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12 See the findings of the Report from the Select Committee on Voting Rights of Aborigines, H of R 1
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.
14 Section 6 Commonwealth Electoral Act 1973 (Cth) amended s 69(1)(a) Commonwealth Electoral
Act 1918 (Cth).
15 Section 34 Statute Law (Miscellaneous Amendments) Act 1981 amended s 69(1)(a)
Commonwealth Electoral Act 1918 (Cth) as from 26 January 1984 (see Gazette 1983, No 8247).
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
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 Australia obiter comments by Brennan CJ, Gaudron21 and Gummow JJ 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 Commentary on the Australian Constitution (2nd ed) Law Book Company Sydney 1997, p 98.
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 are

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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)(ii) *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(a) *Electoral Act 1907*.
29 Sections 17(2)(ab), 31(3)(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.

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

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.\footnote{P Finn, \textit{Integrity in Government Project: Second Report, Abuse of Official Trust — Conflict of Interest and Related Matters} Australian National University Canberra 1993, p 76.}
\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.\footnote{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.} 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.\footnote{Official Record of the Debates of the Australasian Federal Convention (Second Session), Sydney, 1897, at 1012-1013.}
\end{quote}
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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

36 Reference to ‘members’ includes senators except when otherwise noted.
37 Section 45(i) declares the member's seat to be vacant as soon as a member ‘(i) [b]ecomes subject to any of the disabilities mentioned in the last preceding section’.
38 This is clear from ‘thereupon become vacant’ (emphasis added) in s 45.
39 See chapter 4.
40 The position in South Australia is particularly unclear for candidates under s 46 of the
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.
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 Parasram_ 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.\textsuperscript{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 grounds\textsuperscript{55} 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,\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{58} Nominations close at 12 noon on the final date for nominations.\textsuperscript{59} While a similar process of nomination occurs in relation to by-elections to fill casual vacancies in the House of Representatives,\textsuperscript{60} this is not the case when filling casual Senate vacancies pursuant to s 15 of the Constitution.

\textit{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 \textit{Sykes v Cleary}, on whether there is an

\begin{itemize}
\item \textsuperscript{54} At 122-123.
\item \textsuperscript{55} That is, ss 43 and s 44(i), (iv) and (v).
\item \textsuperscript{56} (1992) 176 CLR 77 at 122.
\item \textsuperscript{57} Section 162 Commonwealth Electoral Act 1918.
\item \textsuperscript{58} Section 167.
\item \textsuperscript{59} Sections 170 and 175.
\item \textsuperscript{60} Pursuant to s 33 of the Constitution.
\end{itemize}
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 choosing and appointing a replacement which appears to be reflected in the distinct incapacities of being chosen and of sitting in ss 43 and 44.

Review of Sykes v Cleary

A particular difficulty imposed on candidates by the 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) 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

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 1924 (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', 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.

**Territories**

In the Northern Territory, the grounds of disqualification are expressly determined at the date of nomination. 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.

**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 undue 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.  

Membership of the other House

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. 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.

In view of the interpretation given to 'being chosen' in s 44 in 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'. It also covers the case where the member is appointed to the Senate pursuant to s 15 of the Constitution.

The 1981 Senate Report 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

71 The 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).
72 For example, John Gorton in 1968; Bronwyn Bishop in 1994; Gareth Evans in 1996.
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.
74 At para 5.61.
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.
members of parliament: law and ethics

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.\(^{85}\) 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.\(^{86}\)

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\(^{87}\) and Western Australian\(^{88}\) 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.\(^{89}\)

In the Northern Territory, disqualification arises if 'an office ... under a law of the Commonwealth' is held or accepted.\(^{90}\) 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.\(^{91}\)

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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).
88 Section 34(1)(b) Constitution Acts Amendment Act 1899 (WA).
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).
91 Section 103(2)(a) Electoral Act 1992 (ACT).
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'.\(^92\) 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.\(^93\)

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.\(^94\) Commonwealth legislation was swiftly enacted to disqualify any person who stood to benefit from that scheme.\(^95\) This effectively forced the States to repeal their legislation.\(^96\)

\(2\) 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.\(^97\) The same position applies in the ACT.\(^98\)

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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)(b) 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 Report 100 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.

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; 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(i) 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, '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 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 Hill 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.

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.

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:

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(1999) 163 ALR 648 (Gleeson CJ, Gaudron, Gummow and Hayne JJ; McHugh, Kirby and Callinan JJ dissenting).
118 At para 96.
119 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 Hill122 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(i).123 The only issue was whether the United Kingdom was a ‘foreign power’ within s 44(i). 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 PH 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(3)(b) 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 McIl 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*,128 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 1829.129

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’.130

A different position could well be justified at the State level where, for instance, the Joint Committee on the ICAC recommended131 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 Report132 and the Constitutional Commission133 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.
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.\textsuperscript{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.\textsuperscript{140} At present, it is only a requirement of the \textit{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.\textsuperscript{141}

\textbf{States}

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

\begin{quote}
(b) takes any oath or makes any declaration or acknowledgment of allegiance, 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.
\end{quote}

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)

\begin{itemize}
\item This is in effect the recommendation of the NSW Joint Committee on the ICAC: \textit{Inquiry Into Section 13A Constitution Act 1902} at para 5.20.
\item Clause 72(1)(c) LCARC’s draft Parliament of Queensland Bill disqualifies a member who ‘stops being an Australian citizen’.
\item 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: \textit{Official Record of Debates Item No B7} at 397.’
\item Section 13A(b) \textit{Constitution Act 1902} (NSW); s 7(1) \textit{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) \textit{Constitution Act 1934} (SA); s 34(b)-(c) \textit{Constitution Act 1934} (Tas); s 38(f) \textit{Constitution Acts Amendment Act 1899} (WA).
\item Under s 46 of the \textit{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.
\end{itemize}
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.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.145
This raises in all States (except Queensland, South Australia and Victoria) an
apparent inconsistency between those provisions which permit British subjects
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 Sue v Hill 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.148 This effectively requires them to take out Australian citizenship
to avoid the risk of disqualification.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.150 If this approach is adopted, members
ought to be under a similar obligation to declare any foreign allegiance they assume
after being elected.

Territories

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

144 Sections 17(2) and 31(2) Constitution Act 1934 (SA).
145 Compare M Pryles, above note 106 at 184.
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) Constitution Act 1935 (Tas).
148 This form of allegiance incurs no disqualification in South Australia: ss 17(2) and 31(2)
Constitution Act 1934 (SA).
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.
Conclusion

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
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 
ofences 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.\footnote{151} Although doubt has been expressed whether a conviction is 
necessary for one to be ‘attainted’,\footnote{152} the general view is that some form of 
judgment is necessary, resulting in a sentence of death, forfeiture of property and 
‘corruption of blood’.\footnote{153} Other offences similar to treason but given different 
statutory descriptions are likely also to come within this disqualification. For 
instance, the \textit{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.\footnote{154}

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’.\footnote{155} The Constitutional 
Commission recommended that the offence of treason be expressed as one under 
Commonwealth law and that disqualification cease upon being pardoned.\footnote{156} 
Although the offence of treachery under s 24AA of the \textit{Crimes Act 1914} (Cth) 
includes acts in relation to the States as well as the Commonwealth,\footnote{157} there seems

\footnotesize
\begin{enumerate}
\item Not 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.
\item Final Report of the Constitutional Commission at para 4.811; contrast R D Lumb, above note 104 
\item For example \textit{Moxley and Whiteleys Law Dictionary} (10th ed) Butterworths Sydney 1998 as cited 
    in the NSW Joint Committee on the ICAC para 4.3.
\item At para 3.5; note there has been only one case of disqualification under ss 2 and 7 of the 
    \textit{Forfeiture Act 1870} (UK) — Lynch’s case in 1903.
\item 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.
\item Section 24AA(1)(a)(ii) includes any act ‘to overthrow by force or violence the established 
    government of the Commonwealth, of a State ...’.
\end{enumerate}
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.

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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\(^1\) and by the Final Report of the Constitutional Commission\(^2\) 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.\(^3\)

2. Confer on Parliament the power to determine, generally or in a specific case, whether disqualification should apply.\(^4\) 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).\(^5\) 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.\(^6\) The NSW Joint Committee on the ICAC recommended disqualification if sentenced to imprisonment for at least a year.\(^7\)

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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1 \(^1\) At para 3.38.
2 \(^2\) At para 4.817.
3 \(^3\) 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.
5 \(^5\) 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.
6 \(^6\) Vol II rec 6 at 2.
7 \(^7\) At para 4.30.
Chapter 2: qualifications and disqualifications

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. 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. 175

States

Members

As with the Commonwealth, five States prescribe ‘attainted of treason’ as a permanent disqualification. 176 Only Victoria expressly requires an actual conviction. 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); 178 ‘crime or any infamous crime’ (Qld); 179 ‘felony’ (WA); 180 ‘indictable offence’ (SA). 181

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

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)(b) 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

\begin{itemize}
\item 182 Sections 44(3), 46, 48(2) \textit{Constitution Act 1975} (Vic).
\item 183 Section 34(e) \textit{Constitution Act 1934} (Tas).
\item 184 Section 21(1)(c) and (2)(a) \textit{Northern Territory (Self-Government) Act 1978} (Cth).
\item 185 Section 14(1)(a) \textit{ACT (Self-Government) Act 1988}; same provision for candidates under s 67(4)(c).
\item 186 Clause 72(1)(i).
\item 188 Section 9 Crimes Act 1900 (NSW).
\item 189 Section 3(1) \textit{Criminal Code Act 1913} (WA).
\item 186 Section 4(1) \textit{Criminal Code Act 1899} (Qld).
\item 191 See Official Record of the Debates of the Australasian Federal Convention (Second Session), Sydney 1897 at 1012-1014.
\item 192 See the passage of Chief Baron Gilbert extracted from \textit{Evidence} at 139 and quoted by Maxwell J in \textit{In re Trautwein} (1940) 40 SR (NSW) 371 at 374-375.
\item 193 By the \textit{Evidence Act 6 & 7 Vic c 85}.
\item 194 (1940) 40 SR (NSW) 371.
\end{itemize}
Chapter 2: qualifications and disqualifications

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 foundered 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...

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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.202 Similar provision is made in Tasmania which disqualifies any person from being elected if 'in prison under any conviction'.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 electors204 and candidates,205 both of which grounds, in the end, apply to candidates206 but only the former to members.207

In Western Australia, s 32 of the 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.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.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

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202 Sections 21(b), 79(1) and 81B(1) 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) 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.

203 Section 14(2) Constitution Act 1934 (Tas).

204 Section 48(2)(a) 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.

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.

206 Section 44(1): to be nominated must be qualified to be an elector.

207 Section 46(a): member loses seat if no longer qualified to be an elector.

208 Sections 17(1)(h), 31(1)(h) and 46 Constitution Act 1934 (SA).

209 Section 21(1)(c) and (2)(a) Northern Territory (Self-Government) Act 1978 (Cth).
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the *Commonwealth Electoral Act 1918* (Cth) will result in making a candidate or member not eligible.\(^{210}\)

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.\(^{211}\)

**Electoral offences**

It should not be surprising that conviction for serious electoral offences may incur disqualification from being elected or remaining as a member.\(^{212}\) 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\(^{213}\) and Western Australia,\(^{214}\) 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.\(^{215}\) In Tasmania, the period of disqualification is four years if convicted of any crime under the *Electoral Act 1985* (Tas).\(^{216}\) 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).\(^{217}\) 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.

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\(^{210}\) 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.

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

\(^{212}\) 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.

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

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

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

\(^{216}\) Section 250.

\(^{217}\) 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.\(^{218}\)

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.\(^{219}\) 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),\(^{220}\) 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,\(^{221}\) 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\(^{222}\) or if a finding is made by the Court of Disputed Returns that those offences have been committed.\(^{223}\)

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.\(^{224}\)

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:

The Commission believes that offences against the integrity of the electoral rolls

\(^{218}\) Section 256. See Forms 45 and 46 of the \textit{Electoral Regulations 1985}.

\(^{219}\) These are referred to in cl 64(2)(a)(iii) and 72(1)(i)(ii) LCARC’s draft Parliament of Queensland Bill.

\(^{220}\) These are referred to in cl 64(2)(a)(iv) and 72(1)(i)(iii) LCARC’s draft Parliament of Queensland Bill.

\(^{221}\) Section 164 \textit{Parliamentary Electorates and Elections Act 1912} (NSW).

\(^{222}\) 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).

\(^{223}\) Section 103(4) \textit{Electoral Act 1992} (ACT).

\(^{224}\) Section 89 \textit{Criminal Code} (NT).
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are amongst the most serious that may be committed, and deserve appropriate sanctions.\textsuperscript{225}

\textit{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} This principle was applied by the High Court in \textit{Commissioner for Railways (NSW) v Cavanough} to hold that a State Railways officer was held not to have vacated his office once his larceny conviction was set aside. However, the

\textsuperscript{225} \textit{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} \textit{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.
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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.\(^{231}\)

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.\(^{232}\)

**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.\(^{233}\) As for the distinction between being bankrupt and insolvent, the preferable interpretation\(^{234}\) is that they are synonymous, reflecting the colonial legislation which referred either to insolvency or bankruptcy.\(^{235}\)

The High Court in *Nile v Wood* referred to 'insolvent' as meaning 'adjudicated insolvent'.\(^{236}\) 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.

\(^{236}\) See *Nile v Wood* (1986) 167 CLR 133 at 140, citing *In re Salom; Salom v Salom* [1924] SASR 93; *Stott v Parker* [1939] SASR 98 per Cleland J at 115-116.
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 'takes 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.
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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 and Tasmania 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 noted that this first approach was advocated by Mr Carruthers at the 1897 Constitutional Convention 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.

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 defaulters'.

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251 Candidates: s 83(2)(a) Electoral Act 1992 (Qld), cl 64(2)(b)-(c) LCARC's draft Parliament of Queensland Bill; members: s 7(1) Legislative Assembly Act 1867 (Qld), cl 72(1)(d)-(d) LCARC's draft Parliament of Queensland Bill.

252 Sections 17(1)(d)-(e) and 31(1)(e), combined with s 46 Constitution Act 1934 (SA). Section 46 is intended to apply to candidates the same grounds of disqualification imposed on sitting members by ss 17 and 31 but how this occurs is difficult to identify.

253 Sections 44(2)(c) and 55(c) Constitution Act 1975 (Vic).

254 Sections 32(a) and 38(d) Constitution Acts Amendment Act 1899 (WA). Bankruptcy may also be covered as a legal incapacity within s 7 and 20 which disqualifies members.

255 Sections 7(1) Legislative Assembly Act 1867 (Qld) — omitted from LCARC's draft Parliament of Queensland Bill disqualification provisions.

256 (1988) 167 CLR 133.

257 In Stott v Parker [1939] SASR 98, Napier J at 105 thought it did, whereas Cleland J at 110-120 thought it did not and Richards J at 109-110 was only inclined to agree with Cleland J's view.

258 See for example s 13A(c) Constitution Act 1902 (NSW).

259 Section 33(3)(b) and (c) Electoral Act 1992 (Qld) — members are unaffected, but cl 72(1)(b) LCARC’s draft Parliament of Queensland Bill proposes that they be caught if they breach the terms of the arrangement.

260 Section 13A(d) Constitution Act 1902 (NSW).

261 Section 7(1) Legislative Assembly Act 1867 (Qld): 'shall become a public contractor or defaulter' — omitted from LCARC's draft Parliament of Queensland disqualification provisions.

262 Sections 17(1)(f) and 31(1)(f) Constitution Act 1934 (SA). In Stott v Parker [1939] SASR 98 at 121 Cleland J says no evidence in that case of being a 'public defaulter' but provides no definition.

263 Sections 32(2) and 33(d) Constitution Acts Amendment Act 1899 (WA).
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contractor’. The meaning of both public defaulter and public contractor is elusive.266 Uncertainty over the meaning of ‘public defaulter’ in the early drafts of the Commonwealth Constitution resulted in its deletion.267 However, opinions were then expressed that it referred to one who has escaped the law, for example, by absconding.268 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 Report269 and the Constitutional Commission270 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.271 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.272 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.●

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 c14500 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 P 10 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).
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