Members of Parliament: law and ethics

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Disqualifications: public offices and pensions

Public offices

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

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

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

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¹ See A. Doig, Corruption and Misconduct in Contemporary British Politics, Penguin Books Middlesex 1984, pp 36-67 for an historical account of Crown patronage, especially from 1688. With the enhanced power of the Parliament, the Crown needed to secure its position with support in the House of Commons. This was achieved by awarding, inter alia, contracts and public offices to members of the House of Commons. But even the
(2) to avoid any conflict of interest which might arise between parliamentary
duties and those of any other public office (this includes the inability to adequately
perform the duties of both positions given the modern full-time role of members of
parliament); and
(3) to maintain the principle of ministerial responsibility whereby those who
determine and execute government policy remain accountable to parliament
through the appropriate minister (this role may be hindered if officers attached to
the minister are members of parliament). 2
These grounds were recognised in Sykes v Cleary in the joint judgment of Mason CJ,
Toohey and McHugh JJ as underlying s 44(iv) of the Commonwealth Constitution:

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

Historical origins

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

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

Succession to the Crown Act 1705 (UK) disqualified those holding offices under the Crown
from Parliament: pp 43-44. Further attempts to reduce Crown influence of members
occurred during the following centuries.

2 See similar formulations in Report from the Select Committee on Offices or Places of Profit under the
at 95; Report of the Law Reform Committee of Western Australia, Disqualifications for Membership
of Parliament: Offices of Profit under the Crown and Government Contractors 1971 Project No 14 para
10, cited in the Senate Standing Committee on Constitutional and Legal Affairs, The
3 Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament (16th ed)
1957 p 206.
misrepresented and misunderstood. They are seldom, very seldom, bribed to injure their country, because it is seldom the interest of Ministers to injure it; but the great source of corruption is, that they will not serve it for nothing. Men get into Parliament in pursuit of power, honors, and preferments, and until they obtain them, determine to obstruct all business, and to distress Government; but happily for their country, they are no sooner gratified, than they are equally zealous to promote the one, and support the other.  

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

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

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

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

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

But even during the 18th and 19th centuries, the system of Crown patronage continued to sap the independence of parliament. Various measures were introduced to alleviate this problem. These included Mr Speaker Abbott’s ruling in 1811 on the ad hoc disclosure of members’ pecuniary interests and the 1830s...
resolution of the House of Commons declaring it against the law and usage of Parliament to accept fees for managing private Bills through the House.\textsuperscript{10} The discontinuance in 1834 of the practice of buying public offices, together with the Introduction of public service examinations in 1855, led to the development of a career public service.

The form of this ground of disqualification was radically changed in 1957\textsuperscript{11} and is now contained in the \textit{House of Commons Disqualification Act 1975} (UK). Instead of relying on any general category of offices of profit under the Crown, this Act disqualifies only those holding specific positions under the Crown.\textsuperscript{12} Apart from judges, civil servants, defence personnel and members of legislatures outside the Commonwealth, all the disqualifying positions are specifically listed in Pts I to III of Sch 1.\textsuperscript{13}

\textit{Commonwealth}

Section 44: (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth...

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

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

Section 44(iv) disqualifies all those who fall within the category of ‘offices of profit under the Crown’. As with the other grounds of disqualification in s 44, para (iv) applies to both elected candidates and (via s 45(i)) to sitting members. For candidates who hold positions in the public service and aspire to a political career, this disqualification impacts in a particularly harsh manner. In order to nominate for election, they must resign from their Crown employment and later face the task of regaining a position with the government or elsewhere in the event they fail to be elected. The Constitutional Commission concluded for this reason that ‘public servants do not have equal rights with other citizens to seek election to parliament’.\textsuperscript{14} This problem has been the principal focus of recommendations for

\begin{itemize}
\item \textsuperscript{9} HC Debates (1811) 20, cc 1001-1012.
\item \textsuperscript{10} See D Limon and W McKay (eds), \textit{Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament} (22nd ed) Butterworths London 1997, p 115.
\item \textsuperscript{11} \textit{House of Commons Disqualification Act 1957} (UK).
\item \textsuperscript{12} Section 1 \textit{House of Commons Disqualification Act 1975} (UK).
\item \textsuperscript{13} D Limon and W McKay (eds), above note 10, pp 44-48.
\item \textsuperscript{14} At para 4.855.
\end{itemize}
reform which are considered later. Other difficulties with s 44(iv) derive from the uncertainty of the category of ‘office of profit under the Crown’ and certain outdated exemptions in the final paragraph of s 44.

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

‘Office’

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

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

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

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

The Court also refused to interpret ‘office’ restrictively, along the lines of that suggested by the Federal Court in Grearly v Commissioner of Taxation: namely, that it ‘usually connotes a position of defined authority in an organisation, such as director of a company or tertiary educational body, president of a club or holder of a position with statutory powers’. Also rejected was the view that ‘officer’ meant ‘a subsisting permanent substantive position which exists independently of the person who fills it from time to time’. While holding that permanent public servants at all levels of the public service occupied offices of profit under the Crown, the Court provided little guidance on the requisites for an ‘office’. This was because the Victorian legislation clearly accorded Cleary with holding an ‘office’ as a teacher, even though he had no designated position and was on leave without pay. But even in the absence of such a clear statutory designation, ‘office’ in s 44(iv) was interpreted broadly in Sykes v Cleary to encompass all persons employed (at least full-time) by the executive government. There should be no reason for doubting that part-time employees of the executive also occupy an ‘office’ under the Crown. Of the three attributes of ‘office of profit under the Crown’, it would appear that ‘office’ is the least problematic.

‘Of profit’

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

24 Mason CJ, Toohey and McHugh JJ at 96-97.
26 At 411.
27 (1992) 176 CLR 77 at 96.
28 See for example s 29B Public Service Act 1922 (Cth) which empowers the Secretary of a Department to make an office part-time.
29 See In re The Warrego Election Petition (Bowman v Hood) (1899) 9 Qd J 272; 1981 Senate Report at para 5.2.
constitute an office of profit. A notable case is the appointment in September 1932 of Mr Stanley Bruce as High Commissioner in London while a member of the House of Representatives and an Honorary Minister. The Government defended Mr Bruce from the charge that he had vacated his seat under s 44(iv) on the ground that he received only his expenses as High Commissioner. In the following year, he resigned from the parliament while remaining as High Commissioner.

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

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

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

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30 See *In re The Warrego Election Petition (Bowman v Hood)* (1899) 9 QLJ 272 at 272 per Real J in relation to the travelling expenses of the Central Rabbit Board; G Sawer, ‘Councils, Ministers and Cabinets in Australia’ (1956) *Public Law* 110 at 127. Note the provision made in s 4 of the *Parliamentary Secretaries Act 1980* (Cth) for payment to parliamentary secretaries of only reasonably incurred expenses.

31 HR Debates 135:514.


34 (1899) 9 QLJ 272 at 278.

35 At 275.

36 (1934) 36 WALR 73 at 85.

37 Section 38 *Constitution Acts Amendment Act 1899* (WA).
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public office is not entitled to any remuneration or allowances, only expenses reasonably incurred. This general provision appears to avoid a member incurring disqualification under s 44(iv) for accepting an appointment to, for example, the Council of the National Library whose members (two of whom are members of each Commonwealth House) receive remuneration and allowances as determined by the Remuneration Tribunal. 38 Similarly, in Queensland, members of the Queensland Parliament are eligible to be appointed to a public office provided they waive entitlement to all remuneration other than allowances. 39

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

‘Under the Crown’

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

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

38 Section 13 National Library Act 1960 (Cth).
39 Parliamentary Members (Office of Profit) Amendment Act 1999 (Qld).
40 Clydesdale v Hughes (1934) 36 WALR 73 at 75. See also Report from the Select Committee on Offices or Places of Profit under the Crown, HHC 120 (1940-41) Appendix 1, Third Memorandum by Mr Attorney-General (quoted in K Cole, ‘Office of Profit under the Crown’ and Membership of the Commonwealth Parliament Parliamentary Research Service Issues Brief no 5 April 1993, p 3). While s 44(iv) states ‘under the Crown’, the phrase from the Crown’ seems to have a narrower scope in referring to appointments made directly by the Sovereign: see Report of the Select Committee on Offices of Profit, HC 120 (1940-41) at 12.
42 Section 24.
s 44(iv) so that employees of statutory authorities are disqualified. Their position is considered further below. To exclude those categories from ‘the Crown’ is problematic both in drawing a boundary and in terms of the objectives of the ground of disqualification.

Which Crown?

Since Cleary was an officer of the Victorian Education Department, the other significant issue in Sykes v Cleary was whether the disqualification included offices of profit under the Crown in right of the States. The Court concluded that it did, relying on the text of s 44(iv) and the potential conflict of interest of State public officers having to act in the interests of both the Commonwealth and the State.43

Textual support included not only the reference to ‘any office of profit’ but also the express exclusion from s 44(iv) in the final paragraph of s 44 of ‘the Queen’s Ministers for a State’. This exclusion was inserted to enable existing State Ministers to stand for the new Commonwealth Parliament.44 The Court unanimously agreed that s 44(iv) contemplated offices of profit under the Crown in right of the States, otherwise there was no need expressly to exempt State Ministers and the officers and members of the ‘Queen’s navy and army’.

Deane J, in agreeing with the majority on this issue, noted that in 1900 the indivisibility of the Crown throughout the then British Empire would have meant that under s 44(iv) disqualification would have arisen for holding any office of profit under the Crown anywhere in the Empire. His Honour accepted that with full independence in Australia, New Zealand and Canada, the common law has recognised a separate capacity of the Crown in each of these nations. While he intimated that this would mean that s 44(iv) might not include offices of profit under the Crown in right of other sovereign nations, he maintained that this development has not altered the inclusion of offices of profit under the Crown in right of the States and of the self-governing Territories.45

‘Hold’

An example of the uncertainty which surrounds the scope of these public offices is the debate over Senator Gair’s appointment in 1974 as Ambassador to the Republic of Ireland. At issue was whether an ambassador holds an office of profit under the Crown. Although the edition of Erskine May’s Parliamentary Practice46 current during the drafting of the Constitution regarded an ambassador as not holding such an office,
Professor Sawer regarded 'an ambassadorship as par excellence an office of profit under the Crown'. He argued that *Erskine May*'s view was based on the peculiarity of British ambassadors and therefore had no application to Australia, where they are 'in every sense a servant of the central executive government and paid a salary'.

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

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

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

48 As above p 37; also the view of the Constitutional Commission para 4.855.
49 On 14 March 1974 the Prime Minister advised the Governor-General to approve Gair's appointment, which he did on the same day. On 21 March the Governor-General approved a Minute paper in the Executive Council meeting which required the Minister for Foreign Affairs to fix Gair's salary and the other terms of his appointment; see G Evans (ed), *Labor and the Constitution 1972-1975* Heinemann Melbourne 1977, p 192.
50 Both the Attorney-General and the Solicitor-General gave opinions that Gair was disqualified on 14 and 21 March respectively.
51 G Sawer, above note 47, p 37.
53 An amendment to the 1897 draft Constitution (cf 48) which prohibited acceptance of an office of profit under the Crown within six months of leaving Parliament. This was designed to prevent, as Edward Braden stated, 'the purchase of a vote in the Federal Parliament by any promise of an appointment' (1897 Adelaide Constitutional Convention at 741). That amendment was later removed for fear of denying the government the best possible appointees.
the holding of a position, the member would have to resign from parliament before accepting the position. An alternative approach is suggested by Professor Hanks who discounts the relevance of whether Gair had assumed his ambassadorial office, preferring a more functional test: 'whether the appointment of Gair to that office had proceeded so far that his independence and integrity as a “Parliament man” was compromised'. While there is merit in this approach, it is difficult to infer this test from the language of s 44(iv). It is submitted that ‘holds any office’ means ‘occupy an office’ which requires the member to assume the responsibilities of the position. Even if it may be desirable to cast the net wider, mere acceptance of the position prior to taking up those duties appears not to satisfy s 44(iv).

Specific categories

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

Members and employees of Commonwealth, State and Territory statutory authorities

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

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

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

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

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

While these recommendations facilitate the appointment of members after their election, candidates would be unable to take advantage of this concession. However,

58 See for example an early Queensland decision of Lilley CJ in Hodel v Cruckshank (1889) QLJ 141.
59 Section 10(1)(g) and (h) Australian National University Act 1991 (Cth).
60 Section 10(2)(a) and (b) National Library Act 1960 (Cth) -- both this and the previous footnoted Act are cited in K Cole, above note 40, p 13-14.
61 At para 5.47. A similar recommendation was made at para 5.52 to enable members to serve as members of State and Territory public authorities on the same conditions without the requirement of nomination by the Commonwealth Parliament. The report considered, however, that there would be few State public authorities on which it would be appropriate for federal members to serve.
62 At para 5.48.
63 At para 5.49. See the First Report of the Ontario Commission on the Legislature (1973) for a list of arguments for and against members serving on government bodies — quoted in G Ronyk, above note 33 at 61-62. The Ontario Commission recommended against allowing members to be appointed to government bodies as the arguments against outweighed those in favour of such appointments.
the 1981 Senate Report recommended, as with public servants, there is a need to allow for members and employees of government authorities to stand for parliament and only if elected should they have to resign.  

*Full-time defence personnel*

While part-time Commonwealth defence personnel are expressly exempted from disqualification by the final paragraph of s 44, the accepted view is that *full-time* Commonwealth defence personnel are disqualified under s 44(iv) as they clearly hold offices of profit under the Crown. This view is based on the assumption that full-time Commonwealth defence personnel are not included in the exemption provided by the final paragraph of s 44 for ‘the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen’s navy or army’. The ‘Queen’s navy or army’ refers to the British armed forces, including the Australian colonial forces before 1900 and those of the other colonies of the British Empire. This was the view of Edmund Barton at the Convention Debates in Adelaide in 1897:

> The reason [the Queen’s navy and army] are exempted is that they are not holding an office of profit under the Commonwealth at all, but their pay comes from the Imperial Government.

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

No difficulty arises with the other references to ‘Queen’s’ in the same paragraph: ‘Queen’s Ministers of State for the Commonwealth’ and ‘Queen’s Ministers for a State’ clearly refer to the Ministers of the Commonwealth and of the States. Nor is the reading down of ‘Crown’ in s 44(iv) to the Crown in right of the Commonwealth and of the States inconsistent with the above view given the subsequent exemption in the same paragraph for part-time members of the ‘naval or military forces of the Commonwealth’. That expression clearly describes the

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64 1981 Senate Report, para 5.47.  
65 See 1981 Senate Report, para 5.64. See also the comments of Edmund Barton in the Official Record of the Debates of the Australasian Federal Convention Adelaide 1897 at 754-755. In *Free v Kelly* (1996) 185 CLR 296 Kelly conceded her disqualification under s 44(iv), being still an officer of the RAAF at the time of her nomination for election to the House of Representatives in 1996. Her application to transfer to the Reserve force had been lodged but not given effect before nominating; Evans (ed), *Odger’s Australian Senate Practice* (9th ed) Department of Senate Canberra, p 154.  
66 See 1981 Senate Report, para 5.64.  
68 Quick and Garran, above note 41, p 494.  
69 See *Sykes v Clary* (1992) 176 CLR 77 per Deane J at 118-119.
members of parliament: law and ethics

Commonwealth's defence forces as s 68 of the Constitution vests the command of the 'naval and military forces of the Commonwealth' in the Governor-General.

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

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

State members of parliament

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

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

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70 At paras 5.66-5.67.
71 See HR Debates 21 June 1940 p 133; 20 August 1940 p 420.
72 At para 5.68.
73 See Chapter 2.
74 Reference was made in Chapter 2 to the issue of whether s 164 is open to challenge for impermissibly adding to the grounds of disqualification under ss 43, 44 and 45, or derogating from an implication drawn from the exemption in the final paragraph of s 44 for the Queen's Ministers for a State that members of State Parliaments were not to be prevented from being elected to the Commonwealth Parliament.
Correspondingly, by virtue of State rather than Commonwealth legislation, a member of the Commonwealth Parliament is ineligible to be elected a member of a State parliament or Territory legislature.75

**Elected local government councillors and staff**

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

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

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

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

**Staff of members of parliament**

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

75 Section 79(7) Parliamentary Electorates & Elections Act 1912 (NSW); s 63(2)(f) Electoral Act 1992 (Qld); s 47(1) Constitution Act 1934 (SA); s 31(1) Constitution Act 1934 (Tas) and ss 85(1)(d) and 96(1)(d) Electoral Act 1985 (Tas); s 44(2)(b) Constitution Act 1975 (Vic); s 34(1)(b) Constitution Acts Amendment Act 1899 (WA); s 103(2)(a) Electoral Act 1992 (ACT).
77 At para 3.31. See also K Cole, above note 60, pp 19-21.
78 Support for this view is found in the NSW Court of Appeal decision in Sydney City Council v Reid (1994) 34 NSWLR 506 at 520 per Kirby P (with whom Meagher and Powell JA agreed) in holding that employees of NSW local government authorities were not employed ‘in the service of the Crown’ and so were unable to appeal to a statutory tribunal in relation to promotions.
79 Defined in s 3; includes a minister, opposition leader and the leader of any other recognised political party.
Public Service Act 1922 (Cth), they appear to hold an office of profit within s 44(iv).

Senators-elect

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

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

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

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

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

The above discussion is based on the assumption that a successful candidate becomes a member only on being sworn-in, that is, on taking his or her seat in the House.\textsuperscript{85} If, however, a successful candidate becomes a member before taking his or her seat, such as at the declaration of the poll, the disqualification from sitting under s 44 does not remove the member from his or her seat.\textsuperscript{86} Nor does s 45 remove the member until the member has taken his or her seat. The only other basis for removal is under s 38, for failing to attend the House. But as this section renders the 'place' vacant, the member must first have taken a seat by being sworn in. These difficulties support the correctness of the assumption relied on.

The position of senators-elect has been considered on at least three occasions without any authoritative ruling being made. In 1980 a senator-elect was engaged as a temporary 'legislative assistant' to a member of parliament. The Attorney General, Senator Durack, gave an opinion that s 44 should apply to senators-elect because it would be highly anomalous for candidates to be disqualified for holding public office when elected but not to be during the interregnum (that is, after their election and before taking their place). The mischief remains in both situations. The opinion concluded that as legislative assistants were appointed under the \textit{Public Service Act 1922} (Cth) as temporary employees, the senator-elect was holding an office of profit under the Crown.\textsuperscript{87}

While the Durack opinion acknowledged a lack of authority on this issue, it referred to the case of Senator-elect Doug McClelland which was raised in the House of Representatives in 1962.\textsuperscript{88} Mr McClelland resigned as a Commonwealth court reporter in November 1961 in order to stand for the Senate at the 9 December election. Upon his election, he had to wait until 1 July 1962 before taking his seat. Despite the fact that Mr McClelland had a young family to support and so was in

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

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

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

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

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

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

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

Final paragraph of s 44

The final paragraph of s 44 exempts from para (iv) four categories of persons, of which only the first and last categories now seem required:
- Queen's Ministers of State for the Commonwealth;
- Queen's Ministers for a State;
- receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army; and
- receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Queen's Ministers of State for the Commonwealth

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

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

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

92 Section 3(1) Parliamentary Secretaries Act 1980 (Cth).
93 See s 4 Parliamentary Secretaries Act 1980 (Cth); paras 6.4-6.5 of the 1981 Senate Report, especially the comment of Professor Crisp in para 6.4. Also note Sawer, above note 30 at 125-128 in relation to the Speaker's challenge to the appointment of four 'parliamentary under-secretaries' in 1952.
‘Queen’s Ministers of State for the Commonwealth’. This view is based on s 64 of the Constitution which provides that the officers appointed by the Governor-General ‘to administer such departments of State of the Commonwealth as the Governor-General in Council may establish ... shall be the Queen’s Ministers of State for the Commonwealth’ (emphases added). In other words, only Ministers in charge of a government department are the Queen’s Ministers of State and so within the exemption from s 44(iv). Nevertheless, there is no constitutional impediment to appointment as a minister without portfolio, an assistant minister, or a parliamentary secretary, provided they are not remunerated other than by way of reimbursement for reasonable ‘out of pocket’ expenses.

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

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

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

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

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

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

As for parliamentary secretaries, these have remained unremunerated until 2000 when the *Ministers of State Act 1952* (Cth) was amended to provide for the appointment, in addition to the usual 30 ministers, of a further 12 ministers to be designated on their appointment by the Governor-General as parliamentary secretaries.\(^{103}\) The validity of this approach is doubtful if the exemption for the ‘Queen’s Ministers of State’ is confined to ministers appointed to administer a department under s 64.\(^{104}\)

**Queen’s Ministers for a State**

This exemption is now regarded as redundant since it was originally designed to allow the election of ministers from the States to the new Commonwealth Parliament in 1901.\(^{105}\) Then it complemented the absence of any disqualification of State members from entering the Commonwealth Parliament. However, that is no longer the case (see Chapter 2) nor can it be a justified exemption today.\(^{106}\)

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

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

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

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

Receipt of pay as an officer or member of the naval or military forces of the Commonwealth
by any person whose services are not wholly employed by the Commonwealth

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

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

Provision for reappointment to public office if not elected

Even prior to the High Court’s decision in *Sykes v Cleary*, the generally accepted

109 *(1988) 165 CLR 178* at 186.
111 But the *1997 House of Representatives Report* paras 3.41-3.46 considered the ambiguity here
where a reservist is wholly employed for a period.
112 At para 5.70.
113 *(1992) 176 CLR 77*. 

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view, later endorsed in that case, was that the grounds of disqualification in s 44 were to be determined when nominating as a candidate for election. Hence, public servants and others holding offices of profit under the Crown were advised to resign their positions prior to nominating as candidates. Provision was and is still made in some cases for their reappointment to their former positions in the event their election bid is unsuccessful. In most cases, reappointment is at the discretion of the relevant authority. The 1981 Senate Report was critical of this discretion, recommending that reappointment be mandatory to ensure that public servants not be discriminated against in seeking election to parliament.114

Outline of current reappointment provisions

(i) Defence personnel

The Defence (Parliamentary Candidates) Act 1969 (Cth) allows officers of all three services to apply for a transfer to the appropriate Reserve in order to nominate for Commonwealth, State or Territory elections and then to apply for reinstatement if unsuccessful (ss 7 and 16). Provision is also made for enlisted members (ss 8 and 11) and full-time Reserve members (ss 9 and 12) of the three services to apply to be discharged and to seek re-appointment. Reinstatement or reappointment in each case is within the discretion of the chief of staff upon application being made. But even in the absence of such application, officers and enlisted members may be deemed to have been re-enlisted if required by notice to so apply (ss 13 and 14).

In Free v Kelly,115 Mrs Kelly requested a transfer to the RAAF Reserve but as this request was not acted on before her nomination, she had to concede before the Court of Disputed Returns that she was disqualified from being elected to the House of Representatives at the 1996 general election.

(ii) Commonwealth public servants

Following the recommendation of the 1981 Senate Report,116 the Public Service Act 1922 (Cth)117 was amended in 1986118 to provide for a right of automatic reappointment to the Commonwealth public service for its officers (other than a departmental secretary) who resign their public office within six months of the closing date for nomination for Commonwealth, State or Territory elections and are unsuccessful. They must apply for their former position within two months of the declaration of the poll or of the determination of any challenge by the Court of

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114 At paras 5.30-5.37.
116 At para 5.16.
117 Section 47C.
118 Section 34 Public Service Legislation Streamlining Act 1986 (Cth). Before this amendment, s 47C (since its enactment in 1960) had only provided a discretionary power to reappoint.
Disputed Returns. Reappointment is to one's former office or equivalent if available, otherwise to an unattached position at the same classification.

(iii) State public servants

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

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

Constitutional validity?

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

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

Another approach: no remuneration

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

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

A member of, or a candidate for election to, either House of Parliament is not entitled to be paid, and shall not be paid, any remuneration or allowances in respect of holding, or performing the duties of, a public office[132] but he shall be reimbursed: ... [by the corporation or company concerned or out of the Consolidated Revenue Fund] such expenses as he reasonably incurs in respect of his holding, or performing the duties of, that office.

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

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

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

1981 Senate Report: Recommendations on s 44(iv)

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

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

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

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

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

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

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

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

Constitutional Commission recommendations

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

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

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

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

Conclusion on Commonwealth position

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

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

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

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

States and Territories

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

Hence, a comparison of the position at the State and Territory level in Australia,
demonstrates the three options which are available:
(1) automatic disqualification from parliament;
(2) disqualification from parliament if there is a failure to resign from the public
office; or
(3) automatic loss of the public office.

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

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

(1) Automatic disqualification from parliament

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

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

(2) Disqualification if no resignation of public office

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

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

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

\(^{150}\) Section 21 \textit{Northern Territory (Self-Government) Act 1978} (Cth).

\(^{151}\) Section 38 \textit{Public Sector Employment and Management Act 1993} (NT).

\(^{152}\) Section 45(1) \textit{Constitution Act 1934} (SA).

\(^{153}\) Section 13B \textit{Constitution Act 1902} (NSW). See also s 92 \textit{Police Service Act 1990} (NSW).

\(^{154}\) Section 36 \textit{Constitution Acts Amendment Act 1899} (WA). If elected to the Legislative Council, the member must resign by 22 May following (s 36(9)).
disqualification if two requirements are met: they resign or cease to hold the public office, and a resolution is passed by both Houses directing that the disqualification be disregarded.\textsuperscript{155} In contrast, candidates, on being elected, automatically vacate their public office positions in Western Australia (if they are positions listed in Pts 2 or 3 of Sch V).\textsuperscript{156} Hence, Western Australia distinguishes between those public positions held under the Crown in right of Western Australia, which are automatically vacated, and those positions held outside the State, in respect of which the view was taken that it was beyond the territorial competence of the State to deem as vacated. This aspect is considered further below.

A further variation exists in South Australia where elected candidates can avoid disqualification by resigning their public office before the declaration of the poll.\textsuperscript{157} Sitting members automatically lose their seat if they accept an office of profit from the Crown.\textsuperscript{158} Similarly, in the ACT, holders of a public office or appointment under any Australian law and employees of any authority or body established by a law are not required to resign before nominating\textsuperscript{159} but need to do so in order to become a member\textsuperscript{160} on the declaration of the poll.\textsuperscript{161} It appears that if a sitting member accepts one of these positions, his or her seat is lost as that person is no longer eligible to be a member.\textsuperscript{162}

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

This is the position in Victoria under s 61 of the \textit{Constitution Act 1975}. On being elected, candidates are deemed to have resigned their public office position in that State. However, members who obtain a public office position\textsuperscript{163} after their election are disqualified under ss 49 and 55(d). Similarly in Western Australia, candidates simply vacate their public office (if it is one listed in Pts 2 or 3 of Sch V) automatically upon their election.\textsuperscript{164} The same approach is taken in New Zealand,\textsuperscript{165} although provision is made for reinstatement in the event that the election is later set aside.\textsuperscript{166}

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

\textsuperscript{155} Sections 38 and 39 \textit{Constitution Acts Amendment Act 1899 (WA)}.
\textsuperscript{156} Section 37(1)-(3).
\textsuperscript{157} Section 45(2) \textit{Constitution Act 1934 (SA)}.
\textsuperscript{158} Section 45(1).
\textsuperscript{159} Section 104(b) \textit{Electoral Act 1992 (ACT)}.
\textsuperscript{160} Section 103(2)(a).
\textsuperscript{161} Section 10 \textit{Australian Capital Territory (Self-Government) Act 1988 (Cth)}.
\textsuperscript{162} Section 103(2) \textit{Electoral Act 1992 (ACT)}.
\textsuperscript{163} Presumably, only in Victoria.
\textsuperscript{164} Section 37(1)-(3) \textit{Constitution Acts Amendment Act 1899 (WA)}.
\textsuperscript{165} Section 53(2) \textit{Electoral Act 1993 (NZ)}.
\textsuperscript{166} Section 53(3).
chapter 3: Disqualifications: public offices and pensions

(4) Automatic loss of public office: no disqualification from parliament

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

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

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

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167 Currently two Acts seem to apply to similar effect although the later probably has implicitly repealed the earlier. The earlier is s 5 of the Officials in Parliament Act 1896 (Qld) inserted in 1945. The later is s 7A of the Legislative Assembly Act 1867 (Qld) inserted in 1978. These provisions and the issue of implied repeal are discussed in Electoral and Administrative Review Commission’s 1993 Report on Consolidation and Review of the Queensland Constitution, 76-83 and the Crown Solicitor’s Opinion in Appendix E.
168 Section 7D(2) Legislative Assembly Act 1867 (Qld).
169 The Legislative Assembly and Another Act Amendment Act 1978 (Qld) inserted new ss 7A-7D, which were assented to 17 May 1978: see Legislative Assembly Debates 16 May 1978 at 775. The new sections were intended to prevent any disqualification arising in respect of a Minister, Mr Liew Edwards, who had been appointed to the board of trustees of Ipswich Grammar School, and in respect of a member, Mr Booth, who had been appointed to the Dairy Products Stabilisation Board.
170 Constitution Act and Another Act Amendment Act 1977 (Qld) introduced new ss 7B and 7C into the Constitution Act 1867 (Qld), assented to 21 April 1977. These were repealed by the Legislative Assembly and Another Act Amendment Act 1978 (Qld). This legislation was intended to protect Mr Eric Deeral (NP, Cook) for receiving expenses for attending a meeting of the advisory committee of the Cook Shire Council and also the Survey Minister, Mr John Greenwood, who had appeared as a barrister for the Crown in legal proceedings.
171 Clause 64(3) LCARC’s draft Parliament of Queensland Bill expressly disqualifies those who occupy vice-regal positions and any judicial office.
with the administration of parliament, of justice and police, and of the electoral system. Those who hold crown and parliamentary positions outside the State must resign those positions before taking a seat, although the holding of such a position does not affect the validity of their election (cl 68). Members are prevented from accepting any 'paid State appointment' (cl 69) and if they accept one outside the State, this disqualifies them (cl 72(1)(e)).

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

Categories of public office

A comparison of the categories of 'public office' within the above approaches and their respective exceptions reveals some measure of consistency within Australia. The usual description is: an office of profit under the Crown. Some expressly include:

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

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

Of which Crown?

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

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172 See for example s 138 Constitution Act 1902 (NSW). This is not the position (as noted earlier) in the ACT where members are precluded from holding any public offices and appointment under an Australian law or being an employee of any authority or body established under Australian law: s 103 Electoral Act 1992 (ACT).
173 Section 32(1) Constitution Act 1934 (Tas); s 36 Constitution Acts Amendment Act 1899 (WA); ss 7A and 7D(1) Legislative Assembly Act 1867 (Qld); s 21 Northern Territory (Self-Government) Act 1978 (Cth).
174 Section 44 Constitution Act 1975 (Vic); s 44 Constitution Act 1934 (SA); s 32(3) Constitution Act 1934 (Tas) disqualifies only judges of the Supreme Court.
concerned.\textsuperscript{176} On the other hand, Western Australia and the Northern Territory expressly include public offices under all Crowns in Australia.\textsuperscript{177} The same approach is taken in the ACT in relation to offices, appointments and employees under not only its own law but also under any law of the Commonwealth, State or another Territory.\textsuperscript{178} This difference arises depending on which of the above approaches is adopted. Where the holding of a public office incurs disqualification from parliament ((1) and (2) above), there is no difficulty including public offices outside the State. But where no disqualification arises and instead the member is deemed to have vacated the public office ((3) and (4) above), there are constitutional difficulties with a State deeming the vacating of public offices outside that State — in other words, the State may lack the extra-territorial competence to go beyond its own public offices. A State has the legislative capacity to enact laws which operate beyond the State's boundaries provided there is a sufficient connection between that extra-territorial effect and the interests of the State for the law to be one for the peace, order and good government of that State.\textsuperscript{179} Although a connection might be found in these circumstances, it is more likely that such an interference with the government of the other State will not be allowed.\textsuperscript{180}

The solution is to adopt a twofold approach: that is, deem on election the vacating of a State's own public offices and require, within a prescribed period of being elected, resignation from any public office held outside the State. This is the approach taken in Western Australia\textsuperscript{181} following the recommendations of the 1971 Report of the WA Law Reform Committee. A further difficulty with out of State public offices is that it is impractical to specify the particular offices from which resignation is required, so a general formula is still required.

Finally, it should be noted that the holding of a public office in another jurisdiction is just as incompatible with being a member of parliament as the holding of a public office within that jurisdiction — although, admittedly, incompatibility in the former situation arises more from the impossibility of performing the duties of both positions than from the danger of executive influence.\textsuperscript{182}

\begin{itemize}
  \item \textsuperscript{176} Section 13B(3)(a) Constitution Act 1902 (NSW); s 7D(2) Legislative Assembly Act 1867 (Qld); and s 45 Constitution Act 1934 (SA), s 32 Constitution Act 1934 (Tas), and ss 49, 55(d) and 61 Constitution Act 1975 (Vic) seem to confine their disqualification to offices under their own Crown.
  \item \textsuperscript{177} Section 36 Constitution Acts Amendment Act 1899 (WA); s 21 Northern Territory (Self-Government) Act 1978 (Cth).
  \item \textsuperscript{178} Section 103(2) Electoral Act 1992 (ACT).
  \item \textsuperscript{179} Section 2(1) Australia Acts 1986 (Cth & UK).
  \item \textsuperscript{180} Also the view of the WA Law Reform Committee in its 1971 Report at para 35. On the scope of intergovernmental immunity, see Victoria v The Commonwealth (Industrial Relations Act case) (1976) 187 CLR 416; Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority (Henderson's case) (1997) 190 CLR 410.
  \item \textsuperscript{181} Section 36 Constitution Acts Amendment Act 1899 (WA).
  \item \textsuperscript{182} See this view expressed by the WA Law Reform Committee in its 1971 Report at para 31. The Attorney-General of Victoria, Mr B L Murray, submitted the contrary view to the Qualifications
Exceptions

The categories of exception depend upon the width of the public office category. The most common exception is for Ministers of the Crown.\textsuperscript{183} Other exceptions are:

- a part-time member of the Commonwealth's defence forces;\textsuperscript{184}
- a salaried member of a parliamentary committee or royal commission;\textsuperscript{185}
- an office required or allowed by statute to be held by a member;\textsuperscript{186} and
- a non-remunerated office under the Crown.\textsuperscript{187}

In Queensland, the position was amended\textsuperscript{188} in 1999 to allow members to accept appointment to an office of profit under the Crown provided they waive for all legal purposes the 'profit' element, that is, any right to receive any fee or reward which attaches to that office.\textsuperscript{189} The amendments also restore to members the capacity to accept an office under the Crown which confers no right to any fee. Provision is made, however, for members to accept reimbursement of reasonable expenses incurred for accommodation, meals, domestic air travel, taxi fares, public transport charges or motor vehicle hire. These amendments were sought by the executive to enable members to be appointed to a range of government bodies where their involvement would be beneficial for the community. It is important for the executive not to abuse this exception by making appointments for blatant political purposes rather than in the public interest.

Impact of a republic

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

183 Sections 59 and 53(1) Constitution Act 1975 (Vic); s 45(1a) Constitution Act 1934 (SA); s 13B(a) Constitution Act 1902 (NSW); s 32(2) Constitution Act 1934 (Tas); s 7A(4) Legislative Assembly Act 1867 (Qld).
184 Section 60 Constitution Act 1975 (Vic); s 36 Constitution Acts Amendment Act 1899 (WA).
185 Section 54A Constitution Act 1934 (SA).
186 Section 45(1) Constitution Act 1934 (SA); s 7A(4) Legislative Assembly Act 1867 (Qld).
187 Section 13B(3)(a) Constitution Act 1902 (NSW) but can receive attendance fees and reasonable expenses; see also s 7A(4) Legislative Assembly Act 1867 (Qld) which requires an Order in Council.
188 Parliamentary Members (Office of Profit) Amendment Act 1995 (Qld).
189 This reverses the effect of In re The Warrego Election Petition (Bowman v Hood) (1899) 9 QLJ 272 which held that members were unable to waive a right to a fee.
as follows:

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

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

**Conclusion**

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

**Pensions**

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

**Commonwealth**

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

This ground of disqualification is limited to pensions payable at the pleasure of the Crown, not those payable pursuant to statute\(^ {192}\) or those referred to during the

\(^{190}\) Clause 18 Sch 2.

\(^{191}\) (1992) 176 CLR 77 at 98 and 118-119.

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

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

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

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

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

**Impact of a republic**

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

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

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

Two States prescribe exempted pensions: when retired from Crown employment; and pensions from other Crowns.

Conclusion

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

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