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## Candidates, Members and the Constitution



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## Candidates, Members and the Constitution

The Vision in Hindsight: Parliament and the Constitution: Paper No. 17

### ***Vision in Hindsight***

*Vision in Hindsight* is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

*The Vision in Hindsight: Parliament and the Constitution* is a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. A number of essays have been commissioned and will be published as IRS Research Papers, of which this paper is the seventeenth.

Eleven of these papers were selected for inclusion in the final volume, *Parliament: The Vision in Hindsight*, G. Lindell and R. Bennett, eds, Federation Press, Sydney 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assisted DPL with the management of the project.



**Centenary of Federation 1901-  
2001**



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Apart from forming part of the Vision in Hindsight collection to mark the centenary of the Commonwealth Parliament, this paper also continues the work of two former staff of the Information and Research Service: Kathryn Cole and Sarah O'Brien.

Originally completed in December 2001, this paper has been revised to include reference to developments up to 26 May 2002.

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## Major Issues

A principal task for the framers of the Australian Constitution was to distinguish between those rights and responsibilities to be entrenched in the federal compact and those that could safely be left to Parliament or to the courts to regulate.

Some of these choices were easily made. Australia's Constitution would have to define the distribution of power within the federation and delineate the boundaries of state authority. The basic institutions of government and the manner in which their powers were to be exercised would have to be prescribed. Transitional provisions to get the Commonwealth 'up and running' were needed as was a mechanism for making changes to the Constitution as the need arose.

Other choices were more difficult. Just how much of the administrative detail should the Constitution incorporate? What statements of enduring principle ought to be made? In what ways should the powers given the three arms of government be limited by specific constitutional guarantees? What statements of principle would the document need to contain and what values would it need to reflect to garner sufficient support from voters in the six federating colonies? With regard to the Parliament itself, the written Constitution offered the prospect of a code that would define the rights and obligations of those seeking elected office.

Rules embodying statements of principle once included in the constitutional framework enjoy an elevated status and are protected from simple legislative attack. However, they come at a price.

Constitutions that may only be amended by popular and special majorities can become ossified. Too much specificity may limit the Parliament's capacity to enact new laws. As time passes, community standards and expectations change and support for an entrenched law may dissipate. Constitutionally entrenched rules may become just another trap for the unwary rather than an effective restraint on abuse. Entrenched laws may survive because there is neither the political will nor the pressing need to remove or amend them. Reformers may respond by convening expensive inquiries and by finding ways around the problem without actually resolving it.

Sections 16, 20, 30, 34, 38, 43, 44, 45, 46, 47, 48 and 49 of the Constitution all have, or have had, a bearing on who may be elected to the Australian Parliament. These provisions

are now complemented (or in some cases supplemented) by legislation, principally the *Commonwealth Electoral Act 1918*.

The Founders entertained a fairly simple vision for the federal legislature. First, the Commonwealth Parliament would be made up of men not unlike themselves. In fact, and as was perhaps to be expected, 50 per cent of those who participated in the 1897–98 Convention Debates later served as members of the Commonwealth Parliament. Second, if the institution of Parliament was to be protected from the sort of scandals that had been prevalent in colonial politics, the Constitution would have to guard against conduct that placed private gain above the public good. Third, adjudication of election disputes and disputes over the membership of the House of Representatives and the Senate, though initially left to the respective Houses, could be transferred to the Courts.

Unifying the Convention Debates on members' qualifications was the acceptance of a need to reduce opportunities for conflicting interests and loyalties to affect Parliament's deliberations and its reputation. Although the Founders' aims excited little controversy, striking a balance between the constitutional entrenchment of candidates' and members' qualifications and allowing subsequent Parliaments a say in what those rules ought to be proved more difficult.

For reasons that are not always clear, the Founders constitutionally entrenched some provisions dealing with membership of the Parliament, while others would apply 'until the Parliament otherwise provides' and a third category of matters was left open. Hence some provisions, including those forbidding simultaneous membership of both Houses, others disqualifying candidates and members who are foreign citizens or persons convicted of treason or offences punishable by more than 12 months imprisonment, and those denying bankrupts and holders of offices of profit under the Crown membership of either House, were all entrenched. On the other hand, the penalties for sitting whilst disqualified, the means for resolving disputed elections, and substantive age and residency qualifications are amongst the matters that may be legislated on by the Parliament without first amending the Constitution. Other matters such as whether the mentally impaired or prisoners should be elected to the Parliament were initially left to the electors. Some have never been regulated. For instance, there are no property qualifications for membership of either House, nor is there a limit on the number of terms that a member may serve.

On an international scale, Australia's Constitution sits close to the middle of the spectrum in relation to the number of positive personal attributes required of candidates and members.

Despite early opposition from some members of the House of Representatives, the Parliament quickly moved to divest itself of the task of determining disputes over the polling process. In 1907, after a protracted dispute over the filling of a casual Senate vacancy, further legislation was enacted to allow each House to refer disputes over membership to the High Court. This legislation, however, continued to permit each Chamber to settle such matters in-house. Although there are few instances on which to

reflect, subsequent practice has been for the Senate to refer disputes over qualifications to the Court, whereas the House of Representatives has continued to perform that function for itself. Fears that the determination of qualifications would be tainted where they were not resolved independently were reinforced in 1920 when the Hughes Government used powers then available under section 49 of the Constitution and its numbers in the House to expel a member of the Labor Opposition.

Whether qualifications questions can also come before the High Court by other means such as under section 46 of the Constitution (now succeeded by the *Common Informers (Parliamentary Disqualifications) Act 1975*) or via the High Court exercising a general supervisory jurisdiction is still to be settled. Indeed, many issues surrounding the relationship between the two Houses and the Court to do with qualifications (including the vital issue of when a matter can be said to be finally determined) also remain unresolved.

The content of the qualification and disqualification provisions has been an ongoing if not continuous cause for concern. The generic criticism is that the current provisions are unclear and that they are largely ineffective. One argument has been that many of the existing constitutional restraints ought to be removed and replaced by legislation or else simply done away with altogether. Political practitioners, notably party officials, have perhaps come to regard the sections, especially section 44(i) (foreign citizenship) and section 44 (iv) (office of profit under the Crown), as principally because of nuisance value—more a trap for the guileless rather than a danger to the guilty. Such complaints, though rarely made, are apt to be associated with what for those involved is a political trauma as in the vacating of their seats by Senator Robert Wood (1988), Mr Phil Cleary (1992), Ms Jackie Kelly (1996) and the disqualification of Senator-elect Heather Hill (1999). The subsequent re-election of Cleary and Kelly with enhanced majorities after their respective removals suggests that the electorate may also see the existing disqualification provisions as operating at times in an unduly technical manner.

At the same time, as disputes or controversies over qualifications have become more common—although not commonplace—community concerns about standards in public life have deepened. While there is an argument that the ethical standards of Australia's federal parliamentarians are relatively high and nothing suggests that they are in decline, it is generally accepted that more needs to be done to bolster public confidence and dissipate long held community prejudices many of which predate Federation.

Reforming the existing but inadequate ethics code entrenched in the Constitution will be part of that task. Parliamentary and extra-parliamentary inquiries since the mid-1970s including the Riordan Inquiry into Pecuniary Interests (1974–75), Bowen Inquiry concerning Public Duty and Private Interest (1977–79), the Senate Standing Committee on Constitutional and Legal Affairs Report on the Constitutional Qualifications of Members of Parliament (1981), the Joint Select Committee on Parliamentary Privileges Report (1984), the Proceedings of the Australian Constitutional Convention, Structure of Government Sub-Committee Report on Constitutional Qualifications (1985), the Final Report of the Constitutional Commission (1988), the House of Representatives Legal and

Constitutional Affairs Committee Report on aspects of section 44(i) and 44(iv) of the Constitution (1997) and the Joint Standing Committee on Electoral Matters Report on the 1998 Election (2000) were all to varying degrees critical of aspects of the present provisions.

One prominent concern is that the existing constitutional requirements prevent large numbers of Australians from standing for public office. Another is that the current constitutional safeguards are outmoded and ought to be replaced or complemented by a more transparent modern regulatory regime encompassing members' pecuniary interests and dealing more effectively with conflicts of interest both actual and perceived.

Contrary to what at times may have appeared something of a self-reinforcing clamour for such reforms, it has been suggested that the current provisions adequately serve their purpose and that, in any case, the prospects of securing the necessary support for a constitutional amendment are not good. High Court decisions over the past 15 years ending with *Sue v Hill* (1999) have largely clarified the meaning of section 44(i) and it is now plain what must be done by a foreign citizen to allow him or her to stand for the Australian Parliament. The restraints on public office holders standing for Parliament were also pretty much settled by *Sykes v Cleary* (1992). Likewise, what had been seen as an ongoing constraint on more flexible arrangements in composing federal ministries by appointing Assistant Ministers were dispelled finally by the High Court in *Ex parte Taylor* (2001). It might also be argued that many of the problems associated with the provisions have been or can be solved administratively. Assisted by the Australian Electoral Commission, the established political parties have adopted better procedures to weed out potential candidates who do not meet any of the relevant requirements for election imposed by the Constitution or the Commonwealth Electoral Act. Instituting a convoluted and expensive process of constitutional amendment might also suggest that the problems of 'corruption' at the federal level are greater than they really are.

Against this, certain aspects of the existing constitutional 'code' require attention. Section 44(v), intended to prevent members from benefiting from contractual agreements with the Commonwealth and to stop the Executive suborning members of Parliament by offering them inducements to support the Government, requires reworking. Here the Court's decision in *Re Webster* (1975) arguably only succeeded in reducing the scope of what appeared an overly wide provision to one which now appears to offer little practical protection to the public interest or Parliament's reputation. The second limb of section 44(ii) which disqualifies members once they are subject to be sentenced for an offence punishable by imprisonment for one year or longer is unclear as to a number of timing questions including in relation to the exercise of any appeal rights by members. Potential for conflict between the Courts and Parliament over jurisdictional questions might be eliminated. Whilst the bar on foreign citizens standing for office might be maintained, it is arguable that the present sections could be amended to make it easier to identify cases of potential dual citizenship and streamline the means for removing it as an impediment for political office. Grey areas regarding the incompatibility of public employment and

elected office (employees of statutory authorities, members of statutory authorities and local government employees and local councillors) might also be addressed.

Concerns over the likely chances of securing constitutional change need to be balanced by relatively recent successes in securing change, as in NSW in 1981, and the ongoing damage that may arise from simply doing nothing.

In the Commonwealth's second century the primary task for legislators may be to revisit the intentions of the Founders to ensure that conflicts between private interest and public duty are not resolved in favour of the former. The Founders' intention was that qualifications for holding public office would boost public confidence in the institution of Parliament. Placing some of those requirements in the Constitution rather than leaving them to ordinary legislation served the dual purpose of limiting Parliament's potential to undermine its own credentials and of emphasising the fundamental nature and importance of matters of probity and integrity to the health of any democracy. None of these considerations are any less important now than they were 100 years ago. What has changed is that the Constitutional framework does not provide the certainty or the degree of protection to the public interest that may have been envisioned in 1901 or is required 100 years later. Improvements may be effected by a variety of means including reinforcing existing disclosure rules and related controls on members' pecuniary interests. As it was for the Founders, the choice of what matters to entrench in the Constitution and what to leave to legislation and the good judgment of the electors will be amongst the most important to be made.



## Introduction

Apart from setting the ground rules for the first federal election in 1901, the Constitution need not say anything about membership qualifications for the Australian Parliament. But it does.<sup>1</sup> The formal legal requirements are a hybrid. Some rules are entrenched and cannot be changed without constitutional amendment while others only remain as they are 'until the Parliament otherwise provides'. These rules, whether they are part of the Constitution or in the form of legislation enacted by Parliament, are subject to interpretation by the Courts. Indeed the Parliament has given the High Court as the Court of Disputed Returns a special role to play in relation to both disputed elections and disputes over membership of the Parliament. Beyond that, there are the rules developed by the Senate and the House of Representatives to control their internal proceedings and their relations with each other. These 'in-house' rules and orders are generally not subject to judicial review.

The Constitution's principal focus is on questions of 'qualification' and 'disqualification' but this inescapably is hedged about by broader questions about what sort of people best represent the electors, how parliamentarians should perform their duties, and the standards of probity the public ought reasonably to expect from their elected representatives.

Sections 44 and 45 of the Constitution list the main substantive qualifications and grounds for disqualification. The attributes specified in section 44 apply to candidates as well as members. The grounds set out in section 45 apply to sitting members only.

The Founders fashioned a compromise between: (1) entrenching a comprehensive mandatory code of conduct in the Constitution; (2) allowing Parliament to make the rules for selection of candidates and members; and (3) leaving the membership of both Houses exclusively to the judgment of electors via the ballot box.

Elements of this compromise have proven unsatisfactory. Some of the provisions are widely seen as too narrow or ineffective, others as overly technical. A lack of precision, as in relation to defining the respective roles of the two Houses and the Courts, has also been a recurring concern. On the other hand, the framework devised by the Founders and adapted by the Parliament, if less than perfect, has proven durable and generally workable. A century of parliamentary practice, electoral contests and intermittent judicial review has also unravelled some of the constitutional entanglements that concerned earlier commentators and practitioners. Some substantive doubts have been removed. For instance, while the meaning of section 44(i)—dealing with disqualification arising out of

foreign allegiance and foreign citizenship—was once regarded as uncertain, High Court decisions in more recent times have produced greater clarity if not administrative efficacy.

While the Constitution deals separately with matters concerning 'qualification' and 'disqualification' of candidates and members, that distinction is largely arbitrary. A qualification question may, for instance, relate to whether a candidate is incapable of being elected because he or she is disqualified from standing for office.<sup>2</sup> Laws that narrow the scope of disqualification provisions necessarily enlarge the pool of potential candidates for office. Additional qualification requirements inevitably reduce the potential number of candidates for office. In many instances, nothing need turn on the distinction between 'qualification' and 'disqualification'.<sup>3</sup> Qualifications questions are, however, generally and for the purposes of this paper, treated as distinct from election disputes arising out of voting irregularities.<sup>4</sup>

## **Candidates and Members**

The distinction between candidates and members is of greater practical significance particularly in relation to the Senate.

Section 44 of the Constitution provides that persons who fail to meet the set criteria for election are incapable of being chosen or of sitting as a member of either House.

Under section 44 candidates must therefore deal with any potential cause of ineligibility prior to being elected to or 'chosen' for Parliament. The High Court by a clear majority in *Sykes v Cleary* ((1992)<sup>5</sup> has determined that the relevant deadline for rectifying any disabilities is prior to the date of nomination. So, for example, a person in breach of section 44(v) at the time of nomination because (say) they held shares in a company with Commonwealth Public Service contracts could not save themselves from disqualification by selling those shares after the date of nomination or after entering Parliament. (They would have to rely on the various exemptions under section 44.)

Where a section 44 invalidity is established in respect of a candidate, their candidature is treated as a nullity. The presence of an ineligible candidate in the ballot will not void the election. If, however, an ineligible candidate has received a plurality of votes, their election is treated as void. This will usually give rise to a by-election (in the case of the House of Representatives) or a recount of ballots excluding the disqualified candidate (in the case of the Senate). Where, however, a sitting member does something after the date of their election to incur disqualification, their seat is declared vacant. This gives rise to either a by-election (in the case of the House of Representatives) or a casual vacancy (where a Senator is disqualified). In the latter part of the last century there emerged two radically different critiques of the provisions. First, there were the commentators and various committees of inquiry who regarded the provisions as an inadequate and incomplete bulwark against corruption. A second group, made up principally of practitioners, saw some of the constitutional safeguards as not just ineffectual but largely of nuisance value. Where these two schools of thought could agree was on the desirability



of change and the difficulty, given the constitutionally entrenched nature of aspects of the law, of achieving it.

These contemporary controversies, however, hark back to the three broad options referred to above that confronted the Founders. A century on, the real choice still lies between formal regulation on the one hand and political sanctions imposed either at the ballot box or by party hierarchies on the other.

As with other contributions to the Department of the Parliamentary Library's centenary series, this paper focuses on the way Parliament has exercised the powers conferred on it by the Founders. Beyond that, though, there lies the 'unfinished business' left by what was an incomplete or transitional conferral of power on the two Houses to set standards that protect their own integrity and safeguard the public good.

Late nineteenth century concerns over political ethics led to the inclusion in the Constitution of provisions designed to limit the choices of electors to those of good character. This was to be done principally by restraining the potential for conflicts of interest between the members' private affairs and those of the wider community. The Founders also deemed a narrow class of past transgressions to be an automatic bar to elected office. Subsequently, Parliament has not departed radically from the Founders' words or their wider vision.

Although successive parliaments have complied with the Founders' vision, their interest has been sporadic and mostly reactive, for although demands for higher standards in public life do not abate, actionable forms of graft have been comparatively rare in Australian federal politics. Political pragmatism and understandable scepticism about the efficacy of legislative action has held back reform, even that backed by independent experts and where bipartisan support for change was likely.

It is logical then that a paper such as this should ask what is to be made of the apparent reluctance to test electoral support for renovating entrenched constitutional safeguards on candidates' and members' qualifications? Is it just that it isn't worth the trouble? If that is so, have other means of protecting the public interest largely supplanted the Founders' 'code' of conduct? Is the remedy (if one is needed) to be found in better drafting—a recasting rather than a reformulation of the existing rules? Or is it that the constitutional safeguards reflect a preoccupation with the quality of Parliament and its membership when the focus ought to be elsewhere, for example on the Executive Government? Lastly, has the parliamentary response lived up to the Vision of the Founders and does it meet current public expectations and satisfy Parliament's own aspirations?

## **Then and Now**

The first federal election was held on 29 and 30 March 1901. In total, 127 candidates contested 36 Senate seats and 185 nominated for 75 places in the House of Representatives.

Sections 16 and 34 of the Constitution required that all those standing at the first poll were: subjects of the Queen either natural born or naturalized for five years, Australian residents of three years standing who could vote in House of Representatives elections,<sup>6</sup> and at least 21 years of age.

As sections 44 and 45 provide, anyone seeking election to the first Commonwealth Parliament would be ineligible to stand (and, if elected, could not remain members) if:

- they were employed by government
- they owed allegiance or appeared to owe allegiance to a foreign country
- they had been 'attainted' of treason
- they were under sentence for an offence carrying a penalty of at least 12 months imprisonment
- they were an undischarged bankrupt, or
- subject to certain exceptions, they were in receipt of discretionary payments from government either in the form of a pension or a contract for services.

For the federal election held on 10 November 2001, 285 candidates nominated for 40 Senate vacancies<sup>7</sup> and 1039 candidates stood for 150 seats in the House of Representatives. Candidates for the 2001 General Election were no longer subject to the substantive requirements set out in section 34. Section 16 continued in force, providing that the qualifications for election to the House and the Senate are identical. However, section 34 had been supplanted by section 163 of the *Commonwealth Electoral Act 1918* which requires that candidates be Australian citizens, qualified to vote at a House of Representatives election and at least 18 years of age. Section 34 could be overridden because the Founders prefaced the section with the key words 'until the parliament otherwise provides'. Parliament exercised a similar power with respect to sections 46 (penalties for sitting when disqualified), 47 (disputed elections and qualifications) and 49 (parliamentary privileges, powers and immunities) of the Constitution, all of which have either been overridden or augmented by legislation.

The disqualifications imposed by sections 44 and 45 have been added to by sections 164 (members of other parliaments) and 93(8) (persons of unsound mind, persons serving a sentence of 5 years or more) of the Commonwealth Electoral Act. Sections 44 and 45, although much criticised, remain untouched largely because they can only be repealed or amended by way of the referendum procedure available under section 128 of the Constitution.

## A Vision?

To the extent that the Founders can be said to have entertained a 'vision' for the composition of the federal legislature, it was that (initially at least) it would be comprised of men with similar backgrounds and interests to their own. This is largely what they got. Approximately 50 per cent of those who participated in the 1897–98 Convention debates were later to serve in the federal legislature.

The Founders' more enduring concern, however, was to protect the public good and sustain public confidence in government. As Isaac Isaacs of Victoria observed:

We should be careful to do all that is possible to separate the personal interests of a public man from the exercise of his public duty. We should bear in mind that it is not only important to secure that as far as we can in actual fact, but, in every way possible, we should prevent any appearance of the contrary being exercised.<sup>8</sup>

This goal was matched by a desire not to discourage participation in public life or arbitrarily exclude persons from elected office. Also at the forefront of the Founders' agenda was setting the ground rules for the first federal poll, rules that would not handicap the wider campaign for federation. Those rules would need to provide a credible mechanism for resolving election disputes and for handling challenges to members' and candidates' qualifications.

With an eye to the longer term, the Founders also sought to devise arrangements that would be resilient enough to withstand the instant pressures of political ambition, yet flexible enough to endure over time. As George Reid of NSW cautioned:

I think that if we are going to legislate for the Commonwealth, *instead of legislating for the establishment of the Commonwealth*, our discussion will be endless. If any abuses arise in the Commonwealth it will be perfectly competent for the Parliament to set them right, and if no abuses arise I think it would be a pity to limit the choice of the Executive...<sup>9</sup> [emphasis added]

The end result was a hybrid. Less than a complete code of conduct for candidates and members, some standards are prescribed by the Constitution, others are set by the Parliament, with the rest left to the whims, fancies and good judgment of the voters.

For much of the past century the disqualification provisions excited little or no interest. There was some activity in the first 10 or so years but most of the 'action' has been in the last 25 with challenges to the *bona fides* of candidates and sitting members becoming more common. Matching this trend, commentators and political practitioners have argued that the disqualification provisions are of nuisance value and an ineffective guard against conflicts between public duty and private interest. It is also argued that they unfairly deny large numbers of Australians the right to stand for election to the Commonwealth Parliament.

How, and how well, the Founders succeeded in their aims of devising a fair, workable and democratically inclusive regime of members' qualifications is the subject of the remainder of this paper. The focus is on three principal issues:

1. Were the Founders able to adequately address their own concerns about the disqualification provisions?
2. How has Parliament responded to the strengths and limitations of the current legal regime?
3. Is further reform necessary or possible?

## Frames of Reference

Each delegate to the 1891 Convention was chosen by members of Colonial Parliaments and, on an average, had fifteen years of parliamentary experience behind them. Lawyers were the most heavily represented profession or calling.

Although New Zealand and Queensland were not represented and those attending were elected and not appointed,<sup>10</sup> the profile of the various delegations in 1897–98 was much the same as in 1891. Again the level of parliamentary experience was high, averaging 12 years service per delegate. All the delegates in 1897–98 bar one were either parliamentarians or former members. The percentage of those attending with a legal background rose from just on one third in 1891 to about half of the delegates at the later Convention.<sup>11</sup> There were no women and no indigenous Australians amongst the delegates.

At the time of the debates each of the colonies had similar legislation which entrenched minimum requirements for membership of parliament.<sup>12</sup> Some of the colonial constitutions also contained specific disqualification provisions but here there was a greater degree of variation.<sup>13</sup>

During the Convention Debates, qualification questions generally were only discussed briefly and the matters of controversy were few. Delegates frequently cited their own colonial models and experience.<sup>14</sup> What are now sections 44 and 45 received the greatest attention.

Inevitably the thinking of many delegates was shaped by their own experience, enlivened by what knowledge they had of other constitutions—principally the Canadian [in relation to section 44(i)]<sup>15</sup> and that of the United States of America.

The influence of foreign constitutions should not, however, be overstated. Australia did not, for instance, follow the Canadian model by providing that Senators must be at least 30 years of age or face compulsory retirement at age 75.<sup>16</sup> Nor did the Founders adopt the US

requirements that members of the House of Representatives have attained the age of 25 years and Senators be at least 30 years old.<sup>17</sup>

Comparison with constitutional provisions in other countries generally, would place Australia at close to the middle of the spectrum in relation to the number of positive personal attributes required of candidates and members.<sup>18</sup> Age, residence, and 'citizenship-like'<sup>19</sup> requirements were all incorporated in the draft. The Founders did not, however, entrench constitutional requirements imposing minimum educational qualifications or property qualifications. There were no limits on the number of terms that members could serve,<sup>20</sup> and members could resign from a political party and move to another without a mandatory by-election.

Likewise, there are no recall provisions and no 'reserved seats' for members of particular ethnic groups. Except in respect of the filling of casual Senate vacancies,<sup>21</sup> candidates were elected and not appointed or subject to election by some form of electoral college. The Constitution did not provide for anything akin to modern funding and disclosure rules. There was no requirement for a register of candidates' or members' interests to enable the electors to make more informed decisions in selecting their representatives.

The Constitution itself only set standards for members of parliament generally. There are no special requirements for ministers other than that they must within 3 months of being appointed to the ministry have won a seat in parliament.<sup>22</sup> Ministers were bound by the same provisions as members but are not subject to additional probity requirements to reflect their greater capacity to benefit from any blurring of their public and private interests.<sup>23</sup>

The Founders did not follow the lead of the New South Wales Constitution of 1855<sup>24</sup> and specifically limit the capacity of the Executive to dominate the Parliament by increasing the proportion of members who hold, and thereby may take, the benefits of ministerial office. Section 65 of the Australian Constitution merely provides that the number of ministers should not exceed 7 until the Parliament provides to the contrary.

Rules governing the qualifications of members were, however, much influenced by the practice in the United Kingdom and the six Colonial Parliaments. In those jurisdictions disputes regarding members' qualifications and vacancies came within the exclusive jurisdiction of the relevant House.<sup>25</sup> There was no role for the Courts except under the common informer provisions (discussed below). Reflecting this practice, the precursor to section 47 adopted by the 1891 Convention would have entrenched the practice of the relevant Chamber determining all questions concerning qualifications and vacancies. It was not until the Adelaide Session in 1897 that Parliament was given the option under the Constitution of allowing questions concerning qualifications and vacancies to be dealt with by extra-parliamentary bodies.

Power over disputed elections was another matter. Whether the Commonwealth Parliament ought to follow the usual practice in the majority of the Australian Colonies

and retain jurisdiction over election disputes was a contentious matter both during the Conventions and in the early years of the Commonwealth. In part this was because the British House of Commons had only a few years earlier (in 1868) allowed jurisdiction for the trial of disputed elections to be transferred to the United Kingdom Courts. A motion to include disputed elections in matters that each House of the Australian Parliament could choose to deal with itself—but for which the Parliament as a whole might make provision for extra-parliamentary review—was rejected at the 1897 Adelaide Session.<sup>26</sup> After further disagreement, debate and prevarication, such a motion was eventually adopted at the Sydney Session.<sup>27</sup>

## Flexible or Rigid?

Perhaps the most critical choice facing the Founders was between an entrenched set of provisions dealing with qualifications and one that could be varied by the Parliament.

Those supporting a rigid approach argued that certain basic norms should be protected and pointed to similar though varying approaches in the constitutions of the six Australian colonies. Those wanting greater flexibility argued that the State constitutions were relatively easy to amend and that 'parliament should regulate its own procedures'<sup>28</sup> and that entrenchment was a 'mechanical device' of only limited use in promoting integrity in public life.<sup>29</sup>

The balance between 'rigidity' and 'flexibility' was considered across a range of qualification issues. Hence, at the 1891 Convention debates, there was discussion as to whether the constitution itself should bar persons with criminal records standing for election to Parliament:

George Dibbs (NSW): We must have some regard for the common-sense of the people who have to give their votes for members of parliament ... We may very well trust the electors to do what is right.

James Munro (Victoria): But the electors will not know anything about it [i.e. the candidate's criminal record]!<sup>30</sup>

A similar debate on the merits of entrenchment and flexibility was a significant feature of the Adelaide and Sydney Sessions of 1897 during a debate on whether to limit the right of members to accept Executive Government appointments within six months of retiring from Parliament.<sup>31</sup>

The more radical and arguably more democratic approach of having few if any rules governing qualifications, leaving it to the electorate to make judgments case by case about the qualities of individual candidates, attracted little support, principally because the relevant Westminster and colonial heritage was just too strong.

Indeed it is somewhat surprising that the approach adopted by the delegates was not more rigid than that ultimately agreed. The 1891 draft Constitution shaped the debate and it

followed the 'rigid' approach. It sought to entrench all the key provisions dealing with members' qualifications and disqualifications in the Constitution. Had this model been adopted, Parliament would have had little scope to change the law dealing with disputed elections, members' qualifications, disqualification and vacancies. The 1897 Sessions took a more liberal stance and many of the clauses in the 1891 draft were amended to commence with the phrase 'until the parliament otherwise provides'. Significantly, however, not all the relevant clauses were amended in this way. In a vote of critical importance, an attempt sponsored by South Australian delegate, Patrick Glynn, to give Parliament power to amend the disqualification and procedural provisions in what are now sections 44 and 45 of the Constitution was defeated.<sup>32</sup>

## **'That Went as Well as Could be Expected'**

Much would seem to have gone as the Founders intended or would have hoped.

As mooted at the Convention debates, Parliament moved quickly to divest itself of the power conferred by section 47 of the Constitution to handle election disputes,<sup>33</sup> that is legal challenges to the polling process and the lodgement of election returns. Such disputes come within the sole jurisdiction of the Court of Disputed Returns—invariably the High Court of Australia sitting in a special capacity created under Commonwealth electoral law.<sup>34</sup> Those who believed that the Parliament could not be trusted to hear election disputes impartially thus gained a significant victory over those, principally located in the House of Representatives, who wanted each House to be the final arbiter in such matters. This group, which ironically, given his subsequent expulsion, included Hugh Mahon (ALP, Coolgardie, WA), continued to agitate for keeping decision-making with the Parliament, arguing that the involvement of lawyers and the courts would be expensive and unhelpful.<sup>35</sup>

The *Commonwealth Electoral Act 1902*, which effected the above changes, was also a significant advance on the position in some States. Prior to Federation, Tasmania and Western Australia had transferred exclusive jurisdiction over election disputes to the courts. South Australia and Queensland persisted with hybrid arrangements that provided for court-like bodies comprised of judicial officers and selected members of parliament to determine disputes. South Australia abandoned this arrangement in 1969 and Queensland in 1915 when the latter provided for an Elections tribunal solely constituted by a Supreme Court judge. In New South Wales, exclusive jurisdiction over election disputes did not pass to the NSW Supreme Court until 1928. In Victoria, the Legislative Assembly retained jurisdiction until 1934 and the Legislative Council until 1961.<sup>36</sup>

At the Commonwealth level, disputes about vacancies and qualifications initially, however, stayed exclusively with the two Houses. In 1907 those arrangements received their first major test when a dispute arose over the appointment of J. V. O'Loughlin (ALP, SA) to a casual Senate vacancy. Initially the Senate Committee on Elections and Qualifications sought to resolve the matter but was unsuccessful. Having reached an

impasse, the Senate Committee recommended referral to the High Court. However, for this to happen it was first necessary to amend the relevant legislation to confer jurisdiction on the Court.<sup>37</sup> In late 1907 the *Disputed Elections and Qualifications Act 1907* was passed and provided that any question regarding the qualification of a Senator or a Member might be referred to the Court of Disputed Returns on a resolution of the relevant House.<sup>38</sup> This did not mean that exclusive jurisdiction passed to the Courts, rather a shared (but unequal) jurisdiction was created.<sup>39</sup>

From 1907 until 1974, qualifications questions received little attention. Relatively few matters of alleged electoral fraud or misconduct were raised in Parliament and only a handful of instances are recorded of a senator's or member's right to sit in the parliament being challenged.<sup>40</sup>

Similarly, prior to 1974, academic interest—invariably a sign that trouble is either fomenting or being fomented—had been confined to those few scholars with a special interest in the intersection of constitutional law and politics.<sup>41</sup> One commentator, not unreasonably, had gone so far as to describe the core provisions dealing with the disqualification of members in the following terms:

The disqualifications under sections 44 and 45 [of the Constitution] are of little practical importance, are riddled with difficulty and do not warrant extended discussion.<sup>42</sup>

Although from 1907 the means existed for them to be drawn into disputes over qualifications and vacancies,<sup>43</sup> the Courts, with rare exceptions in 1946<sup>44</sup> and 1950,<sup>45</sup> were until the mid-1970s, likewise barely troubled by such matters. Foreclosing one potential horror scenario, the High Court ruled fairly early on that the presence of a disqualified member does not invalidate parliamentary proceedings involving that member.<sup>46</sup>

With one major exception, disputes concerning the membership of either House have produced few political casualties and attracted little sustained public interest.

Since 1901 only one member has been expelled – the previously mentioned Hugh Mahon (then ALP, Kalgoorlie, WA) on 12 November 1920. In 1903, Senator John Ferguson (Free Trade, Queensland) was required to vacate his seat because of a poor attendance record.<sup>47</sup> In another case, the High Court constituted as the Court of Disputed Returns found that a person who had been sitting for some months in the Senate was an unqualified candidate as at the time of their election they had not been an Australian citizen.<sup>48</sup> In that case, their election was declared void and the vacancy was filled by recount leading to the election of another member of the same party as the disqualified 'Senator'.<sup>49</sup>

Two members of the House of Representatives have lost their seats as a result of having been disqualified by the Court of Disputed Returns from holding parliamentary office because of the bar on members holding concurrent offices of profit under the crown imposed by section 44(iv) of the Constitution. In one case, Phil Cleary who had stood as an independent candidate for the Victorian seat of Wills, subsequently resigned his office



of profit and recovered his seat at the General Election held four months after the Court ruled him ineligible. The second case involved the Liberal Member for Lindsay, Jackie Kelly. The ineligible candidate, having abandoned her office of profit and addressed the dual citizenship issue, was returned to Parliament at the by-election held to fill the vacancy created by her own disqualification.<sup>50</sup>

One Senator resigned after the commencement of her term on account of the possibility that her employment as a parliamentary staffer to another Senator during the lead up to taking her place as a Senator might have contravened section 44(iv). This matter was debated in the Senate and resolved when the potentially ineligible Senator, Senator Jeannie Ferris (Liberal, SA), resigned her Senate seat and was re-appointed to the ensuing casual vacancy.<sup>51</sup>

The most recent eligibility matter to end in the political demise of the central character involved the successful Pauline Hanson's One Nation Party (PHON) Queensland Senate candidate at the October 1998 General Election, Heather Hill. After the poll was declared but before she could take up her seat, Heather Hill's candidacy was successfully challenged in the Court of Disputed Returns.<sup>52</sup> The majority judges<sup>53</sup> found that Hill was incapable of being chosen because at the date of her election she held dual British and Australian citizenship and had not taken reasonable steps to renounce the former before nominating for the Senate. As in *Re Wood*,<sup>54</sup> the vacancy caused by Hill's disqualification was filled on a recount of ballots. It saw another PHON candidate, Leonard Harris, take Hill's place in the Senate from 2 July 1999.

Each of these matters made little material difference to the political make-up of the Parliament at the time. Perhaps their only significant consequence was that some electors were under-represented for relatively short periods while a new member was being chosen.

The closer scrutiny of the provisions over the past quarter century by the courts,<sup>55</sup> the Parliament and commentators has clarified many of the broader issues that were once a source of uncertainty and confusion.<sup>56</sup> The decisions in *Sykes v Cleary* (1992) and *Sue v Hill* (1999) clarified the constitutional meaning of 'dual citizenship' and made plain the preconditions for holders of dual citizenship standing for Parliament.<sup>57</sup> *Sykes v Cleary* settled the relevant time for determining the status of a candidate or member. (For persons standing for office it is the time of nomination. For persons already in Parliament it is the moment in time that the disqualifying event occurs.) After *Sue v Hill* it is now clear that British citizens are to be treated like all other holders of dual citizenship for the purposes of section 44(i). While other problems remain unresolved,<sup>58</sup> the area of unmarked terrain has been considerably reduced.

Arguably, while other facets of the eligibility rules remain less clear cut,<sup>59</sup> they only rarely come into play and their effects have been ameliorated by legislative or administrative action.<sup>60</sup> Moreover, while there is general agreement about the deficiencies of the present arrangements, there are differences about what should be put in their place. The cost of

holding a referendum to replace the problematic elements of sections 44 and 45—and the probability of it being defeated—cannot be simply brushed aside. As the Clerk of the Senate has not unreasonably observed:

... it is almost compulsory for writers on the law and law-related subjects to find fault with the existing regime and to propound reform proposals. It is *de rigueur* to be an ardent reformer. An author who suggested that the law on a particular subject is satisfactory or probably better than any alternative, and therefore should be left alone, would be regarded almost as a disgrace to the profession ...

Section 44 is an easy target, both for its provisions and for the gymnastics performed by the High Court in interpreting it. It is also an area, however, in which a more conservative approach is justified.

In the first place, the likelihood of change is not great. No government would ask electors to spend \$60 or \$70 million voting in a referendum to make life easier for political candidates or members of Parliament; it would be a good recipe for rejection and political unpopularity. If changes were included in a package of other, more important constitutional alterations, their presence would be likely to sink the package.<sup>61</sup>

Contributions to the academic and professional literature over the last few years, along with the enduring work of the Parliament and its officials and of the Australian Electoral Commission, have enhanced the general understanding of constitutional requirements and the impact they can have on the political process.<sup>62</sup> As awareness of the potential pitfalls associated with the provisions has grown, the established political parties have also instituted more methodical and rigorous approaches to vetting the credentials of prospective candidates, with citizenship issues and the holding of potentially inconsistent public office being the main focus of such internal scrutiny. Others however, have inclined to a less sanguine view.

### **'A Nest of Problems?'**<sup>63</sup>

Sections 44 and 45 and the associated constitutional provisions have been widely criticised.

Leading scholarly critics include: Professor Geoffrey Sawer,<sup>64</sup> Professor Peter Hanks,<sup>65</sup> Professor Geoffrey Lindell,<sup>66</sup> Professor Tony Blackshield<sup>67</sup> and Professor Gerard Carney in his recently published and extremely valuable study of aspects of parliamentary law and ethics.<sup>68</sup>

As Professor Sawer commented in evidence to the 1981 Senate Committee on members' qualifications:

The subject of qualifications and disqualifications of senators and members is in general not suited for inclusion in the rigid parts of the constitution. It is necessarily intricate and technical, and has to operate in relation to a body of public and private law (for example,

statutory governmental corporations and commercial private corporations) and to social conditions that are in a constant state of flux. If general in form, such provisions give rise to numerous problems of interpretation, and if precise they rapidly become out of date and irrelevant.<sup>69</sup>

Principally through its committees, Parliament has expressed similar misgivings about the current rules.<sup>70</sup> A study prepared for the Australian Constitutional Convention (1973–85)<sup>71</sup> and the Final Report of the Constitutional Commission (1988) also called for substantial reforms.<sup>72</sup>

It has been variously argued that the existing provisions:

- are open to abuse
- unfairly exclude a significant portion of the population from elected office and reduce the pool of talent available to sit in Parliament
- are uncertain
- are more likely to catch the guileless than the 'guilty' or else do not successfully address the mischief they were intended to prevent
- do not adequately define the respective responsibilities of the courts and the parliament, and
- impose inappropriate or draconian sanctions.

The Convention Debates and early Hansards make it clear that such concerns are not new. More recently though, longstanding doubts about technical features of the provisions and misgivings about their usefulness have been subsumed in (or perhaps surpassed by) a wider debate over lack of accountability and political corruption in its various forms, including conflicts between public duty and private interest.

## **Practicalities**

The rules governing qualifications are now also closer to the surface of daily politics than they once were. Parliament and the Courts have considered a rising number of qualification questions in the last 25 years.<sup>73</sup> Between 1998 and 2000 four court cases either affected or had the potential to affect the composition of the Commonwealth Parliament.<sup>74</sup> In the preceding election year, the candidature of at least four serious or potential aspirants for elected office fell under the shadow of section 44(i) which requires all those holding foreign citizenship to take all reasonable steps to renounce that citizenship before nominating for election to the Commonwealth Parliament. Mr Michael Johnson, a Brisbane barrister with dual British-Australian citizenship, was forced to withdraw from the Liberal pre-selection contest for the March 2001 Ryan by-election over doubts that he could finalise paperwork renouncing his British citizenship in time to

validly nominate as a candidate. The first pre-selected Australian Democrat candidate for the July 2001 by-election in the federal seat of Aston withdrew—perhaps erroneously—from the contest on the basis that he might not meet the requirements of section 44(i).<sup>75</sup> It was also suggested that Carol Nugent, the widow of the late member for Aston, Peter Nugent, was also prevented from pursuing any interest in contesting Aston because she held dual British citizenship and would not be able to renounce it in time to nominate for the poll.<sup>76</sup>

The 10 November 2001 General Election has already produced a fresh dispute over candidates' and members' qualifications. It was reported during the 2001 General Election campaign that a Country Liberal candidate to represent the Northern Territory in the Senate, London-born Nigel Scullion, had 'made an eleventh hour dash to London' to ensure his British citizenship was revoked before the close of nominations.<sup>77</sup> And Mr Scullion's problems did not end there. In the week leading up to the resumption of the Parliament for the 2002 Budget Sitting, Senator Scullion referred a question of his eligibility to sit in the Senate to the President of the Senate for consideration and possible determination by the Chamber or by the High Court. The instance in question arose from a possible breach of section 44(v) of the Constitution which prohibits candidates for and members of the Commonwealth Parliament from holding shares in a company with fewer than 26 members which has any business agreement with the Public Service of the Commonwealth.<sup>78</sup>

As alluded to above, rising levels of litigiousness mean that eligibility questions now occupy the thoughts of campaign managers, candidates and party machines to a degree that had been previously reserved for disputes about polling irregularities. As a former New South Wales Attorney-General has written with regard to both the Commonwealth and New South Wales Constitutions:

The provisions of the Constitution concerning the disqualification of members of Parliament are amongst those most closely studied by members. However, close study does not necessarily bear fruit, for some of those provisions are archaic and quite incomprehensible in their terms, leaving the risk of disqualification hanging like the sword of Damocles over the heads of members.<sup>79</sup>

Such comments should not surprise nor should the degree of frustration felt by political practitioners towards the provisions. As Dr John Uhr notes in another paper in this series, 'elections do not come cheap'.<sup>80</sup> They not only cost the public purse, but are also a huge drain on the financial and political capital of both individual candidates and political parties. The cost to an individual, successful at the ballot box, but subsequently disqualified from office, needs no elaboration. For their supporters, and for a political party—particularly a small political party—the price in terms of lost influence and loss of political momentum can be significant. The losses are multiplied many times over when a disqualification affects the balance of power in either House or ends the career of one of a party's leading lights.

Understandably political apparatchiks see many of the disqualification provisions as dated and largely of nuisance value. In 1901, it is argued, politics moved at a different pace and entry to the Parliament was not generally dependent on securing the endorsement of an established political party. Indeed, at the first General Election, five candidates for the House of Representatives were elected unopposed. Amongst the parties represented in Parliament, allegiances and alliances were relatively fluid. Campaigning and political life was less heavily 'scripted'. Over the past century politics has become more professionalised and the means of political communication have altered radically. The role of the individual parliamentarian has also undergone a marked transformation. This is to say nothing of other changes in society and in voter expectations. Despite such far reaching changes in the political landscape—for instance, at the 1901 election, there were no female candidates whereas for the 2001 poll there were 381<sup>81</sup>—the constitutional framework regulating membership of the Parliament has not altered since 1901.

In this context it is argued that Parliament's response has been irresolute or at best incomplete. What changes have been made to the eligibility rules are fairly marginal and have done little more than replicate parallel changes to the franchise. Only two referendum proposals relating to members' qualifications have been presented to Parliament and neither was put to the people.<sup>82</sup>

## **Parliament and the Abuse of Power**

Fears that a majority in either House may use its powers in relation to members' qualifications to skew the composition of the Parliament have yet to be realised although much the same result was once achieved by related means.

Section 45 of the Constitution relevantly provides that if a senator or a member of the House of Representatives becomes subject to any of the disabilities listed in sections 44 and 45, their place immediately becomes vacant. However, sections 44 and 45 are not the only provisions that may lead to the removal of a member from either House. Sections 49 and 50 of the Constitution ensure that each House, subject to the Constitution, has full control over its own internal proceedings. As constitutional authorities Quick and Garran point out, those powers and privileges at the time of Federation included the power to suspend members for disorderly conduct and the power to expel members guilty of disgraceful and infamous conduct.<sup>83</sup> Until the power to expel was revoked in 1987,<sup>84</sup> either House was able to circumvent the procedures laid down by sections 44, 45 and 47 and expel a member without cause. Each House's power to suspend persists but may be subject to the implied limitation that it cannot be used to create a 'constructive expulsion' by placing the suspended member in breach of either section 20 or 38 of the Constitution regarding unauthorised absences from parliament.

### **Mahon's Expulsion**

On 11 November 1920, Prime Minister William Morris Hughes, acting on a doubtful press report,<sup>85</sup> moved for the expulsion from the House of Representatives of one his former

ALP colleagues, Hugh Mahon, the Member for Kalgoorlie. The allegation against Mahon was that he had made seditious and disloyal utterances at a public meeting following the death in a British gaol of a prominent Irish Republican. In the words of Prime Minister Hughes, Mahon had 'counselled the dismemberment of Britain and the disruption of the British Empire'. Mahon, who was unable to attend the Parliament to defend himself in person due to illness, denied the charge, also claiming that his oath of office as an Australian parliamentarian did not bind him in allegiance to British Prime Ministers or their policies.<sup>86</sup> In the small hours of the morning of 12 November Mahon was held, by a majority voting on party lines, to have trespassed on the privileges of the House enshrined in section 49 of the Constitution. The House having found Mahon guilty, Prime Minister Hughes immediately moved to have his seat declared vacant.<sup>87</sup> Mahon was defeated at the subsequent by-election.<sup>88</sup>

Sixty-seven years elapsed before the Parliament acted to prevent a repeat of the Mahon case. The *Parliamentary Privileges Act 1987* (the Privileges Act)<sup>89</sup> acted on the recommendation of the 1984 Report of the Joint Select Committee on Parliamentary Privilege (JSCPP) and abolished each House's power of expulsion under section 49 of the Constitution.<sup>90</sup>

Reviewing Mahon's expulsion and noting the indecent haste with which that matter had been brought on by Prime Minister Hughes,<sup>91</sup> the JSCPP concluded that the government majority in the House of Representatives had 'demonstrably misused its powers' in the Mahon case. The JSCPP concluded that other factors also argued for the removal of the expulsion power. First among these was that other Constitutional provisions already created what the Committee described as 'something of a statutory code of disqualification'. Secondly, it was wrong for the institution to which a person had been elected to have the power to reverse the decision of the electors. Thirdly, the power of expulsion was seen by the JSCPP as simply too draconian.<sup>92</sup>

### **The Field Affair**

Prior to 1977, section 15 of the Constitution dealing with Senate casual vacancies simply provided that when the place of a Senator became vacant before the expiration of their term of service, a replacement would (in effect) be chosen by the relevant State Parliament. The successor would then occupy the vacated position until the position was subsequently filled at the next General Election for either the House of Representatives or the Senate, whichever occurred first.

From the introduction of proportional representation for the election of Senators in 1949 until 1975, all parties and the State Parliaments had adopted the practice of filling the casual vacancy with a member of the same political party as the resigned or deceased Senator. This practice, some would say 'convention', broke down twice in 1975 and the subsequent appointments made a material difference to the balance of numbers in the Senate where the Whitlam Government did not have a working majority.

When Labor Senate Leader Lionel Murphy resigned from the Senate in February 1975 to take up a position on the High Court, the Coalition Government in NSW secured the appointment of an independent in his place.<sup>93</sup> This break with 'convention' was compounded following the death of Labor Senator Bert Milliner on 30 June 1975. The Queensland National Party Premier, Mr Bjelke-Petersen, refused to appoint the Labor nominee<sup>94</sup> to fill the casual vacancy. Instead the Queensland Legislative Assembly appointed Mr Albert Patrick Field, a member of the ALP hostile to the Whitlam Government who had indicated that he would vote against it, including on the vital issue of the passage of supply.

Prior to Field's appointment the numbers in the Senate had been 30 Coalition, 27 ALP and two Independents both of whom were prepared to support the Government in passing the Supply Bills. Field's appointment was crucial because it gave the Opposition the tactical option of voting to defer consideration of Supply rather than having to vote against it outright.<sup>95</sup> Field's appointment was deeply resented and immediately challenged by the Labor Party. Labor alleged that the appointment infringed section 44(iv) of the Constitution as Field was still employed by the Queensland Public Service at the time of his appointment to the Senate. Labor unsuccessfully moved that the matter of Field's qualifications be referred to the Senate's dormant Committee of Disputed Returns and Qualifications. After a further attempt to deal with the matter in the Chamber,<sup>96</sup> Labor sought redress through proceedings either under the *Commonwealth Electoral Act 1918* or by way of a writ under the *Common Informer (Parliamentary Disqualifications) Act 1975*; the exact form of process adopted is unclear.<sup>97</sup> Faced with the prospect of incurring a pecuniary penalty of \$200 per day for every day he sat after an originating process was served under the Common Informers Act, Field did not return to the Senate after he was given leave of absence on 1 October 1975. The upshot of this was to leave Labor just short of the numbers it needed for a tied vote to defeat Opposition sponsored motions in the Senate.

The Constitutional Referendum passed in 1977 amongst other things<sup>98</sup> amended section 15 to provide for the filling of the casual vacancy by a person of the same political party as the former Senator. The revised section does not provide that the State Government and Parliament must select the party nominee and it is possible that should a disagreement arise over the appointment, that the State Parliament simply would not fill the vacancy.<sup>99</sup>

The Field affair highlights the possible ramifications of qualification questions and the difficulties that may be sparked by them. Ultimately though, the adequacy of the provisions can be argued both ways. On the one hand it might be contended that the provisions as presently understood, i.e. after *Sykes v Cleary*,<sup>100</sup> provide ample guidance to the Parliament for dealing with a Field-type problem. Moreover, it also appears that the extra-parliamentary sanctions available under the relevant Commonwealth laws were enough to resolve the qualifications question albeit in a way which still left the then Government at a disadvantage.<sup>101</sup>

On the other hand, although *Sykes v Cleary* has established the critical point in time when a conflict of offices will find (even) a State Government employee disqualified from election to the House of Representatives, the position with regard to Senate Casual vacancies remains unclear. Is it the time that their appointment is announced; the time that their nomination is presented to the State parliament; or, in the cases of appointments made by the State Governor, is it the time that the appointee first sits in the Senate?<sup>102</sup>

Likewise, as is discussed below, there also remains room for argument over which body or bodies ought to determine whether a person is qualified to sit and what procedures ought to be followed by it in making such a determination.

## Competing Jurisdictions

Section 47 of the Constitution provides that:

Until the Parliament otherwise provides, any question respecting the qualification of a senator or a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of disputed election to either House, shall be determined by the House in which the question arises.

As already discussed, and leaving for the time being the question of whether a dispute about an election can also constitute a valid dispute over a vacancy or a qualification, legislation was enacted in 1903 to transfer sole jurisdiction over 'disputed elections' to the High Court.

By contrast, jurisdiction for the determination of questions concerning qualifications and vacancies is shared between the Parliament and the Courts. This division of authority is in some ways unsatisfactory but not altogether surprising.

As Geoffrey Sawer remarked:

The question of whether a court should involve itself in such a situation cannot be decided by any formal doctrine; it is partly a question of objective judgment as to the stability of the polity in question, the relative prestige of the court and legislature, and the state of rule-consciousness in the society, and partly a question of the temperament and value system of the judges.<sup>103</sup>

In 1907, after years of vigorous debate, Parliament created the means for each House to refer challenges to members' qualifications to the Court of Disputed Returns.<sup>104</sup> An initial reluctance to do so can be attributed to the same sorts of concerns that for a time forestalled attempts to pass jurisdiction over election disputes to the Courts. As noted above and as others record,<sup>105</sup> a dispute regarding a casual vacancy in the Senate brought matters to a head. Acting on the advice of its Committee of Disputed Returns and Qualifications in the Vardon and O'Loughlin matter,<sup>106</sup> the Senate asked the Government to introduce legislation to allow disputes over the filling of vacancies to be referred on the initiative of the relevant House to the Court of Disputed Returns.<sup>107</sup> Such legislation was



indeed introduced and passed into law as the *Disputed Returns and Qualifications Act 1907*. This somewhat expedient step placed the Commonwealth at odds with the position in the States (with the exception of Queensland) at the time of Federation and thereafter.<sup>108</sup>

However, as the relevant jurisdiction is shared between Parliament and the Courts, and because of the multiplicity of procedural paths laid down in sections 44 to 49 of the Constitution and in subsequent enactments, disputes over vacancies and members' qualifications may come to a head in a variety of ways.

1. Under Part XXII, Division 2 of the *Commonwealth Electoral Act 1918*, a matter concerning qualifications can be determined by the relevant House.
2. Questions concerning vacancies and qualifications may be raised first in the relevant House which may then resolve to refer the matter to the High Court constituted as the Court of Disputed Returns pursuant to section 376 of the *Commonwealth Electoral Act 1918*.
3. As an ultimate safeguard, section 46 of the Constitution provided that an interested person may bring what is called a common informer's action directly before the High Court to in effect challenge the right of any person to continue to sit in the Commonwealth Parliament.<sup>109</sup> Such a suit would now be brought under the *Common Informers (Parliamentary Disqualifications) Act 1975*.<sup>110</sup> A person found to have sat while incapable of doing so is liable to pay the person who brings the common informer's action \$200 plus a further \$200 for each day that he or she sat after the originating process was served.<sup>111</sup>
4. The High Court constituted as the Court of Disputed Returns determined in *Sykes v Cleary*<sup>112</sup> that the qualifications of a successful candidate who has yet to take up his or her seat could be challenged in the Court of Disputed Returns under section 353(1) of the *Commonwealth Electoral Act 1918*. This view was confirmed by a 4–3 decision of the Court in *Sue v Hill* (1999).<sup>113</sup> The majority judges<sup>114</sup> concluded that a challenge to the qualifications of a candidate could also give rise to an 'election dispute' within the meaning of Division 1 of Part XXII of the Commonwealth Electoral Act. The minority judges<sup>115</sup> in *Sue v Hill*, concluded that the history of the legislation, the intention of Parliament and the structure of Part XXII of the Commonwealth Electoral Act suggested the opposite result. In their view matters concerning qualifications and vacancies were separately regulated by Division 2 of Part XXII and therefore could not come to the Court by way of a petition under section 353 of the Act.
5. Matters concerning the composition of either House may also be subject to judicial review. Judicial review might be sought where it is alleged that the House's actions are at odds with the Constitution or the general law relating to members' qualifications. Judicial review, it is argued,<sup>116</sup> would be granted on the basis that the Court is vested with an inherent or supervisory jurisdiction to preserve the integrity of the Constitution.<sup>117</sup> Opportunities for seeking Court intervention in the internal workings

of the Parliament are undoubtedly rare but the possibility cannot be ignored. An example of such a dispute not readily capable of resolution under one of the four methods identified above might arise where either House voted to indefinitely suspend one of its members.<sup>118</sup> (The potential scope for the exercise of judicial review in relation to members' qualifications is beyond the ambit of this paper and in any event has been thoroughly traversed elsewhere.<sup>119</sup> However, the point may be made that judicial review of parliamentary behaviour is not inconceivable nor, for that matter, necessarily undesirable.<sup>120</sup>)

This veritable smorgasbord of remedies holds out the prospect of all sorts of interesting procedural, legal and political entanglements involving Parliament and the Courts. For example: does the exercise by either House of its power to determine qualifications questions under section 47 forestall or permanently bar an action under the Common Informers Act? Where a House makes a determination under section 47, is it still open to an interested party to bring an action on the same facts before the Court of Disputed Returns? Likewise where the Court has made a finding, can that finding be challenged or over-turned by the relevant House? Such questions have been the subject of various and largely inconclusive musings by commentators and political practitioners.<sup>121</sup>

Since the 1907 amendments, the Senate has referred two matters concerning the determination of qualifications of Senators to the Court of Disputed Returns for decision.<sup>122</sup> At least one other matter has been considered by the Senate but not referred to the Court.<sup>123</sup> By contrast, the House of Representatives has never referred a qualifications question to the Court and as recently as June 1999 refused to do so in regard a possible infringement of section 44(v).<sup>124</sup>

In the latter instance, allegations were made in the House that a Parliamentary Secretary in the Howard Government, Mr Warren Entsch (Liberal, Leichhardt, Qld), was a shareholder in and a director of a company which had entered into a contract to supply concrete to an agency of the Commonwealth. This, it was alleged, made Mr Entsch incapable of being a member of the House by virtue of section 44(v) of the Constitution that provides that:

Any person who –

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

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

Mr Entsch could not rely on the exception available under section 44(v) excluding companies with more than 25 members as he was one of only two directors and held one of the two shares in the relevant business. On the other hand, there was nothing before the House to suggest that Mr Entsch was personally involved in the formation or performance

of the contract to supply materials to the Commonwealth. Indeed, it appears that he played no role in the day to day management of the contracting firm.<sup>125</sup>

When the matter was raised in the House of Representatives on 10 June 1999, the Government used its numbers to defeat a motion to refer the matter to the Court of Disputed Returns, amending it to in effect proclaim Mr Entsch's innocence of any breach of section 44(v).<sup>126</sup> Some members of the Opposition argued that the enactment of section 376 of the Commonwealth Electoral Act prevented the House dealing conclusively with the matter itself.<sup>127</sup> This view was quite correctly rejected by the Attorney-General. In effect that was the end of the matter as neither the Opposition nor any other interested person was prepared to follow the alternative course of pursuing Mr Entsch via an action under the *Common Informers (Parliamentary Disqualifications) Act 1975*. This would have brought the matter before the High Court sitting in its original jurisdiction (i.e. not as a Court of Disputed Returns).

Although the facts of the matter are not of particular interest for present purposes, the Entsch Affair does highlight the limitations of the present provisions and the manner for resolving any attendant controversy. The episode underscores unresolved concerns about the use by governments of their numbers in the House of Representatives to determine conclusively disputes arising under sections 44 and 45 regarding vacancies and qualifications. Those concerns include the prospect that one day a Government might not only protect its own supporters from judicial scrutiny but also deprive one or more Opposition members of their right to sit in the House without proper cause or without recourse to independent review. Commentary at the time suggested that the motion adopted by the House on 10 June 1999 confirming Mr Entsch's entitlement to remain a member not only prevented the matter being referred to the Court of Disputed returns but also to the High Court sitting in its original jurisdiction.<sup>128</sup> Others expressed support for the less contentious proposition that a resolution of the relevant House cannot act as a bar against a private legal challenge brought under the *Common Informers (Parliamentary Disqualifications) Act 1975*. Adopting the latter view, the Parliament is subject to the laws that it has enacted and both Houses are therefore bound by the Common Informers Act. The application of that Act is not expressly or impliedly extinguished in cases where either House purportedly has made a 'conclusive' finding on a qualifications matter.

It is generally accepted that the present position is unsatisfactory. Likewise few would contend that there are not sound arguments for following the Senate's practice in the *Webster case*<sup>129</sup> by referring such matters to the Court when credible doubts have been raised about an individual's capacity to sit in Parliament. That said, the prospects for reform are not good. Section 47 issues arise infrequently. Moreover, whatever the deficiencies of the current arrangements, they are more aptly described as untidy rather than intolerable. The potential for mischief is also limited if one accepts that the Court retains a supervisory jurisdiction in one form or another and because of the potential for interested parties to seek judicial review by way of the Common Informers Act. Legislation removing Parliament permanently from the fray and thereby from any

attendant charges of self-interest and political expediency, is therefore technically possible but rather unlikely. It is more likely that the Senate will continue to follow the practice of referring qualifications matters to the High Court. In the short-term and at least in respect of government supporters, the House of Representatives will continue to determine such matters for itself. In time—although it could be a rather lengthy period—a sufficiently detailed and robust body of precedent may emerge from any Senate matters referred to the Court. This may in turn help to reshape practice in the Lower House too.

### **Unclear Meaning—Problems with Sections 44(i)–44(iv)**

It has latterly been argued that many of the concerns of earlier commentators about the scope and meaning of sections 44 and 45 have been dispelled by decisions of the Court. This is true but only up to a point and it is perhaps less true of some parts of sections 44 and 45 than others. Take, for example, section 44(iv) which has been probably the most frequently recurring cause of contention in relation to qualification matters over the past decade or so.

Section 44(iv) provides that:

Any person who holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth shall be incapable of being chosen or sitting as a senator or a member of the House of Representatives.

It is then subject to the specific exemption that states that:

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

The principal intention of this and related provisions<sup>130</sup> is to prevent the Executive Government from in effect 'buying' the votes of members of Parliament by granting them some form of ongoing government benefit.

*Sykes v Cleary*<sup>131</sup> clarified some aspects of section 44(iv). Since that decision was given in 1992 it has been accepted that the expression 'office of profit under the Crown' prevents Commonwealth and State government employees, including those on unpaid leave, from nominating for federal Parliament. However, other and critical areas of doubt remain. It is still, for instance, unclear whether local government councillors and employees are subject to the restriction.<sup>132</sup> It is also uncertain whether section 44(iv) prevents Senators-elect from accepting government employment during what may be the protracted period between the time of their election and the moment that they first sit. The issue has arisen on at least

three separate occasions and is unresolved<sup>133</sup> although the accepted wisdom<sup>134</sup> is that such employment is contrary to section 44(iv).

Similarly, but less significantly, the expression 'or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth'<sup>135</sup> has attracted attention and doubts have been raised as to the meaning of the lengthy exemption at the end of section 44 (iv).<sup>136</sup>

### **An Undue Impediment to Efficient Government—The Case of Assistant Ministers and Parliamentary Secretaries**

The second most significant impact of section 44(iv) was on the structure of federal ministries.<sup>137</sup>

Section 64 of the Constitution provides that each Commonwealth Department of State must be headed by a Minister. Ministers for most practical purposes must be members of Parliament and may be paid a ministerial salary (section 66). The Constitution is largely silent on the appointment of what have variously been termed 'Parliamentary Under-Secretaries', 'Assistant Ministers' and 'Parliamentary Secretaries'. No specific mention is made of these offices. Members of Parliament may assist ministers in the administration of their portfolios but they may not be paid for doing so although, of course, they may continue to draw their normal entitlements for performing their parliamentary duties.

Section 65 limits the number of Ministers to seven until the Parliament otherwise provides. The current maximum number of ministers has been set by legislation at 42 by the *Ministers of State Act 1952*.

Together, sections 44(iv) and 64 were until comparatively recent times treated as placing significant restraints on the structure of the Executive branch. Two inhibitions loomed large. First, it was thought that it was not possible that more than one minister can administer a single department of state.<sup>138</sup> This it was argued would tend to undermine the concept of responsible government inherent in section 64. A second and not unrelated question was whether assistant ministers and parliamentary secretaries (however styled) could be paid for any quasi-ministerial duties they performed.

In the most general of terms, assistant ministers help ministers with the 'internal' administration of government departments. Parliamentary secretaries may assist ministers with their parliamentary duties, for example, securing the passage of portfolio legislation. Together with the rarely appointed ministers without portfolio, these positions have been created for a variety of administrative and political purposes but principally to enable a more sensible division of labour within Executive Government. Their parliamentary role is limited. For example, the Standing Orders of the House of Representatives provide that Parliamentary Secretaries are to be treated as Ministers except in relation to the answering of parliamentary questions.<sup>139</sup> The Senate has also taken steps to limit and clarify their standing within that Chamber.<sup>140</sup>

The operation of section 44(iv) meant until recently, however, that assistant ministers had to settle for enhanced status as their principal form of compensation. They could be reimbursed for reasonable expenses incurred whilst performing their official duties but could not be paid like ministers under section 66 or those holding parliamentary office such as the Speaker of the House and the President of the Senate.

History suggests a degree of friction between the pre-occupations and priorities of the Founders, the predispositions of some constitutional commentators and the dictates of modern government. The Founders, for their part, clearly intended to limit the size of the political executive relative to that of the Parliament. Section 65 was included in the Constitution to make changes to the size of the ministry transparent and subject to parliamentary approval, not just the whim of the Government of the day. Allowing governments to appoint an unlimited number of paid Assistant Ministers and Parliamentary Secretaries without parliamentary approval would have undermined section 65.<sup>141</sup> Constitutional commentators Quick and Garran also suggest that the words of section 64 ruled out the possibility of appointing Ministers without portfolios,<sup>142</sup> a point later relied on by Sir Garfield Barwick to suggest that:

[t]he form of the sections (64 and 65) further suggest that the office [of minister] should only be occupied by one incumbent ... and but one officer responsible for the administration of a department.<sup>143</sup>

Tensions between practicalities and constitutional principles soon surfaced. These were largely sparked by the growth in the size and complexity of government generally but also by the enlargement of the Commonwealth's own specific responsibilities under the Constitution. The practice of allowing ministers to act for other ministers was given early recognition by what is presently section 19 of the *Acts Interpretation Act 1901* and has withstood sporadic judicial attention.<sup>144</sup> Parliament has also progressively enlarged the maximum size of the Ministry provided for under section 65 of the Constitution. When first enacted, the *Ministers of State Act 1952* set the maximum size of the Ministry at 20. By 1971 it had risen to 27 and the *Ministers of State and Other Legislation Amendment Act 2000* sets the maximum ministry at 42.<sup>145</sup>

Governments likewise felt themselves under increasing pressure to circumvent the limits imposed by sections 44, 64 and 65. Various 'cunning plans' to circumvent the provisions were devised. Examples of ministers without portfolio can be found as far back as the Barton Government and the third Fisher Government included two assistant ministers.<sup>146</sup> An honorary Minister was even appointed in 1934 to be in charge of the Royal visit.<sup>147</sup> The Scullin Government included 6 assistant ministers between 1929 and 1932 and the three Lyons ministries made a total of 40 such appointments from 1932 to 1939.<sup>148</sup>

The Menzies Government appointed 4 unpaid 'parliamentary under-secretaries' in 1949 but their status was challenged by the Speaker Archie Cameron (Liberal, Barker, SA). The ALP supported the Speaker but the Menzies Government did not.<sup>149</sup> The Government

subsequently responded that the positions did not constitute 'an office' and that their duties did not include performing executive acts required by law.<sup>150</sup>

On 24 May 1956, Prime Minister Menzies advised the House that experience had persuaded him to drop the term 'Parliamentary Under-Secretary' in favour of the title 'Parliamentary Secretary'.<sup>151</sup> On 19 March 1958,<sup>152</sup> Menzies announced that the Government had received legal advice to the effect that the position of parliamentary secretary must be purely honorary and that the Government was also unable to appoint assistant ministers.<sup>153</sup>

On 29 April 1971,<sup>154</sup> Prime Minister McMahon announced the appointment of six unsalaried 'Assistant Ministers' and reiterated the advice that section 44 of the Constitution prevented them being paid for their additional duties.

The Senate Standing Committee on Constitutional and Legal Affairs 1981 Report criticised the need for governments to rely on highly technical or artificial arrangements to appoint 'ministers assisting'. The Report recommended either the wholesale reform of the relevant Chapter of the Constitution (Chapter 5) or, barring that, an amendment to section 44(iv) 'to enable the appointment and remuneration of assistant ministers, parliamentary secretaries and the like without causing their disqualification'.<sup>155</sup> It also noted criticism of the Quick and Garran and Barwick views regarding ministerial offices by leading constitutionalists including Professor Enid Campbell and Professor Geoffrey Sawer.<sup>156</sup> The Report included an opinion by D I Menzies QC which argued that the allocation of ministerial responsibilities was a political not a legal issue. Menzies QC argued that:

The division of labour among the Ministers would I think properly be a matter ultimately for the Prime Minister who is responsible for advising the Governor-General to make the appointments. Any officer so appointed could of course participate in the sum provided by Parliament under s. 66 without incurring any disqualification under s. 44.<sup>157</sup>

In a bold move to restructure Commonwealth administrative arrangements, the Hawke Government after the July 1987 General Election created 16 'super departments' in place of the individual 27 ministries that had existed up till then. As the size of the overall Ministry remained largely unaltered, a system of senior and junior ministers (administering in effect a single portfolio) was instituted. The Hawke Labor Government appointed parliamentary secretaries after the 1990 election in a change largely attributable to the creation of so-called mega-Departments with the Machinery of Government reforms in 1987. Since then the number of Parliamentary Secretaries has progressively increased from 4 under Prime Minister Hawke to the 12 in each of the three Howard Ministries.

In 1988, the *Final Report* of the Constitutional Commission concluded that section 64 may not prevent the appointment of more than one Minister to administer a single department and foreshadowed the sort of mechanism relied on by the Howard Government in 2000.<sup>158</sup> The Constitutional Commission also recommended changes to section 64 to recognise the

position of Assistant Ministers.<sup>159</sup> Taken with the Commission's recommendations relating to section 44(iv), it would also be possible for these to be salaried positions.<sup>160</sup>

It is fair to say that during the whole of this period, the constitutionality of junior and senior minister arrangements attracted more interest in Parliament than in the Courts. The issue was raised but not settled in the Federal Court on several occasions and only resolved after further pressure for change to the relevant constitutional arrangements had cycled through the system in the late 1980s and early 1990s.<sup>161</sup>

Notwithstanding the independent reports and ongoing criticism from commentators,<sup>162</sup> governments in the latter part of the last century continued to search for administrative and legislative ways around sections 44(iv) and 65. Until March 2000, the appointment and entitlements of parliamentary secretaries were governed by the *Parliamentary Secretaries Act 1980*. This legislation and the accompanying administrative machinery provided for appointment of an unlimited number of unsalaried parliamentary secretaries who would receive an expenses of office allowance as determined under the *Remuneration Tribunal Act 1973*. The ALP supported the passage of the 1980 Bill. However, all three Opposition speakers in the House criticised the proposal, variously attacking similar (but less formal) arrangements entered into by the Menzies and McMahon Governments, questioning the Government's motive for the changes and querying the possible implications for ministerial accountability to Parliament.<sup>163</sup>

What now appears the final chapter is this saga began in November 1999 when the Howard Government wrote to the Remuneration Tribunal advising it that the Government intended to amend the relevant legislation to allow for the appointment of Parliamentary Secretaries as officers under section 64 of the Constitution. The Tribunal responded within a month by recommending a new scale for the payment of additional salary to Parliamentary Secretaries.<sup>164</sup> The Ministers of State and Other Legislation Amendment Bill 1999 was introduced on 9 December 1999 reflecting these proposals. The amending law, having enjoyed a fairly rapid passage through the Parliament, came into effect on 10 March 2000. It provided for the repeal of the *Parliamentary Secretaries Act 1980* and set the size of Ministry at a maximum of 42 with 12 of those positions designated as Parliamentary Secretaries.

In September 2001 the High Court of Australia handed down its decision in *Re Patterson; Ex parte Taylor*<sup>165</sup> concerning a challenge to the cancellation of the applicant's visa by Senator Kay Patterson (Liberal, Victoria), the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs. Relevantly, the applicant had argued that the appointment of salaried Parliamentary Secretaries under section 64 of the Constitution was invalid. One matter raised with the Court was whether members appointed to the position of Parliamentary Secretary hold an inconsistent office of profit under the crown and therefore ought to be disqualified from sitting in Parliament by virtue of section 44(iv). Also at issue was whether more than one minister could concurrently administer any Department of State.



Putting close to a century of controversy to rest, the Court upheld present practice. Those judges deciding,<sup>166</sup> rejected Quick and Garran and Barwick's views on concurrent appointments, with Chief Justice Gleeson commenting:

For the Founders of the Constitution to have descended into greater specificity would have imposed an unnecessary and inappropriate degree of inflexibility upon constitutional arrangements that need to be capable of development and adaptability. The deliberate lack of specificity is demonstrated by the absence of any reference to such prominent features of our system of democratic government as the Office of Prime Minister, or Cabinet.<sup>167</sup>

His Honour also rejected the view that concurrent appointments would tend to undermine the quality of responsible government, stating that:

The concept of administration does not require that there be only one person who administers, and the concept of responsible government does not require that there be only one person who answers to Parliament for the administration of a Department. Under the appointments made by the Governor-General, it is for the Minister and the Parliamentary Secretary to make their own arrangements as to the method by which the Department will be administered. It is for Parliament to determine the procedures by which those two persons will answer for the conduct of such administration. To repeat what was said [elsewhere], responsible government is a concept based upon a combination of law, convention, and political practice. The characteristics of responsible government are not immutable. They are certainly capable of accommodating the arrangements made by the Governor-General in the present case.<sup>168</sup>

The challenge to the appointment of salaried parliamentary secretaries under section 64 was dismissed with equal force.

### **So Broad as to be Devoid of Meaning or so Tight as to be Ineffectual—Members Contracting with the Government**

Sections 44(v) and 45(iii) diminish the power of governments over ordinary members of Parliament by removing from the Executive the capacity to offer members inducements in the form of government contracts, fees or honorariums.

Section 44(v) disqualifies 'any person who has any direct or indirect pecuniary interest in any agreement with the Public Service or the Commonwealth otherwise than as a member in common with other members of an incorporated company consisting of twenty-five or more persons. Section 45(iii) similarly disqualifies any senator or member who directly or indirectly agrees to take any fee or honorarium for services rendered to the Commonwealth. The provisions were considered extensively during the Convention debates,<sup>169</sup> and gave rise to the celebrated *Webster case* in 1974.<sup>170</sup>

However, as Professor Carney has noted, the disqualification of government contractors has not attracted the same degree of attention or concern in recent times as the

disqualification of holders of offices of profit under the Crown.<sup>171</sup> Indeed, it is interesting that the equivalent disqualification provision in the United Kingdom<sup>172</sup> was repealed in 1957 on the ground that there (allegedly) had been no abuse by members involving government contracts for over 100 years.<sup>173</sup>

There is no reason to believe that members of the Australian Parliament have lower ethical standards than their UK counterparts. It is not surprising then that only one case regarding members and such conflicts of interest has come before the courts in the past century. That said, sections 44(v) and 45(iii) are far from being dead-letters and have been the focus of parliamentary and curial attention several times since Federation.<sup>174</sup>

On 22 April 1921, it was alleged in the House that Prime Minister Hughes ought to be disqualified under section 45(iii) for accepting a gift of 25 000 pounds as a tribute to his wartime leadership.<sup>175</sup> As Professor Sawyer reported, Hughes survived, successfully contending that the section only covered honoraria accepted for the discharge of official duties to the Parliament or the Government, not gifts for general service to the nation.<sup>176</sup>

On 18 June 1924, the House of Representatives debated whether two members, Arthur Manning (Nationalist, Macquarie, NSW) and William Killen (Country Party, Riverina, NSW), both farmers, had breached section 44(v). Each was a member of a government body, the Australian Meat Council, and had signed cheques on the government account payable to that industry. The House defeated a motion that Manning and Killen were in breach of section 44. The majority accepted the advice of the Attorney-General Littleton Groom (National, Darling Downs, Qld) that a member did not contravene the provision where they derived some indirect benefit because they were part of a group that had benefited from government policy.<sup>177</sup>

On 2 February 1952, Garfield Barwick QC provided private advice to Mr Roy Wheeler (Liberal, Mitchell, NSW) to the effect that the latter had not infringed section 44(v) of the Constitution. In that matter, a company in which Wheeler was a major shareholder had transacted significant business with a number of government bodies—principally the Snowy Mountains Authority.<sup>178</sup>

More recently, and as discussed earlier, the House of Representatives defeated a motion moved by the ALP to have a question concerning the possible disqualification of the Hon. Warren Entsch (Liberal, Leichhardt, Qld) referred to the High Court under section 376 of the *Commonwealth Electoral Act 1918*. It was alleged that Mr Entsch held a significant interest in a company that had performed work for the Department of Defence.<sup>179</sup>

The *Webster case*, however, is by far the most significant and remains something of a landmark in matters concerning candidates and members qualifications. This is both because it is unique—no similar matter has come before the Commonwealth courts—but also because many commentators believe that Chief Justice Barwick construed the sections too narrowly and then compounded his error by incorrectly applying the law to

the facts of the case.<sup>180</sup> Errors, it has been said, that were further compounded by His Honour not referring the matter to the Full Court for determination.<sup>181</sup>

Senator James Webster (Country Party, Victoria) was one of nine shareholders in a family company that had had business dealings with two government Departments. Webster was not only a shareholder in the company but also the managing director, secretary and the manager. His remuneration, however, was not related to the level of company profits. Webster's election to the Senate in May 1974 was challenged in the Chamber on the basis that his conduct infringed, albeit unwittingly, section 44(v) of the Constitution. The Senate voted to refer two matters to the Court of Disputed Returns. First, whether at the time of the May 1974 election Webster was capable of being chosen as a senator and secondly, whether after his election he had, because of his company's business dealings with the Commonwealth, become incapable of sitting as a senator. The Court, Chief Justice Barwick sitting alone, held that Webster was not disqualified, principally because the company's contracts with the government were not of an ongoing nature. His Honour also concluded that Webster had not infringed section 44(v) because he had not derived a pecuniary benefit from the agreement. This argument is a highly technical one, founded on the proposition that shareholders do not at law acquire a pecuniary interest in a contract entered into by a firm of which they are merely a member. Thirdly, Barwick CJ found that section 44(v) was only designed to protect Parliament from the executive and not to stop individuals making a private gain out of their public office.<sup>182</sup> The latter two aspects of Barwick CJ's judgment appear to be at odds with the intentions of the Founders<sup>183</sup> and serve to further narrow the scope of the provision to the point where it is practically useless.<sup>184</sup> To quote one early commentator:

...the decision in Webster's case has rendered [section 44(v)] almost useless as a check upon would-be fraudulent politicians.<sup>185</sup>

The key to Barwick CJ's decision in *Re Webster*, and contemporary commentary on it, is the assumption that the words of section 44(v) cannot be given their literal meaning.<sup>186</sup> As various writers have suggested, a literal approach would lead to the disqualification of any member who so much as agreed to purchase a postage stamp as that would constitute a contract with the Commonwealth.<sup>187</sup> From this starting point, Barwick CJ reasoned that the sorts of agreement or contract to which section 44(v) referred had to form part of an ongoing relationship which was likely to influence a member's conduct. Barwick CJ, relying on not entirely apposite English authorities, concluded that once a contract was complete it could have no likely bearing on a member's future actions. The Chief Justice's approach, however, is questionable.<sup>188</sup> There is no reason for automatically concluding that a contract, although fully executed, can never influence an individual's future course of conduct—especially where there is the prospect of new contracts or agreements at some time in the future.

In defending the conduct of its Parliamentary Secretary for Industry, Science and Resources, the Hon. Warren Enstch, the Government followed much the same approach taken by Barwick CJ in *Webster*. This was notwithstanding the advice offered to it by the

acting Solicitor-General which embraced the earlier decision with less than total enthusiasm.<sup>189</sup> The Government argued that the section could only apply where there was an ongoing contract or agreement and that relationship could influence how the member performed his parliamentary duties. The section was in the interests of practicality to be construed narrowly and mere appearance of a conflict of interest was not considered a relevant or determinative consideration. Underpinning this reading of the provisions was a contention—not strictly derived from the wording of section 44(v)—that it would be unfair to disqualify a member where the breach was inadvertent or unwitting.<sup>190</sup>

Most commentators have taken a different view of the provision. Most have conceded that it is necessary to read down section 44(v) to avoid hard cases. However, the approach adopted in *Webster* is seen as simply too narrow, reducing an impossibly wide prohibition to one of marginal import that robs the section of its efficacy.<sup>191</sup>

This suggests that a regimen is needed that protects Parliament from excessive Executive influence and also punishes those who place private profit ahead of public duty. In applying section 44(v), Professor Carney has suggested that the primary focus should be whether:

... the agreement, irrespective of its subject matter, creates the impression that the member has allowed his or her personal interests to benefit from the government contract to such an extent that it impairs public confidence in the member's capacity to act solely in the public interest?<sup>192</sup>

In other words, whatever test or standard is to be applied it must look to practicalities. Those benefiting from a direct or indirect relationship with the Government should no longer be able to shelter behind a highly technical legal construction of section 44(v) as adopted by Barwick CJ in *Webster*.

But that is the easy bit. A second and arguably more difficult task for reformers is finding the practical means for achieving their end. Whatever changes, if any, are to be made must be tempered by other considerations.

Enthusiasts for 're-arming' 44(v) need to take into account that the present provision—like its now repealed UK counter-part—was devised before Westminster systems of government came to be dominated by highly disciplined political parties. Rigid party discipline and adversarial politics and all that that these entail make sections 44(v) and 47 potent weapons in the hands of a majority in either House. Safeguards may need to be considered to prevent harsh or draconian action against individual members. Those wanting to breathe new life into section 44(v) or replace it with something sterner may also want to think about the wisdom of placing some limits on how and when such a provision may be called into play. It would be desirable that any move away from the standard set by *Webster* to something more demanding should be achieved by careful deliberation and with bipartisan agreement. This probably entails legislative and further constitutional change that is, unless the opportunity presents itself for the High Court to

distinguish or overrule *Webster* and put in its place a suitable alternative. Otherwise, the Houses generally, and despite their best efforts,<sup>193</sup> will continue to deal with such matters on the run and in the heat of the moment. The latter approach will almost inescapably give rise to charges of partisanship that must taint the outcome, however just or reasonable. What may have been intended as a demonstration of political probity may well end up being widely regarded as just another manifestation of the endless search for partisan advantage.

### **Too Draconian or Otherwise Unfair**

Popular prejudice notwithstanding, not many parliamentarians break the law and an even smaller percentage suffer the shame or the inconvenience of being sent to prison. For instance, only one federal Member of Parliament has ever been convicted of bribery.<sup>194</sup> Indeed, a good proportion of federal MPs over the years imprisoned were 'banged up' on account of 'political' offences that arguably had little to do with their fitness for public office. For example, former ALP Senator George Georges (Queensland) was imprisoned on a number of separate occasions in the 1970s and 1980s for taking part in political protests. These involved non-violent protests in support of freedom of assembly and against laws that many would say have no place in a liberal democracy.<sup>195</sup> Former WA Greens Senator Jo Vallentine also was gaoled more than once for engaging in peaceful protest action.<sup>196</sup>

Instances of members being brought down or careers being curtailed by the ordinary criminal law are rare but seem to be on the rise. In the last decade, four members would have been subject to the provisions if they had not first left Parliament or lost office.<sup>197</sup> Two other members comparatively recently have risked losing their seats because of possible convictions for offences carrying prison sentences of at least 12 months.<sup>198</sup>

Sections 20 and 38 of the Constitution are relevant where a member is found guilty of an offence that carries a term of imprisonment of *less* than 12 months and a prison term is actually imposed. In such cases, although the member may not be disqualified under section 44(ii), they may lose their seat because they are unable to attend Parliament. Disqualification in these circumstances may depend on the relevant House's sitting pattern and on when the prison term is to be served. For instance, a member gaoled for three or four months over the winter or Christmas recesses would probably not miss enough sitting time to be subject to disqualification. A member gaoled in early February may have to rely on the relevant House's goodwill to avoid having their seat declared vacant.

A member who lost his or her seat in Parliament on account of a criminal conviction could in a very real sense be said to have incurred a double penalty: first, the sanction attaching to the offence committed and second, the loss associated with their removal from Parliament. Accordingly, it is all the more important to ensure that the sanctions imposed and the way they are determined accord with basic notions of fairness.

As discussed above, the means for determining whether a member should be disqualified from sitting may be subject to partisan manipulation. Regarding process generally, however, the potential for mischief is constrained by Parliament's own good sense but also by the supervisory role that the High Court is able to play principally by virtue of the *Common Informers (Parliamentary Disqualifications) Act 1975*.

The position in relation to some substantive issues is more troubling.

Section 44(ii) speaks of two separate types of offence that may give rise to possible disqualification. The first limb of section 44(ii) disqualifies any person 'attainted of treason'.<sup>199</sup> This limb of section 44(ii) has attracted little criticism although it has been suggested that it be amended to permit persons who have been pardoned subsequently to stand for office.<sup>200</sup> The second limb of section 44(ii) deals with senators and members who are found guilty during their time in office of committing an offence which is punishable by a term of imprisonment of 12 months or more. This latter provision took several forms when debated during the Constitutional Conventions in 1891 and 1897–98 and enjoyed strong but less than unanimous support.<sup>201</sup> In reviewing this provision in 1981, the Senate Standing Committee on Constitutional and Legal Affairs concluded:

3.14 ... This provision is based on the view that someone who has been found guilty of a serious offence is not a fit and proper person to seek or hold parliamentary office while he is under sentence.

3.15 While we are in no doubt that this purpose remains valid, we are by no means certain that s 44(ii) is still the most effective way to achieve it.<sup>202</sup>

Clearly there are problems with section 44(ii). As the Senate Committee concluded, making a given term of imprisonment the barrier to membership of the Parliament sets up a somewhat arbitrary and dated measure of what constitutes a 'fit and proper person'.<sup>203</sup> And arguably although this arbitrariness was intentional, it is the very lack of precision in the drafting of section 44(ii) that is now its most conspicuous fault.

Section 44(ii) was seriously tested in the 1980s in connection with an ongoing dispute between two relatively minor but bitterly opposed groupings on the Australian political scene. In *Nile v Wood*,<sup>204</sup> the High Court, sitting as the Court of Disputed Returns, was asked to invalidate the election of Senator Robert Wood because of several past convictions that carried a term of imprisonment. In each case the respective sentence had been completed well before Mr Wood's purported election to the Senate in 1987. In this instance the Court found in favour of Mr Wood, holding that section 44(ii) only acted to disqualify those under a current sentence.

However, as has been the pattern in such instances involving the Court, and as with disputes centring on sections 44(i) and (iv), the section 44(ii) litigation involving Mr Wood and Mrs Nile left important questions unanswered. Principally, these concern matters of timing and the immediate consequences of a member having become 'subject to

be sentenced, for any offence punishable ... by imprisonment for one year or longer'. Does this mean, for instance, that disqualification is automatic at the time a conviction is entered? Section 45(i), which provides that any member who becomes subject to a disability mentioned in section 44 thereupon loses his or her seat, seems to suggest that disqualification is not only instantaneous but also automatic. On that reading, section 44 is self-executing. However, there are sound reasons for concluding that that may not be so. The 'architecture' of sections 44 to 47 suggest that although the date on which the seat is to be vacated is the day that an offending member is convicted, the actual decision as to any disqualification still resides with the relevant House or the High Court. Moreover, if disqualification were to be both automatic as well as instantaneous, a member would lose their seat even though they had not fully exercised their appeal rights in respect of the criminal conviction that had placed their membership of the Parliament at risk.

As the Founders did not particularise the actual offences that would incur disqualification,<sup>205</sup> the penalty that may be imposed becomes the primary issue and not the degree of wrongdoing. Accordingly, it is possible for a member to be disqualified for a trivial breach of a law that carries an excessive maximum penalty. Moreover, as most criminal prosecutions arise under State and Territory and not federal law, a member convicted of an offence in a given State may stand to lose his or her seat under section 44(ii) but another member convicted of the same offence in another State might not. Within the same jurisdiction there may be multiple penalty regimes covering similar conduct. Whether a member is exposed to the risk of losing his or her seat may therefore depend on how the relevant State crown law officers elect to proceed (if indeed they decide to proceed via courts at all). In such cases, any legal/administrative action, and not necessarily the moral blameworthiness of the alleged offender, becomes the critical determinant.<sup>206</sup>

In calling for the repeal of the second limb of section 44(ii), the Senate Committee noted that the provision's utility as a yardstick for determining fitness for office had been largely subverted by modern sentencing regimes. The latter are structured differently from those prevalent in the late 1890s, commonly providing for the handing down of suspended sentences and the conditional discharge of offenders.

## **Significant Initiatives and Further Proposals for Reform**

Other rules governing members' qualifications have to date proven less contentious. For instance, the Founders provided that no person could be simultaneously a member of both Houses (section 43). Nor can a person sit in either Chamber whilst an undischarged bankrupt or insolvent (section 45(iii)). Together with the provisions already discussed, these formed part of what might anachronistically be termed the 'anti-corruption provisions' of the Constitution. Not that it was the intention of the Founders to compose a comprehensive code of conduct for members. They deliberately stopped short of prescribing anything either so grand or exhaustive. To the extent that such an undertaking would have occurred to them at all, there was strong resistance to the idea that the

Constitution itself ought to set down immutable rules for constituting the membership of the Parliament. The Founders saw themselves providing the foundations and the building blocks but Parliament was to complete the edifice and any necessary renovations as and when the need arose.

To briefly recapitulate, during its first seven years the Parliament did in fact make significant changes to the way in which both disputed elections and qualifications controversies were handled. In 1902, the Court of Disputed Returns<sup>207</sup> was created<sup>208</sup> and disputes over the conduct of elections were transferred from Parliament to the Court.<sup>209</sup> The 1902 legislation also added a further qualification for membership, prohibiting members of State Parliaments from standing for election to the House of Representatives or the Senate.<sup>210</sup>

After the near debacle of the O'Loghlin/Vardon affair in 1907, the Senate Committee on Elections and Qualifications fell into disuse and has not been re-appointed since the mid-1980s. Its House of Representatives equivalent did not survive the first ten years of Federation.

In 1918 the Parliament enacted a major consolidation of Commonwealth electoral law, the *Commonwealth Electoral Act 1918*. At the time few substantive changes were made to the law regulating disputed returns or qualifications.<sup>211</sup> The consolidated Act did, however, provide that persons of unsound mind were not entitled to stand for election to either House.<sup>212</sup>

Following an attempt by the State Parliaments to effectively nullify section 70 of the Commonwealth Electoral Act which required State members to resign their seats within 14 days before nominating for a federal seat, the Commonwealth Parliament passed the *Commonwealth Electoral Act 1921*. New section 70 blocked a State ploy to provide an automatic right of return to any member of a State parliament who had resigned his or her seat to contest a federal poll but was unsuccessful. As a paramount law, the Commonwealth Electoral Act effectively covers the field and thereby denies the States the right to legislate in respect of membership of the Commonwealth Parliament. (This approach was recently confirmed by the Queensland Court of Appeal. The Court invalidated a Queensland Law that sought automatically to unseat local government councillors who stood for election to the Commonwealth Parliament. A majority of the Court held that the Commonwealth has *exclusive* power to legislate on such matters. All three judges agreed that once a Commonwealth law had been enacted, any inconsistent law enacted by a State could be rendered invalid by virtue of section 109 of the Commonwealth Constitution.<sup>213</sup>)

The *Commonwealth Electoral Act 1925* replaced section 69 of the 1918 legislation and ended the reliance on sections 16 and 34 of the Constitution to define members' qualifications—disqualification continued to be exclusively governed by sections 44 and 45 of the Constitution. The new section 69 also made few substantive changes to the former law in effect re-enacting the constitutional requirements that members must be:



- (a) 21 years of age
- (b) a subject of the King either natural born or for at least 5 years naturalized under a law of the United Kingdom or the Commonwealth
- (c) an Australian resident of at least 3 years standing at his or her time of election, and
- (d) an elector entitled to vote for the House of Representatives or qualified to become such an elector or a person living in the Territory for the Seat of Government and who had lived there for a period of at least one month.

A Royal Commission on the Constitution was appointed by the Governor-General on the advice of the Bruce–Page Government on 18 August 1927 to report on the:

... powers of the Commonwealth under the Constitution and the working of the Constitution since federation.<sup>214</sup>

The Royal Commission barely considered members' qualifications and its only relevant recommendation was that section 44(iv) not be amended to allow government workers to stand for election to either House without first resigning from the public service or any other 'office of profit under the crown'.<sup>215</sup>

The *Commonwealth Electoral Act 1949* made two small changes to the qualification requirements.<sup>216</sup> First, the words 'British Subject' replaced 'subject of the King'. This brought section 69 of the Commonwealth Electoral Act into line with the terminology used in the *Nationality and Citizenship Act 1948*. Secondly, the redundant words 'natural-born or naturalized' were dropped. Thus after the 1949 amendments, the minimum citizenship requirements for candidates were the same as those for voters. The changes meant that candidates had to be a British subject, have lived continuously in Australia for six months,<sup>217</sup> and had to have been a resident for three years at the time of nominating for election.<sup>218</sup>

Linking the enrolment and nomination provisions of the Commonwealth Electoral Act, in effect, extended the list of disqualifications,<sup>219</sup> and included a specific provision disqualifying persons of unsound mind from standing for Parliament.<sup>220</sup>

The Joint Parliamentary Committee on Constitutional Review, established on the motion of Prime Minister Menzies on 24 May 1956, although handed an open brief to review the workings of the Constitution,<sup>221</sup> did not examine the provisions dealing with members' qualifications.

In 1973 the voting age was lowered to 18<sup>222</sup> and with it the minimum age for nominating as a candidate.<sup>223</sup> The impact of the change has been fairly negligible. No eighteen year old has been elected to the federal Parliament. Indeed, the youngest member elected to the

House of Representatives was aged 22 years and 2 months<sup>224</sup> at the date of their election. The youngest person elected to the Senate was aged 26 years and 5 months.<sup>225</sup> Only 10 persons aged 26 or under have been elected to the House of Representatives while only 8 persons under the 30 years of age have become Senators since Federation.<sup>226</sup>

## **Widening the Net—Modern Controls on Inappropriate Conduct and Conflicts of Interest**

By the 1970s, legislators worldwide were under added pressure to disclose their private interests. In Australia demands for greater accountability and openness coincided with the 'rediscovery' of sections 44 and 45 of the Constitution.

On 31 October 1974, a Joint Parliamentary Committee on Pecuniary Interests was established under the Chairmanship of the Hon. Joseph Riordan (ALP, Phillip, NSW). The Riordan Committee was asked to report on whether arrangements should be made to provide for the declaration of the interests of members and senators. In reaching its conclusions the Riordan Committee noted that:

As a result of a recent judicial interpretation of section 44(v) of the Constitution, doubts as to the effectiveness of section 45(iii) of the Constitution, and a series of restrictive rulings of successive Speakers of the House of Representatives as to the meaning of standing order 196 [which prohibits Members voting upon issues where they have a direct pecuniary interest], none of the provisions could be regarded with any confidence as a safeguard against conflicts of interest.<sup>227</sup>

The Riordan Committee recommended the drafting of a code of conduct and a system of interest disclosure where it would be compulsory for certain defined interests to be declared but the disclosure of others could be left to the discretion of the individual member. The Committee made detailed recommendations as to the nature of interests requiring declaration.<sup>228</sup> Its report was tabled towards the end of the life of the Whitlam Government, which was unable to respond to the Report before being removed from office on 11 November 1975.

On 16 December 1977 the Fraser Government announced its intention to establish what became known as the Bowen Inquiry.<sup>229</sup> This body was not comprised of members of Parliament but its Chair had been a member and a Commonwealth Attorney-General.<sup>230</sup> When releasing the Bowen Committee's initial terms of reference, Prime Minister Fraser made it plain that he had rejected the proposals outlined in the Riordan Committee's Report, noting:

A whole new approach is required. I do not regard the Report of the Parliamentary Committee on Pecuniary Interests as putting forward adequate solutions. In my view, a statement of pecuniary interests to the Parliament does not provide an adequate procedure.<sup>231</sup>

Eventually formed in early 1978, the Bowen Committee was given expanded terms of reference<sup>232</sup> and made recommendations concerning a range of public offices including public servants, members of the defence forces and staff of statutory bodies. The Committee came down against the promulgation of a comprehensive statement of ethical principles and did not support the creation of a register of members' interests. It did, however, recommend the adoption of a layered system of codes of conduct and, like previous reports, doubted the effectiveness of sections 44(iv), 44(v) and 45(iii) of the Constitution and called for their review. It also invited the House of Representatives to consider the effectiveness of Standing Order 196.<sup>233</sup>

By the time that the Bowen Committee had reported, the operation of section 44 of the Constitution and related provisions had been referred to the Senate Standing Committee on Constitutional and Legal Affairs. The Senate Committee first became involved by way of a reference of a Private Senator's Bill, the Constitution Alteration (Holders of Offices of Profit) Bill 1978, introduced by Senator Mal Colston (then Labor, Qld).<sup>234</sup> On 28 February 1980, acting on a motion by Senator Colin Mason (Australian Democrats, NSW) the Senate Committee was asked to review section 44(iv) as part of a wider reference on the qualification and the disqualification of Members of Parliament.

The Senate Standing Committee on Constitutional and Legal Affairs Report (the 1981 Report) provides a comprehensive and at times damning critique of sections 44 and 45. It recommended that:

- Section 34 of the Constitution should be amended to provide that members of each House must be at least 18 years old and an Australian citizen. With citizenship becoming the primary criterion for enrolment, residency requirements (then in section 69 of the Commonwealth Electoral Act) were to be treated as redundant.
- That section 44(i) of the Constitution be deleted and replaced by a provision in the Electoral Act regarding the consequences of foreign allegiance in its various forms. This would provide that any person who made a declaration that they had taken every reasonable step to divest themselves of their foreign nationality could stand for Parliament. Their continued eligibility would, however, also be contingent on them not taking conscious advantage of any rights or entitlements arising from their unsought nationality while they held parliamentary office.
- Section 44(ii) should be amended to remove the words 'or has been convicted and is under sentence or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer'. It was suggested that only those persons convicted of treason and not subsequently pardoned should be barred by the Constitution from seeking and holding elected office. The Committee specifically rejected the proposal that such matters involving the disqualification of members could be left to each of the two Houses. In doing so, it noted that:

The vitriolic, highly-charged and emotional nature of the debate in the Mahon case, dealing with as it did extremely sensitive questions among the Australian people at that time, does little credit to the case for allowing Parliament itself to decide matters of qualification.<sup>235</sup>

- In relation to offices of profit and public office holders generally, i.e. section 44(iv) and aspects of section 45, the 1981 Report conceded the difficulties inherent in obliging public servants and other government employees to resign their jobs should they want to stand for Parliament. The Senate Committee, nonetheless, supported the principles underlying section 44(iv). It argued that it is inappropriate for public officials to continue to hold paid positions which may 'expose them to undue influence by the Executive' or place undue burdens on their time so that they cannot properly meet their parliamentary duties.<sup>236</sup> The Senate Committee was also concerned to preserve the concept that certain offices, such as judicial offices and those occupied by senior public servants, should not be held by members of Parliament. The Committee recommended the deletion of section 44(iv) and its replacement with a provision which deemed the office-holder to have relinquished that office at the moment they become entitled to a parliamentary salary. Under a new proposed section 45, serving members who took up certain public offices, including some unpaid high status positions, would lose their parliamentary seat.
- The Senate Standing Committee contended that their proposal to amend section 44(iv) also resolved the 'ambiguous' position of senators-elect who, under existing constitutional arrangements, are unable to accept paid government employment while waiting to take up their Senate place.<sup>237</sup>
- In relation to the payment of Assistant Ministers and Parliamentary Secretaries, the Committee concluded that if its recommendations concerning section 44(iv) were not accepted, then the proviso at the end of section 44(iv) should be expanded to exempt Assistant Ministers and Parliamentary Secretaries and the like from disqualification. This was to enable them to be properly remunerated.<sup>238</sup>
- As regards the issues that arose in *Re Webster*, the Committee recommended that sections 44(v) and 45(iii) be deleted and replaced by a provision that would allow the Parliament to make laws regarding conflicts of interest.<sup>239</sup>

No response to the Committee's Report appeared during the life of the Fraser Government but one was tabled by the then Attorney-General, Senator Gareth Evans (ALP, Victoria) on 6 September 1984. The gist of the response was that the matter had been referred to the Australian Constitutional Convention.

Adding to the impetus for reform, the Wran Labor Government of NSW had in 1981 sponsored a successful amendment to the NSW Constitution<sup>240</sup> providing for the disclosure and regulation of the pecuniary interests of members of the Legislative Assembly and the Legislative Council.<sup>241</sup> Contingent on the making of regulations, members of either House could be disqualified where they had wilfully contravened the

disclosure requirements. These included the obligation to disclose: interests in real or personal property; income, gifts; financial or other contributions to travel; shareholdings or other beneficial interests in corporations; partnerships; trusts; positions (whether remunerated or not) held in, or membership of, corporations, trade unions, professional associations etc.; details of occupation or other outside employment; debts; and payments etc. to relatives. Necessary regulations giving effect to the new requirements were made in 1983.<sup>242</sup> As Anne Twomey notes in her (forthcoming) book on the NSW Constitution, the amendments gained strong public support and were seen as not only protecting the integrity of Parliament but also as improving the image of members and insulating them from scurrilous attacks. Federally, reform continued to tread a well-worn and more circuitous path.

In 1983<sup>243</sup> the Australian Constitutional Convention<sup>244</sup> referred the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs 1981 Report to the Convention's Structure of Government Sub-Committee. The Sub-Committee in turn reported in February 1985 endorsing, with some technical and minor qualifications,<sup>245</sup> the major findings and the principal recommendations of the Senate Committee. In particular, the Sub-Committee expressed its support for amendments to sections 44 and 45 that would enable them to be modified by the Parliament, i.e. the position taken by Patrick Glynn of South Australia and a minority of delegates at the 1897-98 Convention.<sup>246</sup> The meeting of the Constitutional Convention in Brisbane in July and August 1985 adopted the Structure of Government Sub-Committee's report with some minor changes.<sup>247</sup>

A requirement that electors (and thereby) candidates be Australian citizens became law in 1984. Since then, those persons who are not Australian citizens but are British subjects are only entitled to vote and stand in federal elections if they were on the electoral roll before 26 January 1984. There is, however, no explicit constitutional requirement that members once elected maintain their Australian citizenship. However, as has been pointed out elsewhere, Australian citizenship is only likely to be lost where a member acquires foreign citizenship.<sup>248</sup> In such a case the member would lose their right to sit by virtue of section 44(i) of the Constitution.<sup>249</sup> (Section 99 is now the principal provision of the Commonwealth Electoral Act dealing with residence. The effect of the latter provision is to require that electors and therefore candidates must have resided in the electorate for which they are a candidate for a period of one month before immediately placing their name on the electoral roll for that Subdivision. This less than onerous requirement does not apply to members once elected, although section 99(iv) does contain the implication that members of both Houses must maintain a residence in either their place of enrolment or the electorate they represent.<sup>250</sup>)

On 20 May 1987, the *Parliamentary Privileges Act 1987* came into effect largely reflecting the work of those responsible for the 1984 Report of the Joint Select Committee on Parliamentary Privilege (JSCPP). The JSCPP was not unduly critical of sections 44 and 45, arguing in passing that they made it feasible to remove the power of expulsion abused by the House of Representatives in 1920.<sup>251</sup>

On 19 December 1985, the Hawke Government had established an expert body, the Australian Constitutional Commission, to undertake a 'fundamental review' of the Constitution. The Constitutional Commission's Final Report, presented on 30 June 1988 in two imposing volumes, contained detailed analysis and a raft of proposals for Constitutional reform.<sup>252</sup> The Report dealt extensively with the eligibility provisions<sup>253</sup> and its key findings and recommendations were not dissimilar to those of the 1981 Senate Committee Report or the Australian Constitutional Convention Sub-Committee in 1985. There were, however, some differences.

Like its predecessors, the Constitutional Commission found little merit in the existing provisions and arrangements. Thus it was not surprising that on the pivotal issue of whether or not rules governing eligibility to stand for Parliament ought to be entrenched in the Constitution or left to ordinary legislation, the Constitutional Commission stated:

Our approach is that it is for the electors to decide whom should represent them in Parliament. Provisions which would disqualify candidates should, as far as possible, be minimised.<sup>254</sup>

Like both the 1981 Senate Committee and the 1985 Brisbane Session of the Constitutional Convention, the Constitutional Commission recommended against tying members' qualifications to those of being an elector.<sup>255</sup>

The Constitutional Commission diverged from the Senate Committee's approach on a number of matters. It recommended the inclusion of a provision in the Constitution to make unsoundness of mind a disqualification for membership of the Parliament.<sup>256</sup> It also recommended the retention of section 43 of the Constitution thereby supporting the continuation of the requirement that a member of one House must first resign their existing seat before nominating to contest a seat in the other Chamber. The Constitutional Commission recommended that a wider class of persons be subject to office of profit/crown employment disqualifications than that put forward by the 1981 Senate Committee.<sup>257</sup> With regard to pecuniary interests, the Constitutional Commission favoured giving Parliament a more restricted power to prescribe matters that would amount to a conflict of interest than that favoured by the 1981 Senate Report.<sup>258</sup> Under the Commission's pecuniary interests proposal, Parliament's power to prescribe disqualifying circumstances would have remained subject to a number of existing constitutional restraints.

The Constitutional Commission and the 1981 Senate Report also took differing approaches to the division of responsibility between the Courts and each House of Parliament in relation to qualifications questions. The Constitutional Commission concluded that each House should retain the power to deal with election disputes and qualification questions that arise in relation to its own membership. This would, presumably, have included a continuation of the current practice by which the relevant House may refer a matter to the Court of Disputed Returns under a procedure like that currently available under section 376 of the *Commonwealth Electoral Act 1918*.<sup>259</sup> The

Constitutional Commission further proposed that notwithstanding a decision of either House, interested persons could challenge the qualifications of a sitting member in the Court of Disputed Returns and that the Court's decision would be determinative irrespective of any view previously expressed by the relevant House. The Constitutional Commission supported the retention of pecuniary penalties in cases prescribed by the Parliament where disqualified or unqualified persons sit in either House. It also recommended that the right to bring common informer actions should be entrenched in the Constitution and not be subject to a legislative override. By contrast, the 1981 Senate Report had recommended clarifying the existing positions by providing that where either House referred a matter to the Court, the latter's jurisdiction became exclusive. The Senate Report had also called for the retention of the current common informer provisions under the 1975 Act but the abolition of pecuniary penalties.<sup>260</sup>

Interestingly, the Constitutional Commission went on to consider the dilemmas that arise where successful candidates change allegiance or party affiliation at some time after they have entered the Parliament. Some submissions to the Constitutional Commission argued that there should be a constitutional requirement that in cases of defection, the member should immediately resign their seat. There are a number of technical difficulties with such a proposal, including the question of how to deal with significant party splits. The Commission decided that it would be inappropriate for the matter to be dealt with by the Constitution.<sup>261</sup>

The Constitutional Commission's work was largely passed over by Government and was tainted by the manner of the Commission's own creation.<sup>262</sup> The defeat of four government inspired and unrelated proposals for constitutional reform on 3 September 1988<sup>263</sup> buried the Report under the combined weight of a lacklustre referendum campaign and partisan recriminations. The proponents of reform were handed another drubbing and the prospects for changing the Constitution seemed to have plumbed new depths.<sup>264</sup>

On 16 December 1996, in the wake of a series of controversies involving aspects of section 44(i) and 44(iv), the Attorney-General, the Hon. Daryl Williams QC, referred aspects of the operation of the sections to the House of Representatives Standing Committee on Legal and Constitutional Affairs. It reported on 25 August 1997, reaching familiar conclusions about the efficacy of the current constitutional provisions.<sup>265</sup> Various witnesses again gave voice to concerns in the political parties and in the wider community about section 44 generally and it was suggested that the disqualification provisions unfairly exclude a large portion of the electorate from standing for public office.<sup>266</sup> The House of Representatives Committee concluded that notwithstanding a number of helpful judicial pronouncements, further legislative and administrative measures would not remedy the situation. A proper remedy would require constitutional amendment.

As to section 44(i), the House of Representatives Committee recommended that the present section be repealed and replaced by a simple provision requiring candidates and members to be Australian citizens. The question of dual citizenship would become one for regulation by the Parliament. Matters of foreign allegiance generally would be also left for

the Parliament, not the Constitution, to regulate. With regard to offices of profit/crown employment, the 1997 Report proposed the deletion of section 44(iv) and its replacement with a provision requiring holders of judicial office to resign that office before nominating for election to the federal Parliament. The 1997 Report also recommended that certain other public offices defined by the Parliament would be automatically declared vacant if their occupants nominated for election to either House.

The Government's response to the House of Representatives Committee report was tabled on 4 December 1997.<sup>267</sup> The Government accepted that constitutional and legislative action is realistically the only way of overcoming the shortcomings of sections 44(i) and (iv). It also supported the general direction of the proposed amendments. However, noting that a number of substantive issues would 'require further consideration', the Government said that it would be disposed to put the constitutional issues to a referendum 'given adequate support for a suitable proposal'.<sup>268</sup>

One recommendation rejected by the Government was the 1997 Report's proposal that the total number of ministerial and like offices be limited under the Constitution to a maximum of 20 per cent of the total membership of the Parliament. (The Committee's proposal had reflected its support for a constitutional amendment allowing for the payment of assistant ministers and parliamentary secretaries.<sup>269</sup>)

The operation of section 44 was again heavily criticised by the Joint Standing Committee on Electoral Matters in its Report on the 1998 Federal Election.<sup>270</sup> The Government members' report<sup>271</sup> and that of the two Australian Democrats,<sup>272</sup> voiced continued support for constitutional change notwithstanding the decision in the *Sue v Hill* handed down in June 1999 and the difficulty of securing popular support for referenda proposals generally. Senators Andrew Murray (Australian Democrats, WA) and Andrew Bartlett (Australian Democrats, Qld) summed up the thinking on the two critical issues as follows:

[Regarding citizenship] It is therefore clear that, especially in view of the multicultural nature of Australian society, contemporary standards demand that Australian citizenship be the sole requirement for being chosen for Parliament under a new s 44(i), with the residual legislative power being given to the Parliament to deal with unique cases that may arise from time to time ...

[Regarding section 44(iv)] times have changed, even though the ancient struggle between the executive and Parliament continues to this day. Whilst [section 44(iv)] may have been appropriate centuries ago, the growth of the machinery of government has meant that the contemporary effect is to prevent the many thousands of citizens employed in the public sector from standing for election...<sup>273</sup>



## Looking Beyond the Law

At the dawn of Federation, if we are to believe the commentators, colonial politicians—the Founders—did not enjoy what would now be called a 'high public approval rating'. As a leading scholar on Federation has charged:

Politicians, in the political culture of the time, were not 'people', they were the object of both mistrust and amusement, as well as the first port of call for those in the community with a grievance.<sup>274</sup>

Edmund Barton is an interesting case in point. In the centenary year, Barton has been rightly and almost universally lauded. After all, he was one of the leaders of the federation movement and a major contributor at the Convention debates (and probably the pivotal architect of the provisions affecting members' qualifications). Subsequently he became Australia's first Prime Minister and later a justice of the High Court of Australia. Barton may not have been a charismatic figure but he was a person of high intelligence who also knew how to translate ideas into action. A recent biography recalls, however, that Barton was regarded by many at the time as indolent, unimaginative and an inveterate compromiser.<sup>275</sup> As it was with Barton,<sup>276</sup> this reproving undercurrent has remained a feature of Australian political culture. Where there is respect, it is grudging or belated. The desire to serve is equated with excessive ambition and, as a generalisation, those entering public life are viewed with suspicion as self-seeking. This malaise may be in part ascribed to the corrosive effects of the partisan and adversarial politics inherited from Westminster and the six Australian Colonial Parliaments and to national myths such as a reputed distrust of authority and those seen as too closely acquainted with its use.

The Founders, for their part, were alive to a deep-seated and ingrained scepticism about the motives underlying the Federal enterprise. Accordingly, the Constitution they fashioned was designed conspicuously to protect the public good and the credibility of the public institutions that it would bring into being. The Convention debates on members' qualifications, although often rather uninspired, are tinged with an understated sense of commitment to higher ideals. This can be seen in Charles Kingston of South Australia's contribution to the debate on members' business dealings with government<sup>277</sup> and in Patrick Glynn's call for delegates to place greater trust in 'the people' when considering the proposal to automatically disqualify bankrupts from Parliament.<sup>278</sup>

A century later, politicians and to a lesser degree Parliament itself are not held in high regard.<sup>279</sup> Opinion polling supports this conclusion with, for example, party leaders rarely achieving approval ratings in excess of 50 per cent. Longitudinal polling shows parliamentarians' already low standing almost halving in the last 25 years.<sup>280</sup> Enthusiastic critiques of serving parliamentarians and political leaders are no less common than they were in Barton's day.<sup>281</sup> Even a healthy discounting for all manner of collective doom saying and an endemic distrust of authority figures and 'tall poppies' leaves a pretty solid basis of discontent. As former Premier of Western Australia and current federal Labor

frontbencher the Hon. Dr Carmen Lawrence observed in August 2000 in a speech that attracted considerable attention:

Many Australians ... are disgruntled by a system which does not appear to respond to their needs and seems, increasingly, to be in the hands of elites more interested in their own advancement than the general good. As a result, our political system has less and less legitimacy.<sup>282</sup>

If this observation and the popular wisdom are correct, then did the Founders and those who followed them fail in safeguarding Australian democracy from the perception, if not the reality, that its leaders and institutional players are 'in it for themselves'?

The hopes of the Founders or the successes and failings of their Constitution should not be exaggerated. It was not the Founders' intention that the Constitution should remain fixed over time or that the rules governing members' qualifications should be an exhaustive statement of members' legal and ethical obligations. Although some expressed their concerns,<sup>283</sup> the Founders could not have expected that constitutional change would prove so difficult to secure. Likewise Parliament can only take a portion of the blame for any failures in its stewardship of the Founders' handiwork. With the exception of the Mahon case,<sup>284</sup> Parliament generally has not abused its powers with respect to its own members nor have the Courts been required to regularly superintend the political process. If Parliament has fallen short of the mark it is possibly more through sins of omission rather than ones of commission.

Perhaps as Dr Lawrence has also suggested, criticism of the apparent self-interest of those in public office is a proxy for wider feelings of disgruntlement and disconnectedness that range:

... across many of our democratic institutions and processes: our outdated constitution; the Byzantine, power-focused behaviour of our major political parties; the disquieting alliance of our political parties with corporations and large organisations; the control of our political parties by privileged minorities; the seeming irrelevance of much parliamentary debate and political discourse in the media; the permanent state of vitriolic antagonism between the major parties; the elevation of executive secrecy above public disclosure; the winner takes all outcomes of elections which preclude the input of minority opinion; and the failure to enunciate and plan for the long term challenges we face as a community. To nominate a few!<sup>285</sup>

A lawyer's perspective on political life, too, may focus too closely on the words of the Constitution and not enough on political checks and balances. As in relation to another problematic area of parliamentary practice—the independence of the Speakership—the law itself is not the ultimate safeguard against improper conduct, '[u]ltimately, the best protection against the majority's tendency to abuse its power is the realistic and sobering prospect of finding itself in the minority.'<sup>286</sup> Much the same might be said for the discipline imposed by partisan politics more generally.

Most decisions about who enters Parliament and when they leave will not hinge on 'character' or even a suggestion of corrupt or improper conduct. As already noted, Australian politics, particularly at the federal level, has been relatively corruption free. Electoral choices, in the main, are more likely to turn on the perceived performance of alternative governments. For that matter, even when character issues are to the fore, the Constitution and legislation governing membership of the Parliament may matter little in the final analysis. Likewise anti-corruption codes and the like may have only a small deterrent effect<sup>287</sup> even though they, together with the prospect of their impending use, has brought some political careers to an early close. But is this enough? And is it the best that can be hoped for?

A century on, and notwithstanding recent guidance from the High Court and better procedures within the parties, many commentators agree that sections 44 to 47 still harbour the 'nest of problems' identified by Professor Blackshield in evidence to the House of Representatives Standing Committee on Legal and Constitutional Affairs in 1997.

First and quite fundamental is the concern that the provisions (and how they are perceived) appear to unfairly exclude a large proportion—running into the millions—of unknowing citizens from seeking elected office.<sup>288</sup> Here the problem is now not that the law is unclear. The High Court's decision in *Sue v Hill* (1999) has pretty much put any relevant doubts to rest. Nor is there probably much community support for allowing dual citizens to stand for election to the Australian Parliament. The problem is rather the large numbers of persons involved and the fact that their disqualification from elected office turns on a misunderstanding or a lack of awareness of their own legal status rather than on an actual division of loyalties.

Second, it may be asked how the provisions might actually serve the aim of keeping politics 'clean'? The provisions target members, but only indirectly relate to the conduct of ministers. The Founders' initial intention was to prevent two sorts of political mischief: (a) members pushing their own private financial ends at the expense of the public good and, (b) outside influence being brought to bear on elected members to distort the democratic process. One might wonder whether the scope for such mischief is as great as it once may have been and if the role and status inferentially assigned to the humble backbencher by sections 44 and 45 is in touch with present realities. Executive power and party discipline place heavy constraints on the influence wielded by ordinary members. Even if backbenchers are not entirely without influence, it is difficult to see how, for example, the decisions in any of the recent matters involving sections 44(i) and 44(iv)—Wood, Cleary, Hill, Entsch and Lawrence—served to protect Parliament from either an overbearing Executive or the subterranean blandishments of a foreign power.

Third, the act of challenging election returns or members' qualifications may itself actually harm public confidence by reinforcing vague public perceptions that politics and the political process is tainted.

Fourth, as a code of conduct and a guard against 'corruption' or misuse of power and political patronage, sections 44 and 45 are rudimentary at best.

## **Changing the focus**

Recent years have witnessed a marked increase in the regulation of electoral affairs including campaign finance and the funding of political parties.<sup>289</sup> Since October 1984 members of the House of Representatives and from 17 March 1994, Senators, have been required to disclose in full their significant family financial interests.<sup>290</sup> The House of Representatives Standing and Sessional Orders provide for a Committee of Members' Interests to be appointed at the commencement of each Parliament.<sup>291</sup> More broadly, Parliament has renovated legislation dealing with public authorities and companies and public employment<sup>292</sup> and conferred a wider supervisory role on two of the Commonwealth's most successful institutions: the Auditor-General and the Joint Committee on Public Accounts and Audit.<sup>293</sup> Less encouragingly, a code of conduct for Senators and Members has on several occasions been proposed but has yet to be adopted.<sup>294</sup>

Reforms that do not work or which lack the commitment of the key players are another matter entirely. As is arguably the case with sections 44 and 45 of the Constitution, ineffective or discredited measures tend to create a 'compliance culture' where the avoidance of technical breaches and the exploitation of loopholes triumph at the expense of improvements in ethical standards.

Attempts to raise standards can also have unforeseen results and longer-term consequences. One recent but already celebrated example of this concerns the adoption of codes of conduct for ministers. Prime Minister Howard first adopted a ministerial code of conduct in 1996<sup>295</sup> and then 'refined' it<sup>296</sup> after this innovation proved a useful tool in the hands of the Opposition which employed it to prise from office a series of Ministers and one of the Prime Minister's most senior advisers.<sup>297</sup> Arguably these episodes not only damaged the Howard Government but also contributed to a wider malaise about Parliament and politicians of all leanings. In both respects, it is hard to sustain the argument that either consequence was intended or anticipated.

The record of the Federal Parliament on matters of integrity is mixed but perhaps not as bad as may be suggested by opinion polling or post-Federation phenomena like 'talk-back' radio. Indeed, there is ample scope for arguing that the level of 'corruption' has probably declined significantly since colonial times. What has increased is the level of vigilance and the frequency with which breaches—including largely technical breaches—of the rules are uncovered.

Collectively, Parliament has not entirely abandoned the prospect of raising political standards. Given the constraints of parliamentary time and the public's interest, it is remarkable that questions of probity receive the attention they do beyond the unending search for partisan advantage. For example, in September 2000, Parliament's Joint

Committee on Public Accounts and Audit (JCPAA) prepared draft guidelines for Commonwealth Government advertising. Those guidelines arose out of the JCPAA's review of the Australian National Audit Office Report on government expenditure in the lead up to the 1998 election intended to promote better understanding of government proposals to make wholesale changes to the Australian taxation system.<sup>298</sup> At the start of its second century, Federal Parliament had before it four bills dealing with honesty concerns.<sup>299</sup> As was the case with the Founders, there persists a willingness to learn from the experience of others. Hence not only have charters of political honesty and truth in advertising been considered but so have successful (to date) overseas experiments such as the Ethics Counsellor model adopted in Canada.<sup>300</sup>

## **Concluding Comment—A New Vision?**

It was the intention of the Founders that the Constitution would serve as an important defence against political corruption, particularly those forms of dishonest behaviour that had been prevalent in the federating colonies. Some limitations on membership of the Parliament were entrenched in the Constitution but others were not. In taking this course, the Founders accepted that there were limits on what could be expected from the Parliament, the courts and from the people in dealing with wrongdoing by candidates, members or ministers. Decisions taken by either House to discipline its members would inevitably be tainted by suspected or actual bias. The Courts might conceivably play a role but that would be limited so as not to impinge on the separation of powers between the arms of government. Elections could have a cleansing effect but were subject to practical limitations,<sup>301</sup> for instance: the electorate's lack of information, and the tendency for probity questions to be swamped by other concerns. Even more telling: the electoral sanction would only be available in theory once every three years for members of the House and once every six in the case of Senators.

One hundred years on, many of the safeguards devised by the Founders and built on subsequently by Parliament seem ineffective and altogether too arbitrary in their operation. Academic criticism and numerous reports including those undertaken by the Parliament have laid the groundwork for change but the reform process has stalled.

History has shown the Australian electorate increasingly reluctant to support constitutional change—particularly changes one might suppose could make life less difficult for parliamentarians or political parties.<sup>302</sup> Experience has also shown that referenda are expensive to run both for those promoting them and for the taxpayer.

That being the case, it is likely for the foreseeable future that the pattern of the past 25 years will be repeated. Parliament will continue to renovate those qualification requirements that are within its legislative capacity. Large numbers of Australians will be excluded from holding elected office because of their parentage or place of birth or because of the nature of their employment. Sections 44 and 45 will continue to entrap the guileless more often than they punish the guilty. Parliamentarians, campaign managers,

party officials and commentators will continue to vent their frustration and point to the problems with the Founders' legacy but the weaknesses that they have identified will remain largely untouched. The established political parties and the Australian Electoral Commission will continue to do what can be done administratively to minimise the damage. Perhaps the High Court, if given the opportunity, will be able to clarify some of the remaining doubtful provisions without sparking a significant political crisis in the process.

Alternatively, a very close election result and ensuing challenges to the eligibility of one or more successful candidates might ignite the sort of undeclared political crisis that was played out around the results of the US Presidential election of 2000 and in Australia in 1975.<sup>303</sup> But that, as the Americans say, would be something 'out of left field'. Otherwise, Parliament, perhaps increasingly frustrated by the current eligibility rules and the continuing low public esteem, might make a determined effort to promote cross-party sponsored reforms in an effort to revitalise the polity and 'spring clean' the Constitution. Something along the lines of the reforms governing members' pecuniary interests sponsored by the Wran Government and endorsed by popular referendum in 1981 would be one way forward. Were it to embark on such or a similar course, Parliament would find itself engaged in a major renovation of the Founders' legacy. Unlikely? Yes, but then Federation itself has more than once been described as something of a political miracle.

## Postscript

In an age where economics dominates politics and the philosophy of 'whatever it takes' appears to provide the popular framework for political analysis, even a suggestion that questions of political ethics might attract concerted attention will struggle to maintain credibility. Hence, in the closing passage of this paper the very idea that the Founder's "code" of conduct for parliamentarians could be mended or refashioned could only be seriously advanced if triggered by some unforeseen event – something 'out of left field'.

That said, the period since the November 2001 Election has been notable for the prominence given to ethical issues in media commentary on Australian public life.

Some of this has been part of the background noise of post-election politics.<sup>304</sup> Some has been less routine and arguably more disturbing, arising from what is popularly referred to as the 'children overboard affair'. But some has had a life of its own.

Hence there have been concerns about the post separation employment practices of recently retired Ministers encompassing both the nature of their employment and any ongoing links with government as, for example, where former ministers have been involved in undertaking the performance appraisals of their former departmental heads.<sup>305</sup>

Issues have arisen as to what disciplinary powers exist and ought to be exercised by the respective Chambers when members of parliament appear to make baseless attacks on those who do not enjoy the protection of parliamentary privilege.<sup>306</sup>

Parliament's role and suitability for scrutinising the credentials and fitness for office of other public officials was implicitly in play in respect of allegations made against the Governor-General concerning his treatment of child sex abuse allegations made against members of the clergy while he was Anglican Archbishop of Brisbane.

The legal status of former parliamentarians and ministerial staff in respect of parliamentary inquiries and, by implication the status of staffers more generally, has been ventilated but remains unresolved.<sup>307</sup>

As already noted, a former Member who failed to retain his seat at the November 2001 Election was convicted on four counts including accepting bribes.<sup>308</sup>

The length of parliamentary terms again has been at issue.<sup>309</sup>

Now the Senate has before it a question under section 44(v) of the Constitution.<sup>310</sup>

All this serves to underline the degree to which many of our notions of what constitute appropriate standards in public life are either not fully formed or less than adequately realised. The Founders wrestled with questions as to who may stand for elected office and how the electorate should be represented because constitution-making invariably brings such issues to the fore. A century and or so later, many of these basic questions are again prominent but this time without the spur of constitution-making to propel them forward to, if not a permanent conclusion, then some form of interim settlement to serve the times.

## Endnotes

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1. Refer Appendix 1 for the text of the more relevant constitutional provisions.
2. *Re Walsh* [1971] VR 33.
3. Hence in this paper 'qualification', unless otherwise stated, may be taken to refer to both qualifications and disqualifying provisions. The expression 'eligibility rules' is also used to refer to both the qualification and disqualification provisions of the Constitution and the *Commonwealth Electoral Act 1918*.
4. The latter may of course also lead to an election being declared void. *Blurton v Commonwealth Minister for Aboriginal Affairs* (1991) 29 FCR 442.
5. 176 CLR 77
6. Thereby preventing women from standing for the first Commonwealth Parliament except in South Australia and Western Australia.
7. Being an election for half the State Senate positions and all four Territory Senate seats.
8. Convention Debates, Adelaide, 21 April 1897, p. 1037.

The Convention Debates will be cited as follows:

Official Record of the Proceedings and Debates of the National Australasian Convention Debates, Sydney, 2 March to 9 April 1891, Government Printer, Sydney, 1891, cited as Convention Debates, Sydney, 1891.

Official Report of the National Australasian Convention Debates, Adelaide, 22 March to 5 May 1897, Government Printer, Adelaide, 1897, cited as Convention Debates, Adelaide, 1897.

Official Record of the Debates of the Australasian Federal Convention, Sydney, 2 September to 24 September 1897, Government Printer, Sydney, 1897, cited as Convention Debates, Sydney, 1897.

Official Record of the Debates of the Australasian Federal Convention, Melbourne, 20 January to 17 March 1898, Government Printer, Melbourne, 1898, vol. 1, 20 January to 22 February 1898, vol. 2., 22 February to 17 March 1898, cited as Convention Debates, Melbourne, 1898.

9. Convention Debates, Adelaide, 17 April 1897, p. 752.
10. Although the Western Australian Delegation was selected by the Western Australian Parliament from amongst its own members.
11. L. F. Crisp, *Australian National Government*, 5<sup>th</sup> ed., Longman Cheshire, 1983, pp. 9–12.
12. *Constitution Act 1855* (NSW), sections 2, 11 and 16, *Parliamentary Electorates and Elections Act 1893* (NSW), sections 23 and 65; *Constitution Amendment Act 1890* (Vic.) sections 35 and 124; *Elections Act 1885* (Qld), section 6 read in conjunction with *Legislative Assembly Act 1867* (Qld), section 2; *Constitution Act* (SA) 1855–6, sections 14 and 16; *Constitution Acts Amendment Act 1899* (WA), section 20; and *Constitution Amendment Act 1898* (Tas.), sections 5 and 7.
13. Compare the relatively detailed NSW model to be found in the 1855 Constitution and the *Parliamentary Electorates and Elections Act 1893* (NSW) section 24, with the less prescriptive approach in SA dealing only with conflicting offices of profit and receipt of Crown pensions [Constitution Act (SA) 1855–6, section 17].
14. At a rough count there were over 20 direct references to colonial or overseas models during the course of the Convention Debates relating to the eligibility provisions.
15. See S. O'Brien, 'Dual Citizenship, Foreign Allegiance and s. 44(i) of the Australian Constitution', *Background Paper*, no. 29, Department of the Parliamentary Library, Canberra, December 1992, pp. 17–18.
16. Refer sections 23 and 29(2) of the Constitution Acts 1867–82 (Canada).
17. The Constitution of the United States, article 1, sections 2 and 3.
18. M. Maley, 'Candidates: Legal Requirements and Disqualifications', *International Encyclopedia of Elections*, edited by R. Rose, MacMillan, 2000, pp. 31–32. P. Laundy, *Parliaments in the Modern World*, Dartmouth, 1989.
19. The term 'citizenship' is not specifically employed in the Constitution. In fact, the notion 'Australian citizenship' was not created until 1949 and then by legislation, not by way of constitutional change. For a discussion of the concepts of 'citizenship', 'alien' and 'British subject' refer to the recent decision of the High Court of Australia: *Re Patterson; Ex parte Taylor* [2001] HCA (6 September 2001).



20. G. Davis, 'Why Not Limit the Terms of Politicians?', *Legislative Studies*, vol. 7, no. 2, Autumn 1993, pp. 48–53.
21. Since the 1977 amendments to section 15 of the Constitution there has, however, been a marked increase in the percentage of Senators who have been appointed rather than directly elected. As at 30 June 1996, the number of appointed Senators had risen to 11 or 14.5 per cent of the Senate. Over the first 76 years of Federation the number of appointed Senators averaged around 3 per parliament. G. Newman, 'Senate Casual Vacancies', *Research Note* no. 34, Department of the Parliamentary Library, Canberra, 6 March 1997.
22. Section 64 of the Australian Constitution.
23. For a discussion of some topical aspects of the overseas experience see Ian Holland, 'Post-separation Employment of Ministers', *Research Note*, no. 40, 2001–2002, Department of the Parliamentary Library, May 2002.
24. Schedule 1 item 2 to the 1855 Constitution [18 & 19 Victoria, c. 54] provided that not less than four-fifths of the membership of the Legislative Council could not hold an office of profit under the crown excepting members of Her Majesty's sea and land forces. Item 18 of the Schedule also limited the number of members of the Legislative Assembly who could be appointed to the Executive Council.
25. Senate and House of Representatives, *Debates*, 5 June 1901, p. 738.
26. Convention Debates, Adelaide, 15 April 1897, pp. 680–682.
27. Convention Debates, Sydney, 21 September 1897, pp. 991–993 and pp. 1034–1035.
28. Josiah Symon (SA), Convention Debates, Adelaide, 17 April 1897, p. 746.
29. Richard O'Connor (NSW), Convention Debates, Adelaide, 17 April 1897, p. 749.
30. Convention Debates, Sydney, 3 April 1891, p. 658.
31. Convention Debates, Adelaide, 17 April 1897, pp. 740–754; and Sydney, 21 September 1897, pp. 1029–1034.
32. Convention Debates, Sydney, 21 September 1897, pp. 1012–1015.
33. Exclusive jurisdiction over election disputes was given to the High Court of Australia under the *Commonwealth Electoral Act 1902*.
34. An 'election dispute' of this type may, for instance, arise over allegations of electoral bribery, vote rigging, multiple voting or misleading election advertising.
35. G. S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, Melbourne University Press, Melbourne, 1989, pp. 105–112.
36. See P. Schoff, 'The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-Judicial Power an Incompatible Function?', *Federal Law Review*, vol. 25, 1997, pp. 326–329.
37. Refer *Blundell v Vardon* (1907) 4CLR 1463 and *Vardon v O'Loghlin* (1908) 5 CLR 201.
38. Section 6.

39. 'Unequal' in the sense that the two Houses each retained the right to determine which matters could come before the Court by way of section 47.
40. It was for instance argued that the appointment of former Prime Minister, Stanley Melbourne Bruce as High Commissioner to London infringed section 44(iv). Refer: Senate and House of Representatives, *Debates*, 15 September 1932, pp. 513–517. In 1962 questions were raised in the House of Representatives regarding of the treatment of Senator-elect, Doug McClelland, occasioned by the operation of section 44(iv) of the Constitution. This was a precursor to the matter involving Senator Jeannie Ferris (Liberal, SA) discussed in the text concerning the prohibition on Senators–elect accepting public sector employment whilst they are waiting to take up a Senate seat. Cited in G. Carney, *Members of Parliament: law and ethics*, Prospect Press, Sydney, 2000, pp. 73–74.
41. For example, Professor Enid Campbell—see *Parliamentary Privilege in Australia*, Melbourne University Press, 1966, pp. 90–108; and Professor Geoffrey Sawer—see *Australian Federal Politics and Law 1901–1929*, Melbourne University Press, Melbourne, 1956 and *Australian Federal Politics and Law 1929–1949*, Melbourne University Press, Melbourne, 1963.
42. C. Howard, *Australian Federal Constitutional Law*, 3<sup>rd</sup> edition, Law Book Company, Sydney, 1985, p. 74 cited in Sarah O'Brien, 'Dual Citizenship, Foreign Allegiance and s. 44(i) of the Australian Constitution', op. cit.
43. *Disputed Elections and Qualifications Act 1907* passed in the wake of the Vardon litigation centring on a disputed Senate seat. Refer: *Blundell v Vardon* (1907) 4 CLR 1463 and *Vardon v O'Loghlin* (1908) 5 CLR 201 discussed by McHugh J in *Sue v Hill* (1999) 199 CLR 462 at pp. 537–539.
44. *Sarina v O'Connor* (1946). See S. O'Brien, 'Dual Citizenship, Foreign Allegiance and s. 44(i) of the Australian Constitution', op. cit., p. 12.
45. *Crittenden v Anderson* (1950) an unreported High Court of Australia decision of 23 August 1950 noted in the *Australian Law Journal* vol 51, 1977, p. 171.
46. *Vardon v O'Loghlin* (1908) 5 CLR 201 at p. 208.
47. Under section 20 of the Constitution for failing to attend Parliament for two consecutive months in one session.
48. *In Re Wood* (1988) 167 CLR 145.
49. Senator Irina Dunn (Nuclear Disarmament Party, NSW).
50. Refer *Sykes v Cleary* (1992) 176 CLR 77; and *Free v Kelly* (1996) 185 CLR 296. In the Kelly case, the respondent conceded that as an officer in the RAAF at the time of her nomination she was ineligible to stand for Parliament. The Court also held that Ms Kelly was ineligible to stand as under section 44(i) she had not taken reasonable steps to renounce her dual New Zealand citizenship.
51. For a detailed and authoritative treatment of this episode see: *Odgers' Australian Senate Practice*, H. Evans, ed., Dept. of the Senate, Canberra, 9th ed., 1999, pp. 153–154.
52. *Sue v Hill* (1999) 199 CLR 462.

53. Gleeson CJ, Gaudron, Gummow, and Hayne JJ.
54. (1988) 167 CLR 145.
55. Refer the leading cases of *Re Webster* (1975) 132 CLR 270; *In Re Wood* (1988) 167 CLR 145; *Sykes v Cleary* (1992) 176 CLR 77; and *Sue v Hill* (1999) 199 CLR 462.
56. For one exposition of this view see, *Odgers' Australian Senate Practice*, 9<sup>th</sup> ed., op. cit., page 151–157 at p. 155.
57. A person who is an Australian and a foreign citizen must take 'reasonable steps' to divest themselves of their foreign citizenship before they nominate to contest a seat in the Federal Parliament. 'Reasonable steps', although lacking precision, was sufficiently elaborated by the Court to satisfy the House of Representatives Standing Committee on Legal and Constitutional Affairs. The Committee's *Report on Aspects of section 44 of the Australian Constitution* (1997), which was otherwise highly critical of the present constitutional provisions, conceded that the High Court had gone 'some distance to resolving the problem' [See Report pp. 24–26].
58. A significant number of Australian citizens—most likely dual citizenship holders or persons who came Australia as children—although they may not know it, also hold foreign citizenship and would be subject to disqualification under section 44(i).
59. For example, the meaning of the phrase 'attainted of treason' in section 44(ii) and the term 'office of profit under the Crown' in section 44(iv).
60. It is argued, for example, that regulations made under the *Public Service Act 1999*, provide a risk free method for public servants to stand for Parliament safe in the knowledge that they can resume their old job if their campaign proves unsuccessful. (It must be said, however, that the validity of such an automatic return provision is open to serious doubt given that in effect it is a direct legislative denial of section 44(iv).) Refer *Public Service Regulations 1999*, Division 3.2.
61. H. Evans, 'Enclosing politicians: the ambitious project', *Constitutional Law and Policy Review*, August 2000, pp. 26–28, and 40 at p. 26.
62. Major contributions to the debate include various reports and studies commissioned by the Parliament itself. The contribution to understanding the issues made by the various editions of *Odgers' Senate Practice* and *House of Representatives Practice* is sometimes taken for granted by commentators and should not be. Professor Gerard Carney's recent study, *Members of Parliament: law and ethics*, op. cit., provides the sort of 'lay' comprehensive and cohesive treatment that this area has needed for many years. Practitioners and party and electoral officials will find it a godsend.
63. Professor Tony Blackshield in evidence to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into 'Aspects of Section 44 of the Australian Constitution', *Report*, 1997, p. 101. Professor Blackshield was putting what is the dominant view on section 44 amongst legal academics, i.e. that the entire provision needs to be replaced and that can only be achieved by constitutional amendment.
64. Evidence to Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualification of Members of Parliament*, 1981. Cited by Professor Tony

- Blackshield in evidence to House of Representatives Standing Committee on Legal and Constitution Affairs Inquiry into 'Aspects of Section 44 of the Australian Constitution', *Report*, 1997, pp. 34–35.
65. P. J. Hanks, 'Parliamentarians and the Electorate' in *Labor and the Constitution 1972–1975*, Gareth Evans, ed., Heinemann, Melbourne, 1977, pp. 166–214, see especially p. 200.
  66. Evidence to House of Representatives Standing Committee on Legal and Constitution Affairs Inquiry into 'Aspects of Section 44 of the Australian Constitution', 1997, transcript, p. 111.
  67. Evidence to House of Representatives Standing Committee on Legal and Constitution Affairs Inquiry into 'Aspects of Section 44 of the Australian Constitution', 1997.
  68. *Members of Parliament: Law and Ethics*, op. cit.
  69. Cited at page 35, of the *Report* of the House of Representatives Standing Committee on Legal and Constitution Affairs Inquiry into 'Aspects of Section 44 of the Australian Constitution', 1997.
  70. Report of the Joint Committee on Pecuniary Interests of Members of Parliament, *Declaration of Interests*, 1975 (the Riordan Report). *Report of the Committee of Inquiry Concerning Public Duty and Private Interest*, July 1979 (the Bowen Report). Report of the Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualification of Members of Parliament*, 1981 (the 1981 Senate Report). Report of the Joint Select Committee on Parliamentary Privilege, *Final Report*, Parliamentary Paper No. 219/1984, October 1984, p. 126. House of Representatives Standing Committee on Legal and Constitution Affairs Inquiry into 'Aspects of Section 44 of the Australian Constitution', *Report*, 1997.
  71. The Proceedings of the Australian Constitutional Convention 1985 (Brisbane Session), Structure of Government Sub-Committee Report on *Constitutional Qualifications of Members of Parliament*, Volume II.
  72. See especially pp. 160–165, 262–267, and 274–306.
  73. A rising tide of electoral litigation and legal controversy regarding the composition of the Parliament was mentioned by several authors in the 1970s. See, for example, G. Evans, 'Pecuniary Interests of Members under the Australian Constitution', *Australian Law Journal*, vol. 49, August 1975, pp. 464–477; and M. Sexton 'The Role of Judicial Review of Federal Electoral Law', *Australian Law Journal*, vol. 52, January 1978, pp. 28–38.
  74. *Sue v Hill* (1999) 199 CLR 462; *Rudolphy v Lightfoot* (1999) 176 ALR 105; *R v Lawrence* (Unreported) Perth District Court, 23 July 1999, Indictment No. 1351/1999; and *R v Murray* (Unreported) Perth District Court, 9 March 2000, Indictment No. 781/1999.
  75. *Sydney Morning Herald*, 'A slight problem with the candidate but Democrats are still focussed on Aston', 12 July 2001.
  76. L. Dodson and A. Crabb, 'MP's widow asked to run for his seat', *The Age*, 8 May 2001 and Annabel Crabb, 'Nugent's widow ineligible', *The Age*, 24 May 2001.
  77. *Canberra Times*, 8 October 2001.

78. Senate, *Debates*, 14 May 2002, pp. 1377–1381.
79. J. W. Shaw QC MLC, 'Disqualification of Members of Parliament', *Public Law Review*, vol. 11, June 2000, pp. 83–86 at p. 83.
80. J. Uhr, 'Rules of Representation: Parliament and the Design of the Australian Electoral System', *Research Paper* no. 29, 1999–2000, Department of the Parliamentary Library, Canberra, 2000, p. ii. See also *Parliament: The Vision in Hindsight*, edited by G.Lindell and R.Bennett, Federation Press, Sydney 2001.
81. The first woman to stand for Federal Parliament was Vida Goldstein who unsuccessfully stood for the Senate in Victoria at the December 1903 General Election.
82. Constitution Alteration (Holders of Office of Profit) Bill 1978 introduced by Senator Colston (ALP, Qld) on 15 November 1978 and Constitution Alteration (Disqualification of Members and Candidates) Bill 1985 first introduced by Senator Mason (Australian Democrats, NSW) on 28 March 1985.
83. J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, (reprinted 1976), Legal Books, Sydney, 1901, p. 501.
84. With the passage of the *Parliamentary Privileges Act 1987*, section 8.
85. Assertions and counter-assertions were made about what Mahon had actually said. Mahon himself was unable to attend the House to answer the expulsion motion. Mahon also denied the accuracy of the report of the offending speech given in the *Melbourne Argus*.
86. Senate and House of Representatives, *Debates*, 11 November 1920, pp. 6382–6383.
87. *ibid.*, p. 6474.
88. G. Souter, *Acts of Parliament*, Melbourne University Press, Melbourne, 1988, pp. 182–184.
89. The Act commenced on 20 May 1987.
90. Refer section 8 of the *Parliamentary Privileges Act 1987*.
91. Joint Select Committee on Parliamentary Privilege, *Final Report*, Parliamentary Paper No. 219/1984, October 1984, p. 126.
92. By virtue of section 5 of the Privileges Act and their Standing Orders, the Senate and the House of Representatives each retain the powers to discipline their respective members. That power includes the power to suspend, although dicta in the High Court's decision in *Egan v Willis* (1998-99) 195 CLR 424 would seem to suggest that that power may only be used for proper purposes so that members may not be suspended for an unreasonable or excessive period of time. [Refer: McHugh J at pp. 455–456; Kirby J at p. 506 and Callinan J at p. 514]. Section 7(5) of the Parliamentary Privileges Act confers an explicit power on a House to fine members for misconduct or improper behaviour.
93. Senator Cleaver Bunton (Independent, NSW), whose term in the Senate expired on 11 November 1975.
94. Dr Mal Colston.

95. For a more detailed discussion see: P. Kelly, *The Unmaking of Gough*, Allen and Unwin 1994, pp. 301–305.
96. Senate, *Debates*, 9 September 1975, p. 606, and 1 October 1975, p. 823.
97. P. J. Hanks, 'Parliamentarians and the Electorate' op. cit., pp. 198–199.
98. Under the amended section 15, a casual vacancy is now filled for the remainder of the former Senator's term. There is no subsequent 'by-election' for the vacancy at the next General Election in those cases where the former Senator's term would not have expired at the next half-Senate election.
99. As was the case in 1987 when the Tasmanian Parliament refused to accept the ALP's nominee to replace Senator Don Grimes who had retired from the Senate on 2 April 1987. See *Odgers' Senate Practice*, 10th edition, 2001, pp. 132–136 for a more detailed treatment.
100. (1992) 176 CLR 77.
101. To which the response would be that the Government's problems arose principally from the operation of the old section 15 and not section 44.
102. G. Carney, *Members of Parliament: law and ethics*, op. cit., pp. 20–21.
103. G. Sawyer, 'Political Questions', *University of Toronto Law Journal*, volume 15, 1963, pp. 49–61 at p. 60.
104. Refer section 47 of the Constitution and *Disputed Returns and Qualifications Act 1907*, subsequently as Divisions 1 and 2 of Part XXII of the *Commonwealth Electoral Act 1918*.
105. G. S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, Melbourne University Press, Melbourne, 1989, pp. 109–110, Paul Schoff, 'The Electoral Jurisdiction of the High Court as the Court of Disputed Returns', op. cit., pp. 322–323.
106. This centred on a dispute over the filling of a casual Senate vacancy. See below and also *J.R. Odgers' Australian Senate Practice*, H. Evans, ed., 10<sup>th</sup> ed., Department of the Senate, Canberra, 2001, pp. 156–159.
107. This was after the High Court had ruled that it had no jurisdiction to make determinations on the filling of casual vacancies in either House: *R v Governor of South Australia* (1907) 4 CLR 1497.
108. P. Schoff, 'The Electoral Jurisdiction of the High Court as the Court of Disputed Returns', op. cit., p. 323.
109. It is arguable that an action under this legislation and section 46 only leads to the imposition of a penalty—removal of the member is not automatic but must be pursued separately.
110. Such as in the case Albert Patrick Field discussed elsewhere. See also: P. J. Hanks, 'Parliamentarians and the Electorate', op. cit., pp. 198–199.
111. Common Informers (Parliamentary Disqualifications) Act, section 3(1).
112. (1992) Dawson J, 107 ALR 577 at p. 579.
113. (1999) 199 CLR 462.

114. Gleeson CJ, Gummow, Hayne and Gaudron JJ.
115. McHugh, Kirby and Callinan JJ.
116. The contrary view is that there is no explicit constitutional power for the Court to adjudicate on the internal affairs of the House of Representatives or the Senate and that no such power can be implied from the words of the Constitution. It has also been argued that the judicial technique is ill suited to the resolution of such matters. Less persuasively it is sometimes said that the Courts ought not to concern themselves with 'political disputes'.
117. Barwick CJ in *Cormack v Cope* (1974) ALJR 319 at p. 322 and Kirby J in *Egan v Willis* 158 ALR 527 at p. 572 and in *Sue v Hill* (1999) 199 CLR 462 at p. 558 and p. 567.
118. The issue arose in *Egan v Chadwick* (1999) 46 NSWLR 563. On 27 November 1998, the NSW Legislative Council suspended the Government Leader in that Chamber for an indefinite period for refusing to table a series of documents. However, the NSW Court of Appeal did not make a decision on whether the *indefinite* suspension was justiciable. (What made the matter justiciable was an alleged trespass to Mr Egan's person.) An intervening State election provided a political solution to Mr Egan's woes.
119. E. Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press, Melbourne, 1961, pp. 105–108, Hon. D. Kerr, 'Mr Egan and the Legislative Council' *Australian Bar Review*, vol. 19, 1999, pp. 67–88, P. Lane, *The Australian Federal System*, 2<sup>nd</sup> ed., Law Book Company, 1979, pp. 1135–1144, G. Lindell, 'The Justiciability of Political Questions' in *Australian Constitutional Perspectives*, H. P. Lee and G. Winterton, eds., Law Book Company, Sydney, 1992, pp. 180–250; 'Duty to Exercise Judicial Review' in *Commentaries on the Australian Constitution*, L. Zines, ed., Butterworths, Sydney, 1977, pp. 150–190, and 'Judicial Review and the Composition of the House of Representatives', *Federal Law Review*, vol. 6, 1974, pp. 84–106. C. Mantziaris, 'Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege', *Research Paper*, no. 12, 1999–2000, Department of the Parliamentary Library, Canberra, December 1999, C. Saunders, 'Democracy: Representation and Participation', in *Essays on Law and Government: Volume 1, Principles and Values*, Paul Finn, ed., Law Book Company, Sydney, 1995, pp. 51–74, G. Sawyer, 'Political Questions', *University of Toronto Law Journal*, vol. 15, 1963, pp. 49–61. M. Sexton, 'The Role of Judicial Review in Federal Electoral Law', *Australian Law Journal*, vol. 52, January 1978, pp. 28–38', P. Schoff, 'The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-Judicial Power and Incompatible Function?', *op. cit.*, James A. Thomson, 'Constitutional Authority for Judicial Review: A Contribution from the Founders of the Australian Constitution', in *The Convention Debates 1891–1898: Commentaries, Indices and Guide*, edited by G. Craven, vol. VI, Legal Books, 1986, pp. 173–202, G. Orr and G. Williams, 'Electoral Challenges: Judicial review of Parliamentary Elections in Australia', *Sydney University Law Review*, March 2001, K. Walker, 'Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?', *UNSW Law Journal*, vol. 20, 1997, pp. 257–273, and D. Williams MP, 'Judicial review of legislative action', *Legislative Studies*, vol. 65, Autumn 1995, pp. 65–71.
120. C. Saunders, 'Democracy: Representation and Participation', *op. cit.*, at p. 68.

121. Gerard Carney, *Members of Parliament: law and ethics*, op. cit., pp. 148–150; and Senate Standing Committee on Constitutional and Legal Affairs, 'The Constitutional Qualification of Members of Parliament', *Report*, 1981, pp. 93–95.
122. See *Re Webster* (1975) 132 CLR 270, *In Re Wood* (1988) 167 CLR 145.
123. In April 1974 the Coalition/Democratic Labor Party controlled Senate declined to refer questions arising under sections 44 and 45 in respect of Senator Vince Gair's (DLP, Qld) appointment as Ambassador to Ireland to the High Court for determination. Refer P.J. Hanks, 'Parliamentarians and the Electorate', op. cit., pp. 191–194.
124. On 10 June 1999, the House of Representatives defeated a motion moved by the ALP to have a question concerning the possible disqualification of Hon. Warren Entsch (Liberal, Leichhardt, Qld) referred to the High Court under section 376 of the *Commonwealth Electoral Act 1918*. It was alleged that Mr Entsch held a significant interest in a company that had performed work for the Department of Defence—House of Representatives, *Debates*, pp. 6720–6730. On 5 May 1977, the House of Representatives defeated a motion to refer a possible breach of section 45(ii) of the Constitution to the Court of Disputed Returns. The matter involved a possible benefit derived by Michael Baume (Liberal, Macarthur, NSW) from a deed of arrangement entered into under Part X of the Bankruptcy Act. Mr Baume was not a party to the deed of arrangement and the House decided, albeit on party lines, not to refer the matter to the Court—Refer Senate Standing Committee on Constitutional and Legal Affairs, 'The Constitutional Qualification of Members of Parliament', *Report*, 1981, pp. 31–34.
125. Advice prepared by Acting Solicitor-General to the Commonwealth, 9 June 1999.
126. House of Representatives, *Debates*, 10 June 1999, pp. 6720–6735.
127. *ibid.*, pp. 6727 and 6728.
128. Emeritus Professor Tony Blackshield, *ABC AM Program*, 11 June 1999.
129. Discussed below.
130. Sections 44(v) and 45(iii).
131. (1992) 176 CLR 77 at p. 99.
132. Discussed in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report*, 'Aspects of Section 44 of the Australian Constitution', 1997 at pp. 66–67 with two Professors of law associated with the present project expressing conflicting views.
133. In respect of Senator Elect Jeannie Ferris (1996) and a question raised in 1980 by Senator Gareth Evans in correspondence with the Attorney-General, Senator the Hon. Peter Durack QC. See also the McClelland matter referred to by G. Carney, *Members of Parliament: law and ethics*, op. cit., pp. 73–74.
134. Advice given by the then Attorney-General, the Hon. Peter Durack QC, in correspondence with Senator Gareth Evans, *Report* of the Senate Stranding Committee on Constitutional and Legal Affairs, 'The Constitutional Qualification of Members of Parliament', 1981, pp. 54–55 and Appendix 2. Discussed in House of Representatives Standing Committee on Legal and



- Constitutional Affairs, *Report*, 'Aspects of Section 44 of the Australian Constitution', 1997, pp. 62–63.
135. G. Carney, *Members of Parliament: law and ethics*, op. cit., pp. 91–92. Questions were raised in 1987 when former Commonwealth Treasury Secretary, John Stone, announced that he would be contesting a Senate seat for the National Party. Refer: K. Cole, 'Office of Profit under the Crown and Membership of the Commonwealth Parliament', *Issues Brief*, no. 5, 1993, Department of the Parliamentary Library, Canberra, 30 April 1993, p. 15.
  136. House of Representatives Standing Committee on Legal and Constitution Affairs Inquiry into 'Aspects of Section 44 of the Australian Constitution', *Report*, 1997, p. 71. However, for a more sanguine view, see G. Carney, *Members of Parliament: law and ethics*, op. cit., pp. 69–70.
  137. Discussion here is necessarily truncated. Readers wanting a more detailed discussion are referred to M. Healy, 'The role of parliamentary secretaries', *Legislative Studies*, Spring 1993, pp. 46–60. Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualification of Members of Parliament*, 1981, pp. 63–74. R. Bennett, 'Ministers of State and Other Legislation Amendment Bill 1999', *Bills Digest*, no. 110, Department of Parliamentary Library, Canberra, 4 February 2000, G. Carney, *Members of Parliament: law and ethics*, op. cit., 2000, pp. 75–76.
  138. Despite some initial reservations, it is now settled that such appointments are to an office of profit under the crown if they are remunerated. Likewise it also seems reasonably free from doubt that more than one person can be appointed to simultaneously administer a department of state. Solicitor-General, *Opinion*, 'Parliamentary Secretaries' remuneration' tabled in the Senate, 17 February 2000. *Attorney-General v Foster* (1999) 84 FCR 582, pp. 593–594; *Re Patterson*; *Ex parte Taylor* [2001] HCA 51, 6 September 2001.
  139. Resolution of the House, 16 October 1991. See also guidelines issued by the Speaker on 26 March 1992.
  140. *Oggers' Australian Senate Practice*, op. cit., 9th ed., especially pp. 457–459.
  141. Although, it may be noted, that the Convention debates are singularly unhelpful on this point with the main point of discussion in regard to section 65 being whether there should be a minimum number of ministers in the Senate. Convention Debates, Adelaide, 19 April 1897, p. 916 and Sydney, *Debates*, 17 September 1897, pp. 799–802.
  142. *Annotated Constitution of the Australian Commonwealth*, 1901, p. 711.
  143. Opinion given 7 February 1958, cited in Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, Canberra, 1981, pp. 68–69.
  144. Refer Beaumont J in *GTE (Australia) Pty Ltd v Brown* (1987–88) 76 ALR 221.
  145. Up to 30 of whom are 'ministers' with a further 12 parliamentary secretaries being able to be appointed. All, however, are designated as appointments under section 64 of the Constitution and therefore are entitled to remuneration.
  146. 17.9.1914–27.10.1915.

147. Sir Charles Marr, who was not a parliamentarian.
148. G. Skene, 'Assistant Ministers', *Background Paper*, Legislative Research Service, Department of the Parliamentary Library, 26 November 1984, p. 2.
149. Speaker Cameron did not resign over the rebuff.
150. G. Skene, 'Assistant Ministers', op. cit., pp. 3–4. Rt Hon. R. G. Menzies, *Ministerial Statement*, 'Parliamentary Under-Secretaries', 27 August 1952. J. R. Odgers, *Australian Senate Practice*, 6th ed., Canberra, 1991, pp. 963–965.
151. House of Representatives, *Debates*, p. 2450.
152. House of Representatives, *Debates*, p. 434.
153. See discussion in Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualification of Members of Parliament*, 1981, pp. 68–71.
154. House of Representatives, *Debates*, pp. 2243–2245.
155. Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualification of Members of Parliament*, 1981, pp. 72–73.
156. *ibid.*, p. 69.
157. *ibid.*, p. 69.
158. Constitutional Commission, *Final Report*, AGPS, Canberra, 1988, vol. 1, p. 329.
159. *ibid.*, 1988, p. 316 and pp. 329–330.
160. *ibid.*, p. 296 and pp. 299–301.
161. Solicitor-General, *Opinion*, 'Parliamentary Secretaries' remuneration' tabled in the Senate, 17 February 2000. *Attorney-General v Foster* (1999) 84 FCR 582, pp. 593–594; *Zoeller v Attorney-General (Cwth) and Others* (1987–88) 76 ALR 267.
162. G. Lindell, 'Responsible Government', in *Essays on Law and Government Volume 1, Principles and Values*, P. D. Finn, ed., Law Book Co., North Ryde, NSW, 1995, especially pp. 90–92.
163. House of Representatives, *Debates*, 3 December 1980, pp. 319–324. Opposition Speakers were the Hon. Bill Hayden, Hon. Mick Young and Brian Howe MP.
164. Remuneration Tribunal, *Report on Senators and Members of Parliament, Ministers and Holders of Parliamentary Office—Salaries and Allowances for Expenses of Office*, 7 December 1999.
165. [2001] HCA 51, 6 September 2001.
166. Gleeson CJ (paras 8–22), Gaudron J (paras 60–72), Gummow and Hayne JJ (paras 209–225) and Kirby J (para 323).
167. Gleeson CJ, para 19.
168. Gleeson CJ, para 21.

169. Convention Debates, Sydney, 3 April 1891, pp. 659–660, and Convention Debates, Sydney, 21 September 1897, pp. 1022–1028.
170. (1975) 132 CLR 270. Before Barwick CJ sitting alone.
171. G. Carney, *Members of Parliament: law and ethics*, op. cit., pp. 112–113.
172. Most recently under the House of Commons Disqualification (Declaration of Law) Act 1931 (UK); formerly the House of Commons Disqualification Act 1782 (UK).
173. G. Carney, *Members of Parliament: Law and ethics*, op. cit., pp. 96–97: who notes a number of critical differences in the wording of the Australian and UK prohibitions.
174. Section 44(v) was, for instance, the subject of considerable debate in relation to accusations made against Mr Warren Entsch (Liberal, Leichhardt, QLD) in June 1999. See above. Refer House of Representatives, *Debates*, 10 June 1999, pp. 6720–6735.
175. House of Representatives, *Debates*, pp. 7698–7710.
176. *Australian Federal Politics and Law 1901–1929*, Melbourne University Press, Melbourne, 1956, p. 215.
177. House of Representatives, *Debates*, pp. 1350–1362.
178. Also referred to in D. Marr, *Barwick*, Allen and Unwin, Sydney, 1980, pp. 280–281.
179. House of Representatives, *Debates*, 10 June 1999, pp. 6720–6735.
180. J. D. Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the Webster case', *Monash Law Review*, vol. 3, 1976, p. 91; P J Hanks, 'Parliamentarians and the Electorate' op. cit., p. 196; G. Carney, *Members of Parliament: Law and ethics*, op. cit., pp. 95–113.
181. A view which His Honour also appears to have entertained for a time. Refer: J. D. Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the Webster Case', op. cit., p. 92.
182. (1975) 132 CLR 270 at pp. 278–279.
183. J. D. Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the Webster Case', op. cit., especially pp. 97–100.
184. Isaac Isaacs (Victoria), Convention Debates, Sydney, 21 September 1897, p. 1023.
185. J. D. Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the Webster Case', op. cit., p. 100.
186. G. Evans, 'Pecuniary Interests of Members of Parliament under the Australian Constitution', *Australian Law Journal*, vol. 49, August 1975, p. 477. Evans also concluded that the provisions were capable of 'relatively precise, narrow and acceptable application' and suggested that the Houses should develop a set of guidelines for dealing with pecuniary interest matters under section 47 of the Constitution. Such guidelines would not be legally binding but they would, as Evans suggests, be difficult to ignore and would reduce the risk of decisions being taken to further partisan ends.
187. *ibid.*, p. 465.

188. For example, G. Carney, *Members of Parliament: Law and ethics*, op. cit., p. 100.
189. House of Representatives, *Debates*, 10 June 1999, pp 6720–6735. Henry Burmester QC, *Opinion*, 'Section 44(v) of the Constitution—Possible Disqualification of a Member', 9 June 1999.
190. This ignores the wording of section 44(v), which leaves no room for consideration of motives or intentions. It creates a strict liability offence and was clearly intended to do so as indicated by the words used in the provision and the relevant Convention Debates.
191. J. D. Hammond, 'Pecuniary Interest of Parliamentarians: A Comment on the Webster Case', op. cit., p. 91.
192. G. Carney, *Members of Parliament: Law and ethics*, op. cit., pp. 104–105. As Carney acknowledges, the test has much in common with a proposal developed by the Senate Standing Committee on Legal Affairs in its 1981 Report.
193. The Senate in setting up an all party committee to review the matter has recently attempted to pursue a non-partisan and more considered approach in respect of the accusations made against Senator Scullion.
194. Dr Andrew Theophanous, the former ALP member for the Victorian seat of Calwell, was convicted of bribery, fraud and conspiracy by the Victorian County Court on 22 May 2002. The offences were committed during his time as a member of the House of Representatives but his trial was not completed prior to the 2001 General Election at which Dr Theophanous—by then an independent member—failed to retain his seat.
195. Senate Standing Committee of Privileges, *Tenth Report*, 'Detention of a Senator', Parliamentary Paper No. 433/1986, 5 December 1986, see especially p. 10.
196. Senator Vallentine was a Senator from 1 July 1985 until her resignation on 31 January 1992. She was a member of the West Australian Greens Party at the time of her resignation having been a member of the Nuclear Disarmament Party and also an Independent Senator.
197. Keith Wright (ALP/Independent, Capricornia, Qld) was convicted of various sexual offences in 1993 and 1994. He was defeated at the March 1993 General Election. Michael Cobb (National Party, Parkes, NSW) was found guilty on several charges of imposing on the Commonwealth and one of fraud and was given a two year suspended sentence on 16 November 1998 and a fine. Mr Cobb retired from Parliament prior to the October 1998 General Election. Former Senator Robert Woods (Liberal, NSW) was sentenced on 17 June 1999 having pleaded guilty to several charges of defrauding the Commonwealth. Senator Woods had resigned from Parliament on 7 March 1997. In addition, at the time of his retirement from the Senate on 30 June 1999, Mal Colston (ALP/Ind, Qld) was facing the prospect of a number of criminal charges carrying a penalty which would, had he been convicted, possibly have led to his disqualification under section 44(ii).
198. Dr Carmen Lawrence (ALP, Fremantle) was acquitted on 23 July 1999 by the Perth District Court of perjury charges arising out of the Marks Royal Commission. Senator Andrew Murray (Australian Democrats, WA) was acquitted on 9 March 2000 of an assault charge arising out of an incident in which he was seeking to protect his pet dog from attack by a larger animal.

199. This arcane expression probably means that anyone ever convicted of treason against Australia is permanently disqualified.
200. Senate Standing Committee on Constitutional and Legal Affairs, 'The Constitutional Qualification of Members of Parliament', *Report*, 1981, pp. 16–18. The Senate Committee would have restricted the ambit of the disqualification to only include treasonable acts against the Commonwealth. Later assessments have favoured the retention of the automatic disqualification for treason in its original form, i.e. encompassing acts against the States and Territories. Gerard Carney, *Members of Parliament: law and ethics*, op. cit., pp. 39–40.
201. Convention Debates, Sydney, 3 April 1891, pp. 655–59, and Convention Debates, 21 September 1897, pp. 1020–1022.
202. Senate Standing Committee on Constitutional and Legal Affairs, 'The Constitutional Qualification of Members of Parliament', *Report*, 1981, p. 19.
203. *ibid.*, pp. 19–20.
204. 167 CLR 133.
205. G. Carney, *Members of Parliament: law and ethics*, op. cit., p. 41; and Senate Standing Committee on Constitutional and Legal Affairs, 'The Constitutional Qualification of Members of Parliament', op. cit., pp. 20–21.
206. As may have been the case in respect of Senator George Georges – Refer: Senate Standing Committee of Privileges, *Tenth Report*, 'Detention of a Senator', op. cit., pp. 5–6 and 10. Senate Standing Committee on Constitutional and Legal Affairs, 'The Constitutional Qualification of Members of Parliament', op. cit., p. 21.
207. Usually constituted by a single judge of the High Court. However, the Court may refer matters to the Federal Court of Australia or to the Supreme Court of a State or Territory. See section 354 of the *Commonwealth Electoral Act 1918*.
208. *Commonwealth Electoral Act 1902*, sections 193–206.
209. *Commonwealth Electoral Act 1902*, section 192.
210. *Commonwealth Electoral Act 1902*, section 96, renumbered as section 70 in 1918.
211. Section 69 still specifically tied candidates' nomination requirements to the relevant constitutional provisions—sections 16, 34 and 43–45.
212. *Commonwealth Electoral Act 1918* section 39(4) subsequently renumbered as paragraph 93(8)(a).
213. *Local Government Association of Queensland (Incorporated) v State of Queensland* SC No. 9276 of 2001. Refer also: *Smith v Oldham* (1912) 15 CLR 302, 317 and Dixon J in *Nelungaloo v The Commonwealth* (1952) 85 CLR 545, p. 564. Davies JA dissented on the question of the exclusivity of Commonwealth power.
214. For further detail, see Professor C. Saunders, 'Parliament as Partner: A Century of Constitutional Review', *Research Paper* No. 3, 2000–2001, Department of Parliamentary Library, Canberra, 15 August 2000, pp. 15–16. See also *Parliament: The Vision in Hindsight*, edited G. Lindell and R. Bennett, Federation Press, Sydney, 2001.

215. Commonwealth of Australia, *Report of the Royal Commission on the Constitution*, 1929, at pp. 29–30 and 269.
216. Section 5.
217. *Commonwealth Electoral Act 1918–49*, section 39(1).
218. *Commonwealth Electoral Act 1918–49*, section 69.
219. Commonwealth Electoral Act, section 93. See G. Carney, *Members of Parliament: law and ethics*, op. cit., 2000, pp. 12–14. Professor Carney notes that this particular drafting device also prevents persons holding a temporary entry permit, persons who are unlawful non-citizens under the *Migration Act 1958*, and those serving a sentence of five years or longer for an offence under Commonwealth, State or Territory law from standing for Parliament.
220. *Commonwealth Electoral Act 1918*, paragraph 93(8)(a) and section 163(1).
221. For an overview of the Parliamentary Joint Committee's work see: Professor Cheryl Saunders, 'Parliament as Partner: A Century of Constitutional Review', op. cit., pp. 19–21.
222. In *King v Jones* (1972) 128 CLR 221, the High Court unanimously rejected the argument that section 41 of the Constitution could be read as conferring a right to vote at 18 by virtue of changing conceptions of adulthood in the period since federation.
223. *Commonwealth Electoral Act 1973*, section 6 amended what is now paragraph 163(1)(a) of the *Commonwealth Electoral Act 1918*.
224. Edwin Corby (ALP, Swan, WA) elected on 26 October 1918.
225. Senator Natasha Stott Despoja (Australian Democrats, SA) elected to the Senate on 2 March 1996. She had been appointed to the Senate on 29 November 1995. Senator Bill O'Chee (National, Qld) was appointed to the Senate under section 15 of the Constitution on 8 May 1990 aged 24 years and 10 months.
226. See Appendix 2.
227. Joint Committee on Pecuniary Interests of Members of Parliament, *Report on Declaration of Interests*, Parliamentary Paper No.182 of 1975, p. 45.
228. *ibid.*, pp. 47–49.
229. Committee of Inquiry Concerning Public Duty and Private Interest. The Committee reported on July 1979.
230. The Hon. Nigel Bowen QC.
231. Cited in the *Report of the Committee of Inquiry Concerning Public Duty and Private Interest*, July 1979, p. 1.
232. Cited in *ibid.*, pp. 2–4.
233. Chapters 7 and 15.
234. On 7 March 1979.
235. Senate Standing Committee on Constitutional and Legal Affairs, *Report*, 'The Constitutional Qualifications of Members of Parliament', 2 June 1981, p. 24.

236. *ibid.*, p. 58.
237. *ibid.*, pp. 54–55 and 60.
238. *ibid.*, pp. 72–73.
239. *ibid.*, p. 86.
240. *Constitution (Disclosures by Members) Amendment Act 1981* (NSW).
241. Inserting new section 14A in the *Constitution Act 1902* (NSW).
242. *Constitution (Disclosure by Members) Regulation 1983* (NSW).
243. Having discussed qualifications and disqualification of members at previous sessions. See references in Constitutional Commission, *Final Report*, volume 1, 1988, *op. cit.*, to all six sessions of the Constitutional Convention 1973–85.
244. Comprised of delegates drawn from Commonwealth and State Parliaments, Territory Assemblies and local government. See Professor C. Saunders, 'Parliament as Partner: A Century of Constitutional Review', *op. cit.*, pp. 21–23.
245. The one significant exception being its disapproval of the 1981 Report's recommendation to allow members of one federal House to stand for election to the other without first formally vacating their existing seat. The amendment would have deemed them to have resigned their old seat on the declaration of the poll for the one subsequently contested in the other Chamber.
246. For one such exchange see: *Convention Debates*, Sydney, 21 September 1897, pp. 1012–1015.
247. S. O'Brien, 'Dual Citizenship, Foreign Allegiance and s. 44(i) of the Australian Constitution', *op. cit.*, pp. 46–48.
248. Refer: Australian Citizenship Legislation Amendment Bill 2000.
249. G. Carney, *Members of Parliament: law and ethics*, *op. cit.*, p. 13.
250. Subsection 99(5) provides, however, the validity of an enrolment may not be challenged on the basis that the person enrolled did not in fact live in the nominated electorate for a period of one month.
251. Refer Joint Select Committee on Parliamentary Privilege, *Report*, 1987, pp. 122–126.
252. See Professor C. Saunders, 'Parliament as Partner: A Century of Constitutional Review', *op. cit.*, pp. 16–18.
253. Constitutional Commission, *Final Report*, volume 1, 1988, *op. cit.*, pp. 160–164 and 263–307.
254. *ibid.*, p. 283.
255. *ibid.*, p. 289.
256. *ibid.*, pp. 295–296.

257. *ibid.*, pp. 296–301. The Constitutional Commission's proposal would have, subject to any exemption enacted by the Parliament, disqualified aldermen in local councils—a significant feeder-group for the Parliament.
258. Constitutional Commission, *Final Report*, vol. 1, 1988, *op. cit.*, pp. 301–304.
259. It is not entirely clear from the body of the Report that this was their intention.
260. *ibid.*, pp 304–307.
261. *ibid.*, p. 304.
262. Professor C. Saunders, 'Parliament as Partner: A Century of Constitutional Review', *op. cit.*, p. 18.
263. For details of the proposals and the referendum results see: House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change: Selected sources on Constitutional Change in Australia, 1901–1997*, February 1997, pp. 110–114.
264. See B. Galligan, 'The 1988 Referendums and Australia's Record on Constitutional Change', *Parliamentary Affairs*, October 1990, pp. 497–506, Professor C. Saunders, 'Parliament as Partner: A Century of Constitutional Review', *op. cit.*, p. 18.
265. House of Representatives, *Debates*, 25 August 1997, pp. 6665–6667: Tabling speech by the Chair of the Committee, Kevin Andrews (Liberal, Menzies, Vic).
266. House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report*, 'Aspects of section 44 of the Australian Constitution', July 1997, especially at pp. 20, 38–39, and 59–61.
267. House of Representatives, *Debates*, p. 12104.
268. Letter from the Attorney-General to the Chair of the House of Representatives Standing Committee on Legal and Constitutional Affairs, 2 December 1997.
269. House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report*, 'Aspects of section 44 of the Australian Constitution', July 1997, pp. 98–99.
270. June 2000.
271. Joint Standing Committee on Electoral Matters, *Report*, The 1998 Federal Election, June 2000, pp. 141–144.
272. *ibid.*, pp. 180–182.
273. *ibid.*, p. 181.
274. Dr H. Irving, 'Commentary' in *Power, Parliament and the People*, M. Coper and G. Williams, eds., Federation Press, Sydney, 1997, p. 119.
275. G. Bolton, *Edmund Barton: the man for the job*, Allen and Unwin, Melbourne, 2000.
276. L. F. Crisp, *Australian National Government*, 5th ed., 1983, and *Federation Fathers*, Carlton, 1990.
277. Convention Debates, Sydney, 21 September 1897, pp. 1024–25.



278. *ibid.*, pp. 1012–1014.
279. H. Mackey, *Reinventing Australia*, Angus and Robertson, Sydney, 1993, pp. 169–184.
280. Morgan Poll, 'Nursing and Pharmacy Most Respected Professions', published in *The Bulletin*, 29 June 1999.
281. D. Adams, 'Howard: Never Great, Always Adequate', in *The Howard Government*, Gwynneth Singleton, ed., UNSW Press, Sydney, 2000, pp. 13–25.
282. Dr Carmen Lawrence, Address to the Sydney Institute, August 2000.
283. Convention Debates, Sydney, 21 September 1897, p. 1014, and Convention Debates, Melbourne, 9 February 1898, for example H. B. Higgins (of Victoria) at pp. 768–769.
284. Had the House acted after a charge of sedition had been heard by the courts, the processes available under sections 44(i), 45(ii) and 47 would arguably have provided a fairer and more defensible result than that which was arrived at under section 49 of the Constitution. Again, note the Parliament has repealed the power of each House to expel members but not their power to suspend with cause.
285. Dr Carmen Lawrence, *op. cit.*, p. 3.
286. S. Bach, 'The Office of Speaker in Comparative Perspective', *Journal of Legislative Studies*, vol. 5, 1999, pp. 209–254.
287. Arguably their effect would be greater if they were better known or more widely understood than are the current provisions.
288. Evidence to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report*, 'Aspects of section 44 of the Australian Constitution', July 1997, at pp. 20 and 60.
289. D. Z Cass and S. Burrows, 'Commonwealth Regulation of Campaign Finance—Public Funding, Disclosure and Expenditure Limits', *Sydney Law Review*, vol. 22, December 2000, pp. 477–526, at p. 478.
290. The Senate Register came into being only after a series of long delays. Dr L. Young, 'Parliamentarians and Outside Employment', *Research Note*, no. 50, 1995–96, Department of the Parliamentary Library, Canberra. For further detail on the respective Senate and House registers, see: Australian Senate, Standing Orders and other orders of the Senate, February 2000, pp. 135–142 and Senate Standing Order 22A; and House of Representatives, Standing and Sessional Orders, February 2000, pp. 113–116 and Standing and Sessional Order 329.
291. See *House of Representatives Practice*, 3rd ed., 1997, pp. 164–166 for further detail.
292. *Public Service Act 1999* replaced the much amended *Public Service Act 1922*.
293. *Auditor-General Act 1997* and three associated acts replaced the *Audit Act 1901*.
294. *House of Representatives Practice*, 3rd ed., 1997, p. 166.
295. J. Howard, *A Guide on Key Elements of Ministerial Responsibility*, tabled in the House of Representatives on 30 April 1996.

296. *A [revised] Guide on Key Elements of Ministerial Responsibility*, issued December 1998. However, changes to the Code of Conduct were mooted by the Prime Minister before the 1998 General Election. See *Sydney Morning Herald*, 17 September 1998.
297. The resignations from Executive Office were Senator James Short (Liberal, Vic.) 14 October 1996, Senator Brian Gibson (Liberal, Tas.) 15 October 1996, Senator Robert Woods (Liberal, NSW) 3 February 1997, Geoffrey Prosser (Liberal, Forrest, WA) 18 July 1997, David Jull (Liberal, Fadden, Qld) 25 September 1997, John Sharp (National Party, Gilmore, NSW) 25 September 1997, Peter McGauran (National Party, Gippsland, Vic.), and Grahame Morris, Prime Minister's senior adviser, resigned on 26 September 1996.
298. Australian National Audit Office, *Audit Report No. 12*, 1998–99, 'Taxation Reform, Community Education and Information Programme'.
299. The Charter of Political Honesty Bill 2000; Electoral Amendment (Political Honesty Bill 2000; Government Advertising (Objectivity, Fairness and Accountability) Bill 2000; Auditor of Parliamentary Allowances and Entitlements Bill 2000 [No. 2]. The former two Bills were sponsored by the Australian Democrats; the latter two by the Australian Labor Party. All four Bills were being examined by the Senate Standing Committee on Finance and Public Administration when the Parliament was prorogued on 8 October 2001.
300. Discussed in H. R. Wilson, 'Ethics and the Canadian Experience', *Papers on Parliament No.35*, Senate Occasional Lecture Series, Department of the Senate, June 2000.
301. As amply demonstrated at the State level. Refer A. Twomey, *The Constitution of NSW*, Federation Press (forthcoming).
302. For example, the 'no' campaign in the 1967 referendum to break the 'nexus' between numbers in the House and the Senate was largely built around the claim that a 'no vote' would mean fewer politicians.
303. Refer to this paper's discussion of the appointment of Mr Albert Patrick Field to the Senate in 1975.
304. Such as calls from new Opposition leaders for parliamentary reform. Ross Peake, 'ALP plan to raise standards in House', *Canberra Times*, 8 February 2002.
305. *The Australian*, Editorial, 3 April 2002; John Nethercote, 'Hearings unearth critical issues', *Canberra Times*, 4 April 2002. Ian Holland, 'Post-separation Employment of Ministers, op cit, May 2002.
306. A particular focus being the unsubstantiated and subsequently discredited attacks made on High Court Judge Michael Kirby under parliamentary privilege by Senator Bill Heffernan (Liberal, NSW) in the Senate March 2002.
307. *Canberra Times*, Editorial, 11 March 2002; Maria Maley, 'Political advisers should be protected', *Canberra Times*, 19 March 2002; *Sydney Morning Herald*, 'The silence of the backroom boys' Editorial, 1 April 2002; Senator Andrew Murray, 'Ministerial advisers must account for their actions', *Canberra Times*, 9 April 2002; Kirsten Lawson, 'Clerks in row over Reith appearance', *Canberra Times*, 13 April 2002; Verona Burgess, 'Abbott against rules for staffers', *Canberra Times*, 23 May 2002; and Kirsten Lawson, 'Immunity claim rejected', *Canberra Times*, 25 May 2002.

308. Dr Andrew Theophanous, the former member for Calwell in Victoria.
309. With proposals advanced by retiring Liberal Party treasurer, Mr Ron Walker, receiving considerable attention. See: Ross Peake, 'Longer terms for MPs unlikely', *Canberra Times*, 14 April 2002.
310. Senate, *Debates*, op. cit, 14 May 2002.



## Appendix 1

### Extracts from the Commonwealth of Australia Constitution Act 1900

#### **Section 16 Qualifications of a Senator.**

The qualifications of a senator shall be the same as those of a member of the House of Representatives.

#### **Section 20 Vacancy by absence.**

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

Refer:

Senate and House of Representatives, *Debates*, 13 October 1903, p. 6000: exclusion of Senator John Ferguson (Free Trade, Queensland).

#### **Section 30 Qualification of electors.**

Until the Parliament otherwise provides, the qualification of electors of the House of Representatives shall be in each State that which is prescribed by the Law of the State as the qualification of electors of the more numerous House of Parliament of the State, but in the choosing of members each elector shall have only one vote.

#### **Section 34 Qualifications of members.**

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

- (i.) he must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen;
- (ii.) he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

#### **Section 38 Vacancy by absence.**

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

Refer:

Senate and House of Representatives, *Debates*, 13 October 1903, p. 6000: exclusion of Senator John Ferguson (Free Trade, Queensland).

### **Section 43 Member of one House ineligible for other.**

A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

Refer:

*Sykes v Cleary* (1992) 176 CLR 77 regarding meaning of 'incapable of being chosen' in sections 43 and 44.

### **Section 44 Disqualification.**

Any person who:

- (i.) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

Refer:

*Sarina v O'Connor* (1946) High Court unreported.

*Crittenden v Anderson* (1950) High Court unreported.

*Nile v Wood* (1987) 167 CLR 133.

*In Re Wood* (1988) 167 CLR 145

*Free v Kelly* (1996) 185 CLR 296

*Sykes v Cleary* (1992) 176 CLR 77

*Sue v Hill* (1999) 199 CLR 462

- (ii.) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or
- (iii.) Is an undischarged bankrupt or insolvent; or

Refer:

*Stott v Parker* (1939) SASR 98. Decision on similar provision in the SA Constitution by the Supreme Court of SA.

*Nile v Wood* (1988) 167 CLR 133 at p.140 on meaning of insolvent being 'adjudicated insolvent'.

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

Refer:

*Nile v Wood* (1988) 167 CLR 133.

*Free v Kelly* (1996) 185 CLR 296.

*Sykes v Cleary* (1992) 176 CLR 77.

House of Representatives, *Debates*, 7 March 1962, pp. 585–586 regarding employment status of Senator-elect Douglas McClelland (Labor, NSW).

Senate, *Debates*, 20 May 1996 to 29 May 1996, pp. 725 to 1249 regarding the status of Senator-elect Jeannie Ferris (Liberal, SA).

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

Refer:

*Re Webster* (1975) 132 CLR 270.

Senate and House of Representatives, *Debates*, 22 April 1921, pp. 7698–7710.

Senate and House of Representatives, *Debates*, 18 June 1924, pp. 1350–1362.

Senate, *Debates*, 15–16 and 21–22 April 1975, at pp. 981–984, 1027–1028, 1139–1142, 1198–1223 and House of Representatives, *Debates*, 16 April 1975, pp 1661–1662.

House of Representatives, *Debates*, 10 June 1999, pp. 6720–6735.

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

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

Refer:

*Ex parte Taylor* (2001) High Court of Australia unreported at time of writing. Case concerned challenge to the status of Assistant Ministers.

### **Section 45 Vacancy on happening of disqualification**

If a senator or member of the House of Representatives:

- (i.) Becomes subject to any of the disabilities mentioned in the last preceding section; or
- (ii.) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or

Refer:

*Stott v Parker* (1939) SASR 98. Decision on similar provision in the SA Constitution by the Supreme Court of SA.

*Nile v Wood* (1988) 167 CLR 133 at p. 140 on meaning of insolvent being 'adjudicated insolvent'.

House of Representatives, *Debates*, 5 May 1977, pp. 719–721 and pp. 1598–1610 regarding the status of Michael Baume (Liberal, Macarthur, NSW)

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

his place shall thereupon become vacant.

### **Section 46 Penalty for sitting when disqualified**

Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.



Refer:

Senate, *Debates*, 9 September 1975, p. 606 and 1 October 1975, p. 823.

### **Section 47 Disputed elections**

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

Refer:

*R v Governor of South Australia* (1907) 4 CLR 1497.

*Re Webster* (1975) 132 CLR 270.

*Re Wood* (1988) 167 CLR 145.

*Muldowney v Australian Electoral Commission* (1993) 178 CLR 34.

*Sykes v Cleary* (1992) 107 ALR 577 per Dawson J at p. 579.

*Sue v Hill* (1999) 199 CLR 462

Senate, *Debates*, 15–16 and 21–22 April 1975, at pp. 981–984, 1027–1028, 1139–1142, 1198–1223 and House of Representatives, *Debates*, 16 April 1975, pp 1661–1662.

House of Representatives, *Debates*, 10 June 1999, pp. 6720–6735.

### **Section 48 Allowance to members**

Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

### **Section 49 Privileges etc. of Houses**

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

## **Section 50 Rules and Orders**

Each House of the Parliament shall make rules and orders with respect to—

- (i) The mode in which its powers, privileges and immunities may be exercised and upheld:

The order and conduct of its business and the proceedings either separately or jointly with the other House.

## **Section 51 (xxxvi) Legislative powers of the Parliament**

The parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: –

- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

## Appendix 2

**Table 1: Members of the House of Representatives who entered Parliament under the age of 26 since 1901**

Name (Born/Died)	Division	State/ Territory	Date of election	Date ceased to be a Member	Party
Corboy, Edwin Wilkie (24.8.1896–6.8.1950) 22 years 2 months	Swan	WA	26.10.18 <sup>1</sup>	Defeated 13.12.19	ALP
Jones, Andrew Thomas (26.5.1944– ) 22 years 6 months	Adelaide	SA	26.11.66	Defeated 25.10.69	LIB
Frazer, Charles Edward (2.1.1880–25.11.1913) 23 years 11 months	Kalgoorlie	WA	16.12.03	Died 25.11.13	ALP
Falkinder, Charles William Jackson (29.8.1921–11.7.1993) 25 years	Franklin	Tas.	28.9.46	Retired 31.10.66	LIB
Zahra, Christian John (8.4.1973– ) 25 years 5 months	McMillan	Vic.	3.10.98		ALP
Punch, Gary Francis (21.8.1957– ) 25 years 6 months	Barton	NSW	5.3.83	Retired 29.1.96	ALP
Fraser, John Malcolm (21.5.1930– ) 25 years 6 months	Wannon	Vic.	10.12.55	Resigned 31.3.83	LIB
Pyne, Christopher Maurice (13.8.1967– ) 25 years 7 months	Sturt	SA	13.3.93		LIB
Keating, Paul John (18.1.1944– ) 25 years 9 months	Blaxland	NSW	25.10.69	Resigned 23.4.96	ALP
Porter, James Robert (19.2.1950– ) 25 years 9 months	Barker	SA	13.12.75	Retired 19.2.90	LIB

Source: Parliamentary Handbook, various years.

**Table 2: Senators who entered Parliament under the age of 30 since 1901**

Name (Born/Died) Age commenced	State	Party	Period of service
O'Chee, William George (19.6.1965– ) 24 years 10 months	Qld	NPA	*8.5.90–30.6.99
Stott Despoja, Natasha Jessica (9.9.1969– ) 26 years 2 months	SA	AD	*29.11.95–
Foll, Hattil Spencer (31.5.1890–7.7.1977) 27 years 1 month	Qld	NAT; UAP from 1931	1.7.17–30.6.47
Russell, Edward John (10.8.1878–18.7.1925) 28 years 4 months	Vic.	ALP; NAT from 1917	1.1.07–30.7.14; 5.9.14–died 18.7.25
Keating, John Henry (28.6.1872–31.10.1940) 28 years 9 months	Tas.	PROT; LIB from 1913	29.3.01–30.7.14; 5.9.14–30.6.23
Lundy, Kate Alexandra (15.12.1967– ) 29 years 2 months	ACT	ALP	2.3.96–2.10.98; 3.10.98–
Sowada, Karin Nicole (1.11.1961– ) 29 years 9 months	NSW	AD	*29.8.91–30.6.93
Armstrong, John Ignatius (6.7.1908–10.3.1977) 29 years 11 months	NSW	ALP	1.7.38–19.3.51; 28.4.51–30.6.62

Source: Parliamentary Handbook, various years.

\* Selected under section 15 of the Constitution.