

Standing Committee on Parliamentary Privilege and Ethics

**Report on sections
13 and 13B of the
Constitution Act 1902**

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Terms of Reference

On 24 June 1997 the Legislative Council resolved:

That the Standing Committee on Parliamentary Privilege and Ethics inquire into and report on:

- (a) the suitability and contemporary relevance of the present provisions under the Constitution Act 1902 relating to Members of Parliament:
 - (i) having contracts or agreements with the Public Service or
 - (ii) holding offices of profit under the Crown; and
- (b) proposals for reform of those provisions.¹

On 25 May 1999 the Legislative Council resolved:

1. That the Standing Committee on Parliamentary Privilege and Ethics is to inquire into and report on the office of profit under the Crown, referred to the Committee in the previous Parliament and not disposed of.
2. That in considering this reference the Committee may review any evidence, submissions, documents and records of the previous Committee.²

¹ Legislative Council, *Minutes of the Proceedings*, No. 82, 24 June 1997, entry no. 2.

² *ibid*, No. 4, 25 May 1999, entry no. 12(5).

Committee membership

52nd Parliament (1999 to present)

The Hon Helen Sham-Ho MLC *Chair*

Independent

The Hon Amanda Fazio MLC³

Australian Labor Party

The Hon Patricia Forsythe MLC *Deputy Chair*⁴

Liberal Party

The Hon Jenny Gardiner MLC

National Party

The Hon Tony Kelly MLC

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Revd the Hon Fred Nile MLC

Christian Democratic Party

The Hon Peter Primrose MLC

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³ Appointed 11 October 2000, replacing the Hon John Johnson MLC.

⁴ Appointed 13 October 2000, replacing the Hon John Hannaford MLC.

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51st Parliament (1997 to 1999)

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Australian Labor Party

The Hon Charlie Lynn MLC

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Summary of Recommendations

Recommendation 1 **page 31**

That sections 13 and 13B be repealed.

Recommendation 2 **page 32**

(1) That legislation be introduced to clarify the powers and privileges of the New South Wales Parliament, including the power to impose sanctions on Members.

(2) That the draft bill be referred to this committee for comment before introduction.

Chair's Foreword

Sections 13 and 13B of the NSW Constitution disqualify for membership of Parliament persons who hold certain types of contracts, offices, and pensions. Section 13 disqualifies persons holding contracts or agreements with the public service of NSW. Section 13B disqualifies a person who holds any "office of profit under the Crown", or pension from the Crown "during pleasure or for a term of years". The disqualifications contained in both sections are subject to detailed lists of exceptions.

Both sections are based on provisions which formerly applied to Members of the British House of Commons, and which originated in the eighteenth century. The aim of those provisions was to ensure that the Crown could not buy the allegiance of a Member by awarding a government contract or position, and to prevent Members having conflicts of interests or loyalties which might affect the performance of their parliamentary duties.

The current inquiry has provided the Committee with an opportunity to review the operation and effectiveness of these disqualification provisions in the context of contemporary NSW. The main concerns to emerge from this review are that these sections have never been used, the meaning and scope of the sections are uncertain in many respects, and the language in which the disqualifications are expressed is archaic and unduly complex. This uncertainty is particularly unsatisfactory given the harshness of the penalty imposed by the sections – loss of a Member's seat. Such a position is contrary to the basic democratic principle that membership of Parliament should be open to as wide a group of citizens as possible, unless there are clear and unequivocal reasons for imposing limitations.

In light of these and other concerns, the Committee has concluded that sections 13 and 13B are unworkable in a contemporary context, and should be repealed. The Committee's report on the inquiry is supported by all Members of the Committee. The Committee accepts that the historical aim of such provisions – protection of the Parliament's independence from subversion by the executive government – remains valid today. The Committee has also noted that there are many other mechanisms by which Members are accountable for their conduct in NSW today, and by which serious corruption can be exposed, many of which did not exist when the original disqualification provisions were introduced. These accountability mechanisms include requirements for the disclosure and registration of Members' pecuniary interests; the jurisdiction of the Independent Commission Against Corruption over Members; the Members' code of conduct; the inherent power of the House to deal with conduct of Members; legislative provisions which prohibit Members occupying certain public offices; media and public scrutiny; and the ballot box.

As well as recommending the repeal of sections 13 and 13B, this Report reiterates the Committee's support for the introduction of legislation to clarify and define the powers and privileges of the NSW Parliament, including the extent to which the House may impose sanctions on Members who are found to have engaged in conduct which falls below the standards expected by the House. As noted in several of the Committee's previous reports referred to on page 31 of this report, such legislation would bring the NSW Parliament into line with all other Parliaments in Australia.

I thank all Members of the Committee for their contributions to this important inquiry, and the Committee secretariat, the Clerk to the Committee, Ms Lynn Lovelock, the Senior Project Officer, Ms Velia Mignacca, and the Committee Officer, Ms Janet Williams, for their tremendous effort in the completion of this report. I also acknowledge the valuable work performed by the Committee as constituted in the previous Parliament, under the chairmanship of the Hon Dr Meredith Burgmann MLC.

Hon Helen Sham-Ho MLC
Chair

Chapter 1 Introduction

Reference by House

- 1.1** On 24 June 1997 the Legislative Council resolved, on a motion by the Treasurer, that the Standing Committee on Parliamentary Privilege and Ethics inquire into and report on:
- (a) the suitability and contemporary relevance of the present provisions under the Constitution Act 1902 relating to Members of Parliament:
 - (i) having contracts or agreements with the Public Service; or
 - (ii) holding offices of profit under the Crown; and
 - (b) proposals for reform of those provisions.⁵
- 1.2** As the inquiry had not been completed by the end of the 51st Parliament, the Legislative Council re-referred the inquiry to the Committee at the beginning of the 52nd Parliament, by a resolution in the following terms:
- 1. That the Standing Committee on Parliamentary Privilege and Ethics is to inquire into and report on the office of profit under the Crown, referred to the Committee in the previous Parliament and not disposed of.
 - 2. That in considering this reference the Committee may review any evidence, submissions, documents and records of the previous Committee.⁶
- 1.3** A new Chair and new membership were appointed to the Committee in the 52nd Parliament.⁷ Details of the Committee's membership throughout this inquiry are provided at pages (v)-(vi) of this Report.
- 1.4** At about the same time as the inquiry was referred to the Committee, a separate inquiry was referred to the Joint Standing Committee on the Independent Commission Against Corruption (ICAC) in relation to section 13A of the *Constitution Act*, which contains a number of further grounds of disqualification for membership of Parliament. The Committee on the ICAC issued its report on the inquiry in December 1998.⁸

⁵ Legislative Council, *Minutes of the Proceedings*, No. 82, 24 June 1997, entry no. 2.

⁶ *ibid*, No. 4, 25 May 1999, entry no. 12(5).

⁷ *ibid*, No. 4, 25 May 1999, entry no. 12(4)4.

⁸ Committee on the Independent Commission Against Corruption, *Inquiry into section 13A Constitution Act*, December 1998.

Outline of provisions

1.5 The current inquiry concerns sections 13 and 13B of the *Constitution Act 1902*. Section 13 deals with contracts or agreements with the public service, and section 13B relates to offices of profit under the Crown. The full text of these sections appears at Appendix 1 to this Report; an outline of each section is provided below.

Section 13 - Contracts or agreements with the NSW public service

1.6 Section 13 disqualifies for membership of Parliament any person who holds a contract or agreement with the public service of New South Wales. Subsection (1) states that a person who has such a contract or agreement is incapable of being elected, or sitting or voting as a Member, for the duration of the contract or agreement. Subsection (2) states that if a Member enters into or continues to hold such a contract or agreement, their seat in the House will become vacant.

1.7 Subsection (3) provides that the disqualifications in subsections (1) and (2) do not extend to any contract with an incorporated company, or trading company consisting of more than twenty persons, where the contract or agreement is made for the general benefit of the company. Other exceptions, listed in section 13(4) - (5), include:

- a contract with respect to a loan to the Treasurer, or to a body authorised to borrow by an Act of Parliament
- a contract the benefit of which devolves on a person as beneficiary under a will
- a settlement in respect of compensation payable by Her Majesty, or a statutory body representing Her Majesty
- a lease, license for occupation, sale, purchase or exchange of land
- a contract or agreement for the supply of goods or services by Her Majesty, or a statutory body representing Her Majesty, where the goods or services are supplied on terms similar to those on which they are supplied to members of the public
- a secured loan by Her Majesty, or statutory body representing Her Majesty, on the like terms as those available to members of the public.⁹

Section 13B - Office of profit under, or pension from, the Crown

1.8 Section 13B(1) provides that a person who holds an office of profit under the Crown, or has a pension from the Crown “during pleasure or for a term of years”, is not capable of sitting or voting as a Member of either House. Further, if such a person is elected as a Member, their seat in the House will become vacant, after seven sitting days from the time that notice of their holding the office or pension is given to the House. However, the person’s seat will not become vacant if the House has previously passed a resolution

⁹ The full text of section 13 is included at Appendix 1.

indicating that it is satisfied the person has ceased to hold the office or be entitled to the pension.

1.9 Subsection (2) provides that if a Member accepts such an office or pension their seat in the House will become vacant after seven sitting days from the time that notice of their acceptance of the office or pension is given to the House. As in subsection (1), the seat will not become vacant if the House has passed a resolution indicating it is satisfied that the Member has ceased to hold the office or be entitled to the pension.

1.10 Subsection (3) lists a number of exceptions to the disqualifications contained in subsections (1) and (2). These include:

- the office of Minister of the Crown, or any office created by an Act as an office of the Executive Council
- where the office of profit does not confer on the Member or person any entitlement to payment of remuneration, other than payment of fees for attending meetings and/or allowances for expenses incurred in carrying out the duties of the office
- where the office of profit is under the Crown other than the Crown in right of the State of New South Wales
- the offices of Vice-President of the Executive Council
- the office of parliamentary secretary.¹⁰

Reference in the Legislative Assembly

1.11 In October 2001 the Speaker of the Legislative Assembly wrote to the Chair of the Legislative Assembly Standing Ethics Committee suggesting that the Committee commence an inquiry into the office of profit provisions of the *Constitution Act*.¹¹ That Committee resolved to conduct an inquiry in similar terms to the inquiry of this Committee concerning office of profit, with a view to settling joint recommendations to be put before both Houses.¹²

¹⁰ The full text of section 13B is included at Appendix 1.

¹¹ Letter from Mr John Price MP, Chairman, Legislative Assembly Standing Ethics Committee, to the Hon Helen Sham-Ho MLC, Chair, Standing Committee on Parliamentary Privilege and Ethics, dated 31 October 2000, attaching copy of correspondence from the Speaker.

¹² *ibid.*

Conduct of Inquiry

- 1.12** On 12 July 1997 the Committee called for submissions in relation to this inquiry through advertisements in five newspapers: *The Sydney Morning Herald*, *The Australian*, *The Daily Telegraph*, the *Illawarra Mercury* and *The Newcastle Herald*. The Committee also wrote to the Clerks in all Australian Parliaments, and to overseas Parliaments, informing them of the Committee's inquiry and requesting details of any similar current or concluded inquiries in those Parliaments. The Committee further wrote to the Premier, the Leader of the Opposition, the Leader of the House in the Legislative Council, the Leader of the Opposition in the Legislative Council, the cross-bench Members of the Legislative Council, and the independent Members of the Legislative Assembly.
- 1.13** In response to the advertisements and requests for information the Committee received a total of 18 submissions, which included reports prepared by other parliamentary committees on their equivalent provisions. Four Members of the NSW Parliament also tendered submissions. A complete list of submissions is supplied at Appendix 2.
- 1.14** Following the re-referral of the inquiry to the Committee in the 52nd Parliament, the Committee called for further submissions on 24 April 2001. Two further submissions were received as a result of this process (details at Appendix 2). The Committee also wrote to all persons who had provided a written submission in the previous Parliament, to ascertain whether their submissions were still current or required updating.
- 1.15** On 21 April 2000 the Committee sought advice from the Crown Solicitor on the possible application of sections 13 or 13B of the *Constitution Act 1902* to a number of hypothetical scenarios. The advice was sought to provide the Committee with a broader understanding of the practical effect of these disqualification provisions. The Crown Solicitor provided the advice on 6 December 2000 (copy attached at Appendix 4).
- 1.16** During the inquiry, the Committee held 13 meetings, including one joint meeting with the Legislative Assembly Standing Ethics Committee. The minutes of the Committee's meetings are attached at Appendix 5.

Chapter 2 Historical background to sections 13 and 13B

2.1 Sections 13 and 13B of the NSW Constitution Act are derived from provisions which formerly applied to Members of the British House of Commons. This chapter outlines the historical development of both the British and NSW provisions.

Contracts or agreements with the public service (section 13)

House of Commons

- 2.2** The origin of the disqualification for contracts or agreements with the public service lies in the *House of Commons (Disqualification) Act 1782*.¹³ The objective of the Act, according to its preamble, was “further securing the Freedom and Independence of Parliament”.¹⁴ The Act provided that any person who held or undertook any contract or commission for or on account of the public service was incapable of being elected as a Member of the House. Further, if a Member entered into such a contract, the Member’s seat was vacated.¹⁵ An exception applied in the case of incorporated trading companies contracting in their corporate capacity, and to Members who were directors or shareholders of such companies.¹⁶
- 2.3** In 1931 it was found necessary to clarify the scope of this Act as it was feared that the disqualification could apply to an unnecessarily broad range of activities (such as possession of a telephone).¹⁷ Accordingly, the *House of Commons Disqualification (Declaration of Law) Act 1931* limited the operation of the Act to contracts or agreements “for the furnishing or providing of money to be remitted abroad or wares and merchandise to be used or employed in the service of the public.”¹⁸
- 2.4** In 1956 a select committee of the House of Commons reviewed the law relating to this disqualification.¹⁹ The committee concluded that the disqualification had become archaic

¹³ Gerard Carney, *Members of Parliament: law and ethics*, Prospect Media Pty Ltd, 2000, p. 95.

¹⁴ *ibid*, pp. 95-6.

¹⁵ *Erskine May’s Treatise on the Laws, Privileges, Proceedings and Usage of Parliament*, 16th ed. (1957), Butterworth & Co, London, pp. 215-6.

¹⁶ *ibid* p. 216.

¹⁷ *ibid*.

¹⁸ *ibid*.

¹⁹ *Special Report from the Select Committee on the House of Commons Disqualification Bill*, House of Commons Paper 349.

and anomalous,²⁰ and reflected a time when most trade and commerce was transacted by individuals rather than corporations as in modern times. On this basis, the committee recommended that the disqualification be abolished.²¹

2.5 The committee did consider whether it would be desirable to attempt to draft alternative provisions to replace the disqualification. However, it decided against such a course, due to the “extreme difficulty” of drafting a suitable clause, the lack of reported cases of corruption in this area, and the fact that the House could treat as a contempt the offer of a government contract to a Member in order to influence the Member’s parliamentary conduct.²²

2.6 In 1957, the disqualification for public contractors in the House of Commons was abolished.²³

New South Wales

Constitution of 1855

2.7 Section 28 of the Constitution of 1855 closely resembled the contracts provisions of the *House of Commons (Disqualification) Act*. It provided that any person holding any contract or agreement for or on account of the public service was incapable of being elected or sitting or voting as a Member of the Legislative Assembly, and that the seat of any Member who entered such a contract or agreement was to be declared by the House to be void. An exception applied in the case of any contract or agreement entered into by an incorporated or trading company consisting of more than 20 persons, where the agreement was made for the general benefit of the company.

Constitution Act 1902

2.8 The *Constitution Act 1902* included section 13(1), (2) and (3), in largely the same terms as they stand today. Since 1902, this section has been substantially amended on two occasions, in 1962 and 1980. In 1962, the words “of New South Wales” were inserted after “Public Service” within section 13(1), excluding contracts on behalf of the public service of another state or the Commonwealth. In addition, subsections (4) and (5) were inserted, which contain a lengthy series of exceptions to the disqualification provisions within subsections (1) and (2). In 1980, subsections (4A) and (4B) were added, which relate to further exceptions.

²⁰ *ibid*, p. vi.

²¹ *ibid*, para 6.

²² *ibid*.

²³ *House of Commons Disqualification Act 1957* (re-enacted in 1975), section 9.

Office of profit under the Crown (section 13B)

House of Commons

Development

- 2.9** *Erskine May* (17th edition) describes the development of the House of Commons disqualification relating to office of profit as occurring in three phases: the "privilege phase" before 1640; the "corruption phase" from 1660; and the "ministerial responsibility phase" after 1705.²⁴
- 2.10** In the privilege phase, the main concern of the House of Commons was to ensure that Members who held Crown offices gave priority to their duties to the House over their duties to the Crown. This attitude was merely one aspect of House's continuous effort to gain recognition for its privileges from the Crown at the time. Accordingly,
- the criterion which was applied to an office was not the extent to which the Crown could exert its influence, but compatibility with the physical attendance of the holder on the service of the House.²⁵
- 2.11** After 1660, the rationale for the office of profit disqualification extended to the prevention of potential or actual conflicts of interest between the legislature and the executive in the performance of Members' duties. At that time, a comprehensive system was instituted of winning over individual Members to the King's interest, by the distribution of offices and places of profit under the Crown. The reaction of the House was to seek to make the holding of paid Crown office incompatible with membership of the House.
- 2.12** There was, however, a realisation of the difficulties which might arise through a complete severance of the executive and the legislature. Two alternative expedients were canvassed by the House in a series of bills during the last decade of the seventeenth century: complete exclusion of office holders; and vacation of seats on appointment to office without bar to re-election. Eventually, the expedient of complete exclusion was given statutory effect in the Act of Settlement, 1701.²⁶
- 2.13** However, the development of the doctrine of ministerial responsibility posed problems in relation to the law of office of profit, as the office of Minister is an office of profit under the Crown. To overcome this difficulty, section 25 of the *Succession to the Crown Act 1705*, and subsequent legislation, permitted Ministers to retain their seat in the House and their ministry on being re-elected to Parliament. According to *Erskine May* Ministers only became fully exempt from office of profit provisions in 1926.²⁷

²⁴ *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usage of Parliament*, 17th ed. (1964), Butterworth & Co, London, p. 209.

²⁵ *ibid.*

²⁶ *ibid.*, pp 209-210.

²⁷ *ibid.*, p. 211.

Reform

- 2.14** In 1956 a select committee of the House of Commons recommended that, rather than relying on a general disqualification in this area, all disqualifying offices should be clearly specified, so that candidates and the electorate would know with certainty the restrictions applying to membership of the House.²⁸ Legislation reflecting the committee's views was passed the following year: *House of Commons Disqualification Act 1957*. This Act, as re-enacted in 1975, currently applies. Under the Act, only the holders of positions specifically listed in a schedule to the Act, and certain defined classes of officers, are disqualified for membership of the House.

New South Wales

- 2.15** The NSW Constitutional provisions relating to offices of profit developed in several stages. The *Constitution of NSW (1855)* was enacted as a schedule to the *New South Wales Government Act 1855 (Imp)* (18 & 19 Vic, C 54), and was amended in 1884. After federation, the *Constitution of NSW 1902* was enacted, and the sections relating to office of profit were amended several times, in 1933, 1975, 1978, 1980, 1987 and 1988.

The Constitution of NSW (1855)

- 2.16** Section 18 of the 1855 Constitution provided that any person holding an office of profit under the Crown, or pension from the Crown "during pleasure or for a term of years", was incapable of being elected to the Legislative Assembly, subject to certain exceptions: the Colonial Secretary, Colonial Treasurer, Auditor General, Attorney General, Solicitor General, and up to five "additional officers" declared by the Governor on the advice of the Executive Council. Section 19 provided that acceptance of an office of profit or pension from the Crown by a Member of the Assembly would result in the Member's seat being declared void, subject to a similar list of exceptions.
- 2.17** Members of the Legislative Council were not covered by sections 18 or 19. However, section 2 required that not less than four-fifths of the Members of that House consist of persons not holding any "office of emolument under the Crown".
- 2.18** In 1884, concerns arose that the seats of certain Members of the Assembly could be in doubt, due to a failure to comply with the technical requirements of the exception relating to "additional officers" declared by the Governor.²⁹ To address these concerns, an Act was passed which deemed various categories of office-holders to have been validly elected notwithstanding the office of profit disqualification.³⁰ The Act also replaced sections 18

²⁸ *Special Report from the Select Committee on the House of Commons Disqualification Bill*, House of Commons Paper 348.

²⁹ *Hansard*, Legislative Assembly, 23 January 1884, p. 1382 (concerning Constitution Act Amendment Bill 1884); Report from the Committee of Elections and Qualifications, Seat of the Honourable George Houstoun Reid, Esq., a Member for East Sydney, and seat of Francis Bathurst Suttor, Esq., Member for Bathurst, *Votes and Proceedings of the Legislative Assembly during the session 1883-84 with the various documents connected therewith*, Vol 2, p. 153.

³⁰ *Constitution Act Amendment Act (No. 2) 1884*, sections 4 and 5.

and 19 with new provisions,³¹ which did not allow for particular officers to be exempted by the Governor, but did include a new exception in the following terms:

the holder of any office of profit under the Crown created by Act of Parliament as an office of the Executive Government.

2.19 This exception is currently provided in section 13B(a)(i).

The Constitution Act 1902

2.20 The new *Constitution Act* of 1902 contained similar provisions concerning offices of profit³² and offices of emolument³³ as had applied under the earlier Constitution.

2.21 In 1933 the provisions of this Act were substantially amended so far as the Legislative Council was concerned.³⁴ The main effect of the amendments was to abolish the previous system of appointments to the Council, and introduce a system of elections for the Members of the Council, by vote of both Houses. At the same time, the existing section concerning “offices of emolument” was repealed,³⁵ and a new section was inserted which provided for the disqualification of any Council Member who accepted an office of profit under, or pension from, the Crown.³⁶ This provision was subject to various exceptions, including the office of Vice-President of the Executive Council (which was always filled by a Member of the Legislative Council³⁷).

Parliamentary secretaries excluded

2.22 The next substantive change to the office of profit provisions did not occur until 1975, when the office of parliamentary secretary was included as an exception.³⁸ This reform had become necessary because of the introduction of a special remuneration for the holders of

³¹ *ibid*, section 6 (repeal of sections 18 and 19); sections 1 and 2 (new sections equivalent to sections 18 and 19 respectively).

³² Sections 26 and 27.

³³ Section 16.

³⁴ *Constitution Amendment (Legislative Council) Act 1933*.

³⁵ *ibid*, section 4(2).

³⁶ *ibid*, section 3(1), inserting new section 17B(3).

³⁷ See *Parliamentary Record, Legislative Council and Legislative Assembly, 1824-1999*, Volume VI, 1st edn, “Ministries”, p. 246 and following pages.

³⁸ *Constitution and Other Acts (Amendment) Act 1975*, section 7(b) and (c).

the office,³⁹ which made the office of parliamentary secretary an office *of profit* under the Crown. At that time, the exception only applied to Members of the Assembly.⁴⁰

Introduction of section 13B

2.23 In 1978 the office of profit provisions were again changed in line with reforms to the electoral system for the Legislative Council. The chief reform was the abolition of the system of election by vote of both Houses, and the establishment of a system of direct election by the people. In addition, all of the office of profit provisions then in force were repealed, and a new disqualification provision relating to office of profit was inserted which applied to all Members of Parliament: section 13B.⁴¹

2.24 Two years later, section 13B was substantially amended by the *Constitution (Amendment) Act 1980* (NSW). The principal amendments brought about by this Act are outlined below.

(a) Exception for meeting fees and reasonable expenses

2.25 The first amendment introduced in 1980 was the insertion of a new exception in section 13B(3)(a)(ii), which applies to a person who:

holds or accepts an office of profit under the Crown in respect of which he is not entitled to any remuneration, except either fees payable to him, as a member of a body, in respect of his attendance at meetings of that body or an allowance for reasonable expenses incurred or to be incurred in carrying out the duties of the office, or both those fees and such an allowance.⁴²

2.26 The second reading speech on the amending bill discussed the reasons for the introduction of this exception. The speech noted that, to avoid the “harshness” of the restrictions imposed by section 13B, successive governments had developed the practice of deeming part-time offices with statutory bodies not to be offices of profit under the Crown, by including appropriate provisions in the statutes creating the bodies concerned.⁴³ However, in the case of part-time appointments to non-statutory bodies, it was not possible to avoid the operation of section 13B where appropriate, except by declaring the office to be unpaid. The new exception was introduced to deal with this anomaly:

[T]he Government’s decision to move to amend the Act was precipitated by realisation of the anomaly which arises in the case of non-statutory bodies. The Government’s legal advice is that section 13B precludes a member of Parliament

³⁹ *ibid*, section 8; *Hansard*, 15 October 1975, p. 1838.

⁴⁰ A new section 38(1) of the *Constitution Act 1902*, inserted by section 7(e) of the amending Act, provided that the Premier may from time appoint a Member or Members of the Legislative Assembly to hold office as parliamentary secretary.

⁴¹ *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*, section 3(1), Schedule 1 (7).

⁴² *Constitution (Amendment) Act 1980*, section 3(1), schedule 1(2)(c).

⁴³ *Hansard*, 19 March 1980, p. 5439.

from accepting a remunerated office in such a body even though he declines to accept payment. Accordingly, part-time positions in non-statutory bodies have to be declared as unpaid where it is desired to appoint a member of Parliament.⁴⁴

2.27 The new exception was also considered appropriate in light of the nature of the offices and positions to which it applies:

Positions so remunerated are normally advisory only in nature and it is considered reasonable to permit, in general terms, the tenure of such offices. On the other hand, offices which attract an annual salary or fee may or may not be suitable for tenure by members of Parliament. The Government believes that where it is desired to attach an annual salary to an office, such office should be created by statute and a determination then made as to whether it is appropriate that an exemption from the office of profit restrictions should be granted.

The practical consequence of the provision in respect of allowances for reasonable expenses will be to permit payment of an allowance in advance. The expenses of carrying out the duties of certain types of offices may be significant and it would be unreasonable to expect office bearers to pay such expenses from their own pockets in the first instance.⁴⁵

(b) Exception for offices and pensions outside NSW

2.28 The *Constitution (Amendment) Act 1980* also established an exception for any person who:

holds or accepts an office of profit under the Crown, other than the Crown in right of the State of New South Wales, but not being an office as a member of a legislature of a country other than New South Wales (section 13B(3)(a)(iii)).

2.29 The reason for exempting offices outside NSW was outlined in the second reading speech on the Bill as follows:

Item (2)(c) [of the Bill] will further amend subsection (3) by specifying to the effect that the whole restriction on tenure of offices of profit under the Crown will apply only to offices which are – to use the constitutional expression – in right of NSW; that is to say, offices which are within the framework of government in this State. It appears that section 13B applies to offices under the Crown in all its sovereign jurisdictions but the Government believes such a broad limitation is unnecessary in a federal environment. The historical aim of obviating the executive Government having undue influence over Parliament has general application only where the executive Government and the Parliament concerned are in the same jurisdiction. As it would be clearly wrong for a member of our Parliament to concurrently serve in another parliament, there is a proviso prohibiting this.⁴⁶

A similar exception was created for persons who have or accept a *pension* from the Crown other than the Crown in right of the state of NSW (section 13B(3)(a)(iv)).

⁴⁴ *ibid*, pp. 5439-40.

⁴⁵ *ibid*, p. 5440.

⁴⁶ *ibid*.

(c) Disqualification procedure

2.30 The final change brought about by the *Constitution (Amendment) Act 1980* was to amend the provisions of section 13(1) and (2) relating to the procedure by which the office of profit disqualification takes effect. Before these amendments, a person who held a disqualifying office or pension was incapable of being elected as a Member, and the seat of a Member who accepted such an office or pension “thereby” became vacant. However, under the procedure established in 1980, an elected candidate’s or Member’s seat only becomes vacant after seven sitting days from the date the House is notified of their holding the office or pension, unless the House has previously passed a resolution indicating it is satisfied the Member has ceased to hold the office or to be entitled to the pension.

2.31 The second reading speech on the amending bill stated that the aim of this new procedure was to allow for inadvertent breaches of the office of profit provisions to be detected and rectified, without the drastic consequence of loss of seat:

The Government gave close attention to the provisions of section 13B concerning treatment of a parliamentarian who infringes the restriction. The present consequences are considered to be both harsh and irrational. The practical purpose of the restrictions is to preclude a person from serving both Parliament and the Executive Government; an object which can be attained, where a person has come to serve both, simply be [sic] requiring him to resign to punish a transgressor and it is the devastating punishment of loss of seat. Though the Act was probably drafted on the assumption a person was conscious of his actions, this would not necessarily be so, particularly in the case of a member who, acting entirely in good faith, declined to accept payment for a remunerated office. The House of Commons Disqualification Act provides relief from disqualification and this principle has been adopted in the bill. Item (2)(a) will remove the reference in subsection (1) of section 13B to the ineligibility of a current office bearer to be elected to Parliament and will provide that his seat will become vacant upon the expiration of seven sitting days from the date the anomaly comes to the notice of the House in which he is seated, unless the House first passes a resolution that notice be given in accordance with standing rules and orders. The matter of drawing suitable rules will require the attention of the appropriate committees of the Houses in due course. Item (2)(b) makes corresponding provision in respect of sitting members who accept a restricted office of profit.⁴⁷

Other changes to section 13B

2.32 The *Constitution (Amendment) Act 1987* made the following changes to section 13B:

- a new exception was created for holders of the office of Minister of the Crown (section 13B(3)(a)(i)), and an earlier exception covering certain specified government officers was deleted;

⁴⁷ *ibid*, p. 5441.

- the exception relating to the Vice-President of the Executive Council was extended so that it applied to the Members of both Houses (section 13B(3)(b)).⁴⁸

2.33 In 1988 the exception relating to parliamentary secretaries was also extended to the Members of both Houses (section 13B(3)(c)).⁴⁹

Other provisions relevant to section 13B today

2.34 The operation of section 13B today is affected by a number of other provisions. These include:

- (a) Certain public offices are deemed by legislation not to be offices of profit under the Crown. These include the offices of: member of the Sydney Cricket Ground and Sports Ground Trust,⁵⁰ member of the Motor Vehicle Repair Industry Council other than the office of Chairperson,⁵¹ appointed member of the NSW Cancer Council,⁵² member of the Sydney Opera House Trust,⁵³ member of a committee established by a development corporation under the *Growth Centres (Development Corporations) Act 1974* (NSW),⁵⁴ and member of the Community Justice Centres Council.⁵⁵
- (b) The *Constitution (Public Service) Amendment Act 1916* (NSW) provides that section 13B does not extend to any person who holds any office of profit in the public service of NSW.⁵⁶ However, any officer in the public service who is elected as a Member must resign his or her office in the public service on being declared elected.⁵⁷ An officer who is contesting a parliamentary election is not entitled to any salary during the officer's absence from duty owing to such contest.⁵⁸

⁴⁸ Amendment to section 13B(3)(b). This change was introduced with the aim of achieving flexibility in the appointment of Members to the Vice-Presidency: *Hansard*, Legislative Council, 27 May 1987, p. 12517.

⁴⁹ *Constitution (Parliamentary Secretaries) Amendment Act 1988*, section 3, schedule 1(1).

⁵⁰ *Sydney Cricket Ground and Sports Ground Act 1978* (NSW), section 7, schedule 1(5).

⁵¹ *Motor Vehicle Repairs Act 1980* (NSW), section 9(1), schedule 1(4).

⁵² *New South Wales Cancer Council Act 1995* (NSW), section 6 and schedule 1,(8)(3).

⁵³ *Sydney Opera House Trust Act 1961* (NSW), section 9.

⁵⁴ *Growth Centres (Development Corporations) Act 1974*, section 6, schedule 2, (12)(4).

⁵⁵ *Community Justice Centres Act 1983* (NSW), section 30(2).

⁵⁶ Section 2(1). This provision also applies to officers and temporary employees of a teaching service: *Teaching Services Act 1980* (NSW), section 98.

⁵⁷ *Constitution (Public Service) Amendment Act 1916* (NSW), section 2(2).

⁵⁸ *ibid*, section 3.

- (c) The NSW Government Personnel Handbook states that government employees wishing to stand for election to State Parliament should take leave of absence from the date of nomination for election:

In order to avoid potential conflict between political interests and public employment it would be preferable for employees to take leave for election campaigning purposes from and including the day of nomination for the election. (...) When contesting an election, leave may be taken with or without pay according to the employee's reference and entitlements available.⁵⁹

- (d) Under the *Police Service Act 1990* (NSW), a member of the police service who nominates for election to State Parliament shall be granted leave of absence until the day on which the result of the election is declared.⁶⁰ If the Member is elected, he or she is required to resign from the service.⁶¹

2.35

There are also various legislative provisions which preclude a Member of Parliament being appointed to particular offices, and require that the office is vacated if the occupant is nominated for election to Parliament. Provisions of this type apply, for example, to the Commissioner of the Independent Commission Against Corruption,⁶² the Ombudsman,⁶³ the Police Integrity Commissioner,⁶⁴ and the Director of Public Prosecutions.⁶⁵

⁵⁹ NSW Government Personnel Handbook, at www.premiers.nsw.gov.au, accessed 4 February 2002, section 5-10.2.

⁶⁰ *Police Service Act 1990*, section 92(1).

⁶¹ *ibid*, section 92(2).

⁶² *Independent Commission Against Corruption Act 1988* (NSW), section 103 and schedule 1, 1(2)(b) (appointment), 6(1)(f) (vacation of office on nomination).

⁶³ *Ombudsman Act 1974* (NSW), section 6(3)(b) (appointment); section 6(4)(c) (vacation of office on nomination).

⁶⁴ *Police Integrity Commission Act 1996* (NSW), section 7(3) and schedule 1, 1(2) (appointment), 7(1)(e) (vacation of office on nomination).

⁶⁵ *Director of Public Prosecutions Act 1986* (NSW), section 31 and schedule 1, 2(5) (appointment), 4(2)(a) (vacation of office on nomination).

Chapter 3 Sections 13 and 13B - problems and issues

Overview

- 3.1** The purpose of the current restrictions imposed by section 13 and section 13B of the Constitution Act is to ensure that Members of Parliament are not placed in situations of conflict of interest or subjected to inappropriate influences in the performance of their legislative duties. The restrictions are also intended to ensure that the executive government cannot purchase the allegiance of a Member by awarding that Member a government contract or position. As indicated in Chapter 2 these provisions came about very early in the development of the modern parliament, and in some measure reflect the exigencies of the times from which they arose.
- 3.2** The contractual interest provisions are unclear and difficult to interpret. They also have little relevance to contemporary standards of accountability, modern company law and accepted commercial practice. Under the current provisions it is possible for a Member to lose their seat unwittingly, due to ignorance of the obscure meanings or intentions of the relevant statutes concerning contracts. Furthermore, as other committee inquiries have found, it is almost impossible to define by statute a contractual interest offering the potential for Crown patronage as against those which do not.⁶⁶
- 3.3** The concept of office of profit is even more unclear. There is no definition of what constitutes an office of profit. Advices provided by the Crown Solicitor on the interpretation of the provisions have left the situation no clearer, since each case is specific and as yet not tested at law. Members are confronted with the dilemma of either not accepting a position, even when there is very real need for their expertise, or accepting a position and risking the loss of their seat in Parliament.

Contracts with the Crown

- 3.4** As outlined earlier, section 13 provides that a person who has a contract or agreement with the public service of NSW is incapable of being elected or sitting or voting as a Member of either House of Parliament. It also provides a disqualification for any Member who enters into or continues to hold such a contract.
- 3.5** These disqualifications reflect the nature of society and commerce at the time when the original English provisions on which section 13 is based were developed (see Chapter 2). Further, the level of public access to information, and public accountability, were much lower at that time, so potential or actual conflicts of interest involving Members of Parliament were more likely to go unnoticed by the wider community. In these circumstances, it can be appreciated why it was considered necessary to place restrictions on Members contracting with government entities. However, the need for such restrictions is not so apparent today, when different conditions prevail.

⁶⁶ *Report of the Joint Select Committee of the Legislative Council and Legislative Assembly on Offices of Profit of Members of Parliament and Members Contracts with the Crown*, Parliament of Western Australia, November 1982, p. 26.

3.6 The difficulty of applying the contracts disqualification in modern times has led to its abolition in a number of jurisdictions, as discussed elsewhere in this Report.⁶⁷ For example, in the British House of Commons, the disqualification was abolished in 1957, following a select committee report which concluded that the law on the subject had become archaic and anomalous.⁶⁸ Since abolition, the problem of conflicts of interest in that House has been solved by a different, non-statutory route – disclosure and registration of Members’ pecuniary interests.⁶⁹

3.7 Apart from the difficulties inherent in the application of this disqualification today, there are also anomalies and uncertainties arising from the particular provisions of section 13. For example, section 13(3) provides an exception from disqualification for any contract entered into by a company consisting of more than 20 persons, where the contract is for the “general benefit” of the company. However, it is not clear whether a contract which provides a personal benefit to a Member, in addition to a “general benefit”, would be included. Further, the use of a particular number of members (20) as a criterion for distinguishing between companies which are covered by the exception and those which are not, appears arbitrary. As Professor Enid Campbell stated in her submission to the Committee:

One may wonder what ‘magic’ there is in the number of members of a company.⁷⁰

The artificial nature of this distinction is demonstrated by the fact that the exception could apply to a Member with a majority interest in a large company which had sizeable contracts with the government. However, it would not apply to a Member with a minority interest in a company with fewer than 20 members which had a less profitable contract with the Crown.

3.8 A further anomaly in section 13 identified by Professor Campbell is that while the section covers contracts and agreements, it does not extend to legal relationships created by gift by or on behalf of the Crown, which could be seen as having an even greater potential to give rise to conflicts of interest. In this regard, Professor Campbell notes that the Constitutional Commission in 1988 observed in relation to a similar disqualification provision of the Commonwealth Constitution, that the receipt of gifts and sponsored travel, which is not covered by the provision, may be more serious than the receipt of fees or honoraria, which is covered, and results in disqualification.⁷¹

3.9 The confusion surrounding section 13 was recognised in the NSW Parliament in 1962, during debate on the bill which introduced the lengthy list of exceptions currently

⁶⁷ See paragraph 2.6 and Appendix 3.

⁶⁸ *Special Report from the Select Committee on the House of Commons Disqualification Bill*, House of Commons Paper 348, p. vi.

⁶⁹ Sir Donald Limon, former Clerk of the House of Commons, submission, 23 July 1997, p. 2.

⁷⁰ Enid Campbell, Sir Isaac Isaacs Professor of Law, Monash University, submission, 1 September 1997, p.7, para 3.9.

⁷¹ *ibid*, p. 7, para 3.10.

contained in section 13(4). The second reading speech on that bill noted that the contracts disqualification had been referred to in an English court judgment as “a pitfall into which men who wish to walk upright and according to law may unwittingly tumble”.⁷² It went on to describe two possible approaches to addressing this problem, and the particular approach adopted in the bill:

[there are] only two ways of ridding, or attempting to rid, the law of these pitfalls. The first is to repeal the public-contractor provisions ... this being the course recommended by the English select committee. The second, which Hon. members will observe has been followed in the present measure, is to attempt a detailed specification of the contracts or agreements that will disqualify a member and those that will not. Our law now is that, subject to the limited exception in section 13(3) of the Constitution Act, all contracts for or on account of the public service disqualify.⁷³

- 3.10** Although the aim of making section 13 more specific by delineating further exceptions is understandable, the practical effect has been to make section 13 extremely complex and technical, and, on one view, potentially more confusing than was previously the case.
- 3.11** In the Committee's view, such an experience illustrates the difficulties inherent in any attempt to codify in detail the types of interests and contracts which might be considered to warrant disqualification for membership of Parliament. A similar view of detailed codification was taken by the House of Commons select committee referred to earlier, which rejected the option of introducing new provisions to replace the contracts disqualification, due to the “extreme difficulty” of drafting a suitable clause. The committee also noted that there had been no precedents involving corruption of Members through the holding of interests in government contracts in the preceding 100 years, and that the House could treat as a contempt any offer of a contract by the executive to a Member which was designed to influence the Member's conduct in Parliament.
- 3.12** In view of the uncertainties and anomalies arising from section 13, and the impracticability of establishing a suitable alternative, the Committee has concluded that section 13 should be repealed, and reliance placed on the other mechanisms currently available by which Members are accountable for their conduct. These mechanisms include the wide-ranging powers of the Independent Commission Against Corruption to deal with corrupt conduct by Members, the power of the House to expel, suspend, or impose other forms of sanction on a Member who engages in dishonourable conduct,⁷⁴ and the contempt power noted by the Commons committee referred to earlier. The mechanisms currently in place to provide for public accountability of Members of Parliament are discussed in more detail below (paragraphs 3.35 – 3.62).

⁷² *Hansard*, 4 December 1962, pp. 2250, and 2252.

⁷³ *ibid*, p. 2252.

⁷⁴ Such as occurred in the matter which gave rise to *Armstrong v Budd* (1969) 71 SR (NSW) 386.

Office of Profit

3.13 Many of the arguments referred to above in relation to contracts also apply to the office of profit provisions in section 13B. As Professor Campbell indicated in her submission to the Committee:

It is generally accepted that the concept of holding an office of profit under the Crown is vague and that in particular cases there can be room for dispute about whether a person is holding such an office.⁷⁵

3.14 No definition of “office of profit under the Crown” is provided in section 13B, although a number of exceptions are listed in section 13B(3). Further, no relevant definitions are provided by other legislation, apart from section 21(1) of the *Interpretation Act 1987*, which states that the term “office ... includes a position”.

3.15 The meaning of "office of profit under the Crown" has been considered by the courts on a number of occasions.⁷⁶ The leading case is *Sykes v Cleary* (1992) 176 CLR 77 (109 ALR 577), which concerned the equivalent provision to section 13B in the Commonwealth Constitution, section 44(iv). In that case, the High Court of Australia took the view that “office of profit under the Crown” includes all permanent public servants employed by government departments.⁷⁷ On this basis, the majority of the Court found that the expression extended to a state school teacher on leave without pay. Nevertheless, despite reaching a conclusion on the facts of that particular case, three members of the Court expressed the view that the meaning of “office of profit under the Crown” is “obscure”.⁷⁸

3.16 While decisions in cases such as *Sykes v Cleary* clarify certain aspects of this concept, the precise scope of the disqualification remains uncertain. One of the main areas of uncertainty is the extent to which the disqualification applies “at the margins of government employment”, as noted by Professor Colin Hughes in his submission to this Committee.⁷⁹ That is, it is not clear whether the expression encompasses positions with entities such as:

- independent statutory bodies not subject to Ministerial or other executive control,
- corporations which receive some form of State funding, or
- corporations in which the Crown owns some portion of the shares, or in which it has the right to nominate a director.⁸⁰

⁷⁵ Campbell, submission, p. 1, para 1.1.

⁷⁶ See Gerard Carney, *Members of Parliament: law and ethics*, 2000, Prospect Pty Ltd, pp 62-67.

⁷⁷ Carney, p. 61, and footnote 18.

⁷⁸ *Sykes v Cleary* (1992) 176 CLR 77 at 95, referred to in Carney, p. 61.

⁷⁹ Colin Hughes, Emeritus Professor of Political Science, the University of Queensland, submission, 15 September 1997, pp. 2-3.

⁸⁰ *ibid*, p. 2.

- 3.17** This problem, and the general uncertainty surrounding the meaning of the term, have been noted in several inquiries relating to section 44(iv) of the Commonwealth Constitution, and in those jurisdictions in which equivalent disqualification provisions have been repealed (see Appendix 3).
- 3.18** In addition to this issue, a number of further concerns arise in relation to section 13B:
- the language used in the section is archaic, modelled on UK legislation from 1701 which has now been repealed
 - the section does not necessarily achieve its policy aims (avoidance of conflicts of interest and undue influence by the executive government over Members), as the criteria for disqualification are so broadly-stated and inflexible
 - the penalty imposed by the section (loss of a Member's seat) may be disproportionate to the conduct involved, particularly in cases where an office technically falls within the terms of the section but does not involve any real risk of a conflict of interest or improper influence.
- 3.19** The Committee supports the concept that Members of the Parliament should not be placed in situations of conflict of interest or subjected to inappropriate influences in the performance of their duties. It also believes that the executive government should not be able to purchase the allegiance of a Member by awarding that Member a government position. However, it considers that the provisions of section 13B are so obscure, unclear, and archaic as to render them inappropriate and unworkable.
- 3.20** The Committee also notes that a variety of other mechanisms exist today by which Members are accountable for their conduct, which the Committee believes would bring to light any conflicts of interest or inappropriate offices held by Members. Many of these mechanisms have developed since the office of profit disqualification was originally introduced. The accountability mechanisms which will be discussed in more detail later include:
- annual compulsory registration of pecuniary and other interests
 - the Members' code of conduct
 - the role of the ICAC
 - legislation affecting particular public offices
 - the role of the Parliamentary Remuneration Tribunal
 - Legislative Council Standing Orders 126 and 238
 - the inherent power of Parliament to regulate the conduct of its Members
 - common law offences relating to misconduct in public office
 - party discipline

- media / public scrutiny
- the ballot box.

Each of these mechanisms is discussed below.

- 3.21** In light of the availability of these alternative mechanisms for regulating Members' conduct, and the other factors considered earlier, the Committee is of the view that section 13B should be repealed. While some of the submissions received by the Committee favoured the approach of amendment and clarification rather than repeal, the Committee believes that repeal is the only practical solution, given the fundamental nature of the difficulties which the section presents, the level of scrutiny to which the conduct of Members is subject through other means, and the difficulty of establishing a suitable alternative.
- 3.22** In this regard, the Committee notes that there have been as many as five inquiries concerning the federal office of profit disqualification since 1981, each of which has recommended that the current provisions be replaced with new forms of disqualification (see Appendix 3). In those inquiries, a number of different approaches have been proposed to the identification and description of the offices which should be considered incompatible with membership of Parliament. Nevertheless, despite these various recommendations, no action has been taken by the federal Parliament in relation to this issue to date.⁸¹
- 3.23** The Committee is conscious of the fact that the approach it recommends on this issue places considerable reliance on the House's responsibility for the conduct of its own Members. In this regard, the Committee continues to support the enactment of privileges legislation for the Parliament of NSW, to include appropriate sanctions which could be imposed for those Members whose conduct is found to be below that expected from Members today. This issue is further discussed in Chapter 4.

Other views considered by the Committee

- 3.24** Although the Committee concluded that section 13B should be repealed, for the reasons discussed earlier in this chapter, during the course of the inquiry it considered a range of different views concerning section 13B and the best approach to reform. A number of these different views are noted below.
- (a) Direction of reform in other Parliaments
- 3.25** The Committee noted that where reform of the office of profit disqualification has been undertaken or considered in other Parliaments, the favoured approach has been to attempt

⁸¹ The federal Government has expressed support for the replacement of the existing Commonwealth provisions with new provisions broadly consistent with the recommendations of the most recent committee inquiry (House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution, Subsections (i) and (iv)*, July 1997.) However, it has indicated that various substantive issues must be considered before deciding on the final form of any proposal (Government response to Report).

to replace the existing provisions with new provisions which specify more clearly and in more detail the offences which are to result in disqualification for membership of Parliament. This approach has been adopted, for example, in the UK House of Commons and Western Australia. A similar approach has been recommended for the Commonwealth Parliament (see Appendix 3, pp. 48-51).

(b) Importance of principles underlying section 13B

3.26 A number of submissions received by the Committee highlighted the importance of the principles which section 13B is designed to protect, while acknowledging that there are problems with the manner in which those principles are currently expressed. For example, the Clerk of the Australian Senate, Mr Harry Evans, described the principles enshrined by section 13B as follows:

Both provisions [section 13 and section 13B] embody constitutional safeguards of the integrity of the legislature which are of great importance. The latter provision is particularly important. It should be seen as an anti-corruption, specifically an anti-bribery, provision. Without some such safeguard it would be possible for the executive government to buy the allegiance of members of the legislatures by awarding them government jobs, perhaps jobs created specifically for the purpose of buying their allegiance. ...

In relation to office of profit under the Crown, the importance of the safeguard would seem to oblige constitutional prescription....⁸²

3.27 However, he noted that there is uncertainty as to the extent of the term “Crown”, and difficulties with many of the current exceptions within section 13B. To overcome these problems, Mr Evans suggested that:

a simple prohibition on the holding of an office of profit under the executive government of the state, the Commonwealth or another state or territory, with an exception for ministers, would be adequate to achieve the purpose of the safeguard without undue difficulties of interpretation.⁸³

3.28 Professor Colin Hughes also highlighted the important principles which apply to disqualification provisions such as section 13B. These include that:

the independence of Members of Parliament, the legislative branch of government, should be protected from subversion by the executive branch and party which controls it.⁸⁴

3.29 He also identified various further problems with section 13B as it currently stands, which would be capable of rectification by amending the section.⁸⁵

⁸² Harry Evans, submission, 15 August 1997, pp. 1-2.

⁸³ *ibid*, p. 3.

⁸⁴ Colin Hughes, Emeritus Professor of Political Science, University of Queensland, submission, 15 September 1997, p. 1.

⁸⁵ Those contained in section 13B(3)(a)(ii) and (iii): submission, p. 2.

(c) Other aspects of section 13B

3.30 While the evidence considered by the Committee indicated that the expression “office of profit under the Crown” is unsuitable as a basis for disqualification, the Committee noted that certain other features of section 13B are comparatively beneficial, as they provide a degree of flexibility in the application of the disqualification.

3.31 One such feature is the scope which is provided within section 13B for the relevant House to determine any questions which might arise in particular cases. That is, under both section 13B(1) (which relates to elected candidates), and section 13B(2) (which relates to sitting Members), the disqualification does not take effect if the House has passed a resolution indicating that the person or Member has ceased to hold the office.

3.32 Another positive feature is the way in which the disqualification applies to elected candidates. Under section 13B(1), if a person who holds an office of profit “is elected” as a Member, they are not capable of sitting and voting in the House and their seat in the House may become vacant. By contrast, under the equivalent Commonwealth provision, the disqualification applies to an elected candidate if they held an office of profit at any time during the election period, even if they resigned from the office by the date of the election. The differences between the two provisions were noted by the Clerk of the Senate in his submission to the Committee as follows:

the New South Wales provision prevents only the continued holding of office as a member in the presence of the disqualification, whereas the Commonwealth provision prevents the *election* of a person subject to the disqualification. The New South Wales provision thereby avoids some of the questions of interpretation which arise under the Commonwealth provision.⁸⁶

3.33 Professor Enid Campbell’s submission to the Committee also commented on the benefits of this aspect of section 13B:

Constitutional provisions regarding disqualifications of MPs, should, in my opinion, be drafted in such a way as not to operate as a substantial impediment to translation from office holding or employment within public services and public authorities to the office of an elected MP. The provisions of s 13B of the NSW Constitution Act 1902 appear to be sensitive to this concern.⁸⁷

3.34 The final feature of section 13B which may be noted in this context is the exception provided within section 13B(3)(a)(ii) for offices in which the only form of remuneration is payment of fees for attending meetings and/or “reasonable expenses”. As indicated in Chapter 2, this exception was established in 1980, so that Members could be appointed to non-statutory government bodies where considered appropriate. However, questions of interpretation may arise as to whether particular expenses associated with the office are “reasonable”.

⁸⁶ Harry Evans, submission, p. 3.

⁸⁷ Enid Campbell, submission, para 1.7.

Accountability Mechanisms

3.35 The mechanisms by which Members of the Legislative Council are accountable for their conduct are outlined below.

A. Registration of pecuniary interests

3.36 The *Constitution (Disclosures by Members) Regulation 1983* requires Members to disclose each year in a published register various types of interests held in a number of different categories: real property; sources of income; gifts over the value of \$500; contributions to travel; interests and positions in corporations; positions in trade unions and professional or business associations; debts; and dispositions of property. The register is open to inspection by the public.

3.37 Under section 14A(2) and (3) of the *Constitution Act 1902*, if any Member “wilfully contravenes” the provisions of the regulation, the House may declare the Member’s seat vacant. There has been no instance of this procedure being used since the regulation was introduced.

B. Members’ code of conduct

3.38 The Members’ code of conduct was first adopted by the Legislative Council by resolution on 1 July 1998, and was re-adopted on 26 May 1999. The 1999 resolution has continuing effect unless and until amended or rescinded by the House.

3.39 The code consists of six clauses, which relate to the following areas: (1) disclosure of conflicts of interest; (2) bribery; (3) gifts; (4) use of public resources; (5) use of confidential information; (6) duties as a Member of Parliament. In addition, the “preamble” to the code acknowledges Members’ “responsibility to maintain the public trust” by performing their duties with honesty and integrity, respecting the law and Parliament, and using their influence to advance the common good of the people of New South Wales.

3.40 The resolution of the House adopting the code states that the code is adopted “for the purposes of section 9 of the Independent Commission Against Corruption Act 1988”. Under that Act, conduct by a Member which amounts to a “substantial breach” of a code of conduct adopted for the purpose of section 9, and which satisfies certain other criteria, is “corrupt conduct” within the meaning of the Act (see (C) below).

C. Role of ICAC

3.41 Under the *Independent Commission Against Corruption Act 1988*, the Independent Commission Against Corruption (ICAC) has power to investigate “corrupt conduct” by public officials and to make findings of “corrupt conduct” against such officials. Section 7 of the Act defines “corrupt conduct” as any conduct which falls within both section 8 and section 9. Section 8 contains a list of types of conduct, including: conduct that could adversely affect the honest and impartial conduct of official functions by a public official; conduct that involves the dishonest or partial exercise of official functions; and conduct that involves a breach of trust.

3.42 Section 9(1) states that, despite s. 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament - a substantial breach of an applicable code of conduct.

3.43 The expression “applicable code of conduct” is defined in section 9(3), as:

- (a) in relation to a Minister of the Crown - a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations;
- (b) in relation to a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown) - a code of conduct adopted for the purposes of this section by resolution of the House concerned.

3.44 An “applicable code of conduct” was adopted by the Legislative Council by resolution on 1 July 1998, and re-adopted on 26 May 1999 (see (2) above).

3.45 Section 9(4) sets out a further ground of “corrupt conduct”:

Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

3.46 There has been only one case where the ICAC has made a finding of “corrupt conduct” against a Member of Parliament. In that case the Member, Mr Brian Langton, was found to have made deliberately false statements in support of claims for reimbursement through the parliamentary travel warrant system. The ICAC decided such conduct amounted to “corrupt conduct” as it fell within section 8(1)(b) (dishonest or partial exercise of official functions),⁸⁸ 8(1)(c) (breach of public trust),⁸⁹ and 8(2)(e) (fraud).⁹⁰ Within section 9, the conduct satisfied section 9(1)(a) (criminal offence)⁹¹ and 9(1)(c) (grounds for dismissal of a

⁸⁸ ICAC, *Investigation into Parliamentary and Electorate Travel: First Report*, April 1998, p. 83.

⁸⁹ *ibid.*, p. 84.

⁹⁰ *ibid.*

⁹¹ *ibid.*

Member).⁹² At the time the ICAC reported on the matter (April 1998), the code of conduct had not been adopted, so the potential application of section 9(1)(d) did not arise.

D. Legislation affecting particular public offices

3.47 A number of statutory provisions relating to particular public offices specify that a Member of Parliament is not entitled to be appointed to the office, and that the office will be vacated if the occupant is nominated for election to Parliament. Such provisions apply, for example, to the ICAC Commissioner,⁹³ the Ombudsman,⁹⁴ the Police Integrity Commissioner,⁹⁵ and the Director of Public Prosecutions.⁹⁶

3.48 In addition, under the *Constitution (Public Service) Amendment Act 1916* (NSW), section 13B does not extend to any person who holds any office of profit in the public service of NSW,⁹⁷ but any officer in the public service who is elected as a Member must resign his or her office in the public service on being declared elected.⁹⁸ The NSW Government Personnel Handbook states that government employees wishing to stand for election to State Parliament should take leave of absence from the date of nomination:

In order to avoid potential conflict between political interests and public employment it would be preferable for employees to take leave for election campaigning purposes from and including the day of nomination for the election. (...) When contesting an election, leave may be taken with or without pay according to the employee's reference and entitlements available.⁹⁹

3.49 Under the *Police Service Act 1990* (NSW), a member of the police service who nominates for election to State Parliament shall be granted leave of absence until the day on which the

⁹² *ibid*, p 85.

⁹³ *Independent Commission Against Corruption Act 1988* (NSW), section 103 and schedule 1, 1(2)(b) (appointment), 6(1)(f) (vacation of office on nomination).

⁹⁴ *Ombudsman Act 1974* (NSW), section 6(3)(b) (appointment), section 6(4)(c) (vacation of office on nomination).

⁹⁵ *Police Integrity Commission Act 1995* (NSW), section 7 and schedule 1, 1(2) (appointment), 7(1)(e) (vacation of office on nomination).

⁹⁶ *Director of Public Prosecutions Act 1986* (NSW), section 31 and schedule 1, 2 (5) (appointment), 4(2)(a) (vacation of office on nomination).

⁹⁷ Section 2(1). This provision also applies to officers and temporary employees of a teaching service: *Teaching Services Act 1980* (NSW), section 98.

⁹⁸ Section 2(2).

⁹⁹ NSW Government Personnel Handbook, at www.premiers.nsw.gov.au, accessed 4 February 2002, section 5-10.2.2

result of the election is declared. If the Member is elected, he or she is required to resign from the service.¹⁰⁰

E. Parliamentary Remuneration Tribunal

3.50 Under the *Parliamentary Remuneration Act 1989* the Parliamentary Remuneration Tribunal has the power to impose conditions relating to the provision of Members' "additional entitlements". Recent determinations of the Tribunal have included extensive conditions and guidelines concerning the use of such entitlements. These guidelines and conditions presumably constitute "guidelines or rules about the use of [public] resources" with which Members are required to comply under clause 4 of the Members' code of conduct (see (B) above).

3.51 The current determination of the Tribunal also includes a condition that additional entitlements in the nature of fixed allocations and the Sydney allowance are subject to external audit by the Auditor-General of NSW.¹⁰¹

F. Legislative Council Standing Orders 126 and 238

3.52 Standing Orders 126 and 238 regulate Members' right to participate in certain types of proceedings when they have a pecuniary interest in the matter being discussed. Standing Order 126 applies to Members voting in divisions in the House, while Standing Order 238 applies to Members in Committees.

3.53 Standing Order 126 provides:

No Member shall be entitled to vote in any division upon a question in which he has a direct pecuniary interest, not in common with the rest of Her Majesty's subjects and on a matter of State policy, and the vote of any member so interested shall be disallowed.

3.54 Standing Order 238 provides:

No Member shall sit on a Select Committee who shall be pecuniarily interested in the inquiry before such Committee.

3.55 Standing Order 126 is confined to voting in divisions. It does not extend to participation in other procedures such as asking questions, speaking in debate, or moving amendments, or to other activities such as discussions with other Members, Ministers, or public officials in the course of a Member's parliamentary duties.

¹⁰⁰ *Police Service Act 1990* (NSW), section 92(1) and (2).

¹⁰¹ Determination, August 2001, pp. 6-7.

G. Inherent powers of the House

3.56

The courts have determined that, in the absence of legislation conferring a particular power, Houses such as the NSW Legislative Council have such inherent, common law powers as are “necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute”.¹⁰² These powers include the power to take action against one of the House’s own Members, provided the action is necessary to protect the integrity of the House and its procedures, and not a cloak for punishment of the Member.¹⁰³ This power has been exercised by the House on a number of occasions:

- In 1969 a Member of the Legislative Council, the Hon Alexander Armstrong, was expelled from the House on the ground of “conduct unworthy of a Member”. The conduct in question involved being party to an arrangement to procure false evidence for the divorce court, and stating in court that he would consider bribing a judge. A court challenge by the Member to the validity of the House’s actions was unsuccessful.¹⁰⁴
- On several occasions during 1996-1998, the Legislative Council passed resolutions temporarily suspending the Treasurer from the service of the House for failure to comply with certain orders for the production of State papers. Once again, the validity of the House’s actions was upheld by the courts.¹⁰⁵
- In 1997-8 the Standing Committee on Parliamentary Privilege and Ethics investigated the conduct of a Member, the Hon Franca Arena MLC, in relation to statements she had made in the House against named individuals. In its report on the matter, that Committee found that Mrs Arena’s conduct “fell below the standards the House is entitled to expect of a Member, and brought the House into disrepute”. It also recommended that Mrs Arena be required to provide an apology to the House in respect of her conduct, and that in the event of failure to comply she be suspended from the service of the House until the apology was provided. Ultimately, the House accepted a “statement of regret” from Mrs Arena, in lieu of an apology.¹⁰⁶

3.57

In addition, the acceptance by a Member of compensation in connection with promoting or opposing a matter in the House or a committee may be treated by the House as a contempt. In this regard, *Erskine May* states:

The acceptance by a Member of either House of a bribe to influence him in his conduct as a Member, or of any fee, compensation or reward in connection with the promotion of or opposition to any bill, resolution, matter or thing submitted

¹⁰² Eg *Kielley v Carson* (1842) 4 Moo. PC 63 at 88; *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 404.

¹⁰³ *Armstrong v Budd* (1969) 71 SR (NSW) 386.

¹⁰⁴ *ibid.*

¹⁰⁵ *Egan v Willis and Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 73 ALJR 75; *Egan v Chadwick* (1999) NSWLR 563.

¹⁰⁶ *Minutes of the Proceedings of the Legislative Council*, No 59, Wednesday 16 September 1998, entry no. 12.

or intended to be submitted to either House, or to a committee, is a contempt. Any person who is found to have offered such a corrupt consideration is also in contempt.⁽²⁾ A transaction of this character is both a gross affront to the dignity of the House concerned and an attempt to pervert the parliamentary process implicit in Members' free discharge of their duties to the House and (in the case of the Commons) to the electorate.¹⁰⁷

H. Common law offences and remedies

3.58 Bribery of a public official, including a Member of Parliament, is an offence at common law.¹⁰⁸ In relation to this offence, *Halsbury's Laws of Australia* states:

While it is an element of the common law offence that the bribe be in relation to the public official's exercise of a legal power enjoyed by virtue of the office, a conspiracy to bribe a member of Parliament was found to have been made out when the object of the bribe was to persuade the member to put pressure on a Minister to carry out a particular transaction involving expenditure of public money.[...] The fact that the pressure could be exerted by virtue of the member's role was sufficient to make the agreement a public mischief and a criminal conspiracy.[...]

A jury which is unable to agree that a bribe has been paid may convict a person charged of an attempt to bribe.¹⁰⁹

3.59 In addition, various common law offences and equitable remedies attach to misconduct by public officers, including Members of Parliament.¹¹⁰ According to Professor Gerard Carney, at least two rules apply in cases where a Member fails to disclose a personal interest in the execution of his or her public duties:

First, public contracts and any other official action may be set aside or avoided where they have been negotiated or decided upon by a public officer who fails to disclose a personal interest in the matter.⁽¹⁰²⁾ This principle operates irrespective of any corrupt or wilful intent on the part of the officer. It is more likely to arise with ministers in administering their departments than with members of Parliament. Parliament proceedings are not within the scope of this principle.⁽¹⁰³⁾ Second, private contracts which tend to create a conflict of interest with a member's duty are illegal on grounds of public policy: *Wilkinson v Osborne*,⁽¹⁰⁴⁾ *Horne v Barber*.¹¹¹

¹⁰⁷ *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usage of Parliament*, 22nd ed. (1997), Butterworth & Co, London, p. 112.

¹⁰⁸ *Halsbury's Laws of Australia*, p. 250,150, "Bribery and Obstruction of Public Officers".

¹⁰⁹ *ibid*, para 130-12340.

¹¹⁰ Gerard Carney, *Members of Parliament: law and ethics*, 2000, Prospect Media Pty Ltd, p. 357.

¹¹¹ *ibid*.

I. Party discipline

- 3.60** The system of political parties and party discipline expanded in all Australian parliaments during the twentieth century. Today, a Member who engages in conduct which might be seen as being unacceptable to the electorate risks losing their party's support, access to their party's electoral funding, and endorsement for preselection.

J. Media / public scrutiny

- 3.61** The conduct of public figures, including politicians, is subject to higher levels of media scrutiny today than at any time in the past.

K. Ballot box

- 3.62** For much of its history the Legislative Council consisted of Members who were appointed by the Governor or elected by the Members of both Houses. This changed in 1978 with the introduction of a system of direct election by the people. Since 1991 every Member of the Legislative Council is elected by the people in a fixed term election.

Chapter 4 Conclusions and recommendations

- 4.1** The evidence considered by the Committee during the inquiry indicated that section 13 (government contracts) and section 13B (office of profit) are unclear in meaning, uncertain in scope, and in some cases, anomalous. The key provisions within each of the sections are expressed in language which is complex and antiquated, the meaning of which remains largely obscure, despite the Committee obtaining detailed legal advice on various aspects of the matter during the inquiry. This lack of certainty is particularly unsatisfactory given the harshness of the penalty imposed by each of the sections – loss of a Member’s seat in Parliament. The Committee is concerned that under the current provisions it is possible for a duly-elected Member to lose his or her seat because of an inadvertent, minor, or technical breach of the disqualification provisions.
- 4.2** Given this fundamental uncertainty, and the potentially disproportionate nature of the penalty, the Committee has concluded that both sections 13 and 13B are unworkable in a contemporary context. Further, it believes that the difficulties inherent in the sections are such that they are not amenable to amendment or reform, but require repeal. The Committee accepts that the historical aim of such disqualification provisions – protection of the Parliament’s independence from subversion by the executive government – is an essential principle of our system of parliamentary democracy. However, it does not believe that the maintenance of that independence today hinges on the continuing existence of these little-known and never-used provisions. In addition, as already noted, there are various other mechanisms in place today by which Members of the Legislative Council are accountable for their conduct, and by which serious corruption can be exposed, which did not exist when the disqualification provisions were originally introduced. As already outlined,¹¹² these include the compulsory registration of pecuniary interests, the role of the Independent Commission Against Corruption, media scrutiny, and the judgment of the electors at the polling booth.
- 4.3** The Committee has given consideration to whether it would be desirable to attempt to draft alternative provisions to replace sections 13 and 13B once repealed. However, it has concluded that it would be impracticable in our modern ever-changing world to attempt to codify all the possible types of contracts, interests, or offices which could potentially give rise to unacceptable conflicts of interest, or improper influence over Members by the executive government. The Committee also fears that the adoption of such an approach would inevitably lead to disagreements about what contracts or offices should be prohibited, and who should mediate such disagreements. It also foresees that, once such a code were enacted, distinctions of a purely technical nature would arise (as at present) between the contracts and offices which are and are not included. Ultimately, the Committee has concluded that it is preferable to rely on the power of the House itself to regulate the conduct of its Members (a power which the Legislative Council has not been slow to exercise in recent years against individual Members), and on the other external accountability mechanisms.

¹¹² See paragraphs 3.35 to 3.62.

- 4.4** Given the uncertainty surrounding the meaning and scope of sections 13 and 13B, and the availability of alternative mechanisms by which Members are accountable for their conduct today, the Committee makes two recommendations:

Recommendation 1

That sections 13 and 13B be repealed.

- 4.5** As the Committee has recommended the repeal of sections 13 and 13B, and relies to some extent on the ability of the House itself to deal with improper conduct by Members, it reiterates its support, expressed in three of its previous reports,¹¹³ for the enactment of legislation to clarify the powers and privileges of the Houses of the NSW Parliament. As noted in those earlier reports, all of the Australian Parliaments except the NSW Parliament have legislated to define the powers of their Houses, either by reference to the powers of the House of Commons (such as in Victoria), or in more express terms (such as in the Commonwealth *Parliamentary Privileges Act 1987*). In NSW, in the absence of such legislation, the Houses largely rely on their inherent, common law powers, the extent of which is ascertained by reference to decisions of the courts.
- 4.6** The courts have formulated certain principles which define the limits of these inherent powers. The basic principle is that the inherent powers extend only to what is reasonably necessary for the existence of the House and the proper exercise of its functions.¹¹⁴ The nature of the House's functions, and what is reasonably necessary, is to be determined by reference to the role played by the House in the system of responsible government in NSW.¹¹⁵ However, deciding what is reasonably necessary in any particular case can be difficult. Significantly, every case in which the validity of actions by the NSW Legislative Council has been challenged in the courts has involved the exercise by the House of some aspect of its inherent powers.¹¹⁶ In each case, the action taken by the House has been against one of its own Members.
- 4.7** In the Committee's view, rather than relying on such uncodified powers, the precise nature of which can be uncertain, the powers of the Houses should be clearly expressed in legislation, including the power to take action against Members in respect of an offence against the House. For example, in the Commonwealth *Parliamentary Privileges Act* referred

¹¹³ Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, October 1993, p. 20; Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into sanctions where a Minister fails to table documents*, Report No. 1, May 1996, p. 22; *Report on inquiry into statements made by Mr Gallacher and Mr Hannaford*, Report No. 11, November 1999, para 3.3.3.

¹¹⁴ Eg *Egan v Willis* (1998) 73 ALJR 75 at 86.

¹¹⁵ *ibid*, at 83-86.

¹¹⁶ *Armstrong v Budd* (1969) 71 SR (NSW) 386; *Egan v Willis and Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 73 ALJR 75; *Egan v Chadwick* (1999) NSWLR 563.

to earlier, there are provisions which define the necessary elements of an offence against a House (section 4),¹¹⁷ and clarify to some extent the sanctions which may be imposed where an offence is committed (sections 7 - 9, 12, 13).¹¹⁸

4.8 In light of these considerations, the Committee recommends:

Recommendation 2

- (1) That legislation be introduced to clarify the powers and privileges of the New South Wales Parliament, including the power to impose sanctions on Members.
 - (2) That the draft bill be referred to this committee for comment before introduction.
-

¹¹⁷ *Parliamentary Privileges Act 1987* (Commonwealth), section 4.

¹¹⁸ *ibid*, sections 7 - 9, 12, 13.

Appendix 1

Sections 13 and 13B

Section 13

- (1) Any person who directly, or indirectly, himself, or by any person whatsoever in trust for him or for his use or benefit or on his account, undertakes, executes, holds, or enjoys in the whole or in part any contract or agreement for or on account of the Public Service of New South Wales shall be incapable of being elected or of sitting or voting as a Member of the Legislative Council or Legislative Assembly during the time he executes, holds or enjoys any such contract or any part or share thereof or any benefit or emolument arising from the same.
- (2) If any person being a Member of such Council or Assembly enters into any such contract or agreement, or, having entered into it, continues to hold it, his seat shall be declared by the said Legislative Council or Legislative Assembly, as the case may require, to be vacant, and thereupon the same shall become and be vacant accordingly.
- (3) Provided that nothing in subsection (1) or (2) contained shall extend to any contract or agreement made, entered into, or accepted by any incorporated company, or any trading company consisting of more than twenty persons, where such contract or agreement is made, entered into, or accepted, for the general benefit of such incorporated or trading company.
- (4) It is hereby declared that nothing in subsection (1) or (2) extends to:
 - (a) a contract or agreement for or in respect of a loan to the Treasurer or to a body authorised to borrow by Act of Parliament,
 - (b) a contract or agreement the benefit or burden of which or any interest in which devolves upon a person:
 - (i) as beneficiary under a will or as a person entitled to share in the estate of an intestate - until he has been in possession of the benefit, burden or interest, as the case may be, for one year from the date of commencement of the *Constitution (Amendment) Act 1962* or from the date of the devolution, whichever is the later date,
 - (ii) as executor, administrator or trustee - until he has been in possession of the benefit, burden or interest, as the case may be, for three years from the date of commencement of the *Constitution (Amendment) Act 1962* or from the date of the devolution, whichever is the later date,
 - (c) a compromise or settlement in respect of compensation or other money payable by Her Majesty or a statutory body representing Her Majesty,
 - (d) a lease, licence for occupation, sale, purchase or exchange of land, or a contract or agreement for such a lease, sale, purchase or exchange or for the occupation of land or for an easement; or a gift or an agreement for a gift by any person of land to or for Her Majesty or a statutory body representing Her Majesty,
 - (e) a contract or agreement for the supply or provision by or to or for Her Majesty or a statutory body representing Her Majesty of goods, wares or merchandise or services (including the provision of insurance or indemnity) where the goods, wares or merchandise or services (including the provision of insurance or indemnity) are supplied or provided on

the like terms as those on which they are ordinarily supplied or provided to members of the public,

- (f) a loan by Her Majesty or a statutory body representing Her Majesty to any person upon the security of a mortgage, bill of sale, lien or other security upon and subject to the like terms as those ordinarily imposed by Her Majesty or the statutory body on loans made to members of the public.

Notice of any such compromise or settlement as is referred to in paragraph (c) that takes place after the commencement of the *Constitution (Amendment) Act 1962* shall be published in the Gazette within two months from the date of the compromise or settlement, as the case may be.

(4A) Nothing in:

- (a) subsection (1) applies so as to prevent a person who holds an office of profit under the Crown or has a pension from the Crown during pleasure or for a term of years from being elected or of sitting or voting as a Member of either House of Parliament, or
- (b) subsection (2) requires or permits the seat of a Member of either House of Parliament who accepts such an office or such a pension to be declared to be, or to become or be, vacant,

by reason only of his holding or accepting that office of profit or his having or accepting that pension.

(4B) In subsection (4A), ***office of profit under the Crown*** includes any office or place of profit under the Crown which, by any Act, is declared or deemed not to be an office or place of profit under the Crown for the purposes of any Act or of this Act, whether in those terms or in terms to the like effect.

(5) In this section, ***statutory body representing Her Majesty*** includes any statutory body that is part of, or that exercises any function that is a function of, the Public Service of New South Wales.

Section 13B

(1) A person:

- (a) holding an office of profit under the Crown, or
- (b) having a pension from the Crown during pleasure or for a term of years,

shall not, if he is elected as a Member of either House of Parliament, be capable of sitting and voting as a Member of the House to which he is elected, and his seat as a Member shall become vacant, after the expiration of the period commencing with his election and ending on the expiration of 7 sitting days of that House after notice of his holding that office or having that pension has been given to that House in accordance with its Standing Rules and Orders, unless that House has previously passed a resolution indicating that it is satisfied that that person has ceased to hold that office or, as the case may be, that the right of that person to that pension has ceased or is suspended while he is a Member of that House.

(2) If a Member of either House of Parliament accepts any office of profit under the Crown or pension from the Crown during pleasure or for a term of years, his seat as a Member of that House shall become vacant upon the expiration of the period commencing with his acceptance of the office or the pension and ending on the expiration of 7 sitting days of that House after notice of his accepting that office or pension has been given to that House in accordance with its Standing Rules and Orders, unless that House has previously passed a resolution indicating that it is satisfied that that Member has ceased to hold that office or, as the case may be, that the right of that Member to that pension has ceased or is suspended while he is a Member of that House.

(3) Notwithstanding subsection (1) or (2):

(a) a person:

- (i) who holds or accepts the office of Minister of the Crown or any office of profit under the Crown created by an Act as an office of the Executive Government,
- (ii) who holds or accepts an office of profit under the Crown in respect of which he is not entitled to any remuneration, except either fees payable to him, as a member of a body, in respect of his attendance at meetings of that body or an allowance for reasonable expenses incurred or to be incurred in carrying out the duties of the office, or both those fees and such an allowance;
- (iii) who holds or accepts an office of profit under the Crown, other than the Crown in right of the State of New South Wales, but not being an office as a member of any legislature of a country other than New South Wales, or
- (iv) who has or accepts a pension, referred to in subsection (1) (b) or (2), from the Crown, other than the Crown in right of the State of New South Wales,

shall be capable of being elected and of sitting and voting as a Member of either House of Parliament,

- (b) a person who holds or accepts the office of Vice-President of the Executive Council shall be capable of being elected and of sitting and voting as a Member of either House of Parliament, and
 - (c) a person who holds or accepts the office of Parliamentary Secretary shall be capable of being elected and of sitting and voting as a Member of either House of Parliament.
- (4) For the purposes of subsections (1) and (2), sitting days shall be counted, whether or not they occur during the same session of Parliament.

Appendix 2

List of submissions received by the Committee

List of submissions received by the Committee

No	Author¹¹⁹
1	DG McGee, Clerk of the House of Representatives, New Zealand
2	JM Davies, Clerk of the Parliaments, House of Lords, United Kingdom
3	Sir D Limon, Clerk of the House Commons, United Kingdom
4	Hon BS O'Keefe AM, QC, Commissioner, Independent Commission Against Corruption
5	D Davidson, General Legal Counsel, House of Commons, Ottawa
6	V Baird, Staff Director and Chief Counsel, Select Committee on Ethics, United States of America
7	H Evans, Clerk of the Senate, Australia
8	T Decker, Clerk-at-the-Table and Senior Committee Clerk, Legislative Assembly, Ontario
9	Hon HAD Oliver QC, Conflict of Interest Commissioner, Legislative Assembly, British Columbia
10	Enid Campbell, Sir Isaac Isaac Professor of Law, Monash University, Melbourne
11	Hon Peter Primrose MLC, Legislative Council, NSW
12	I Allnutt, Deputy Clerk and Usher of the Black Rod, Legislative Council, Western Australia
13	Hon E Page MP, Minister for Local Government, NSW
14	J Price MP, Deputy Speaker and Chairman of Committees, Legislative Assembly, NSW
15	C Hughes, Emeritus Professor of Political Science, Department of Government, University of Queensland
16	J Middlebrook, Secretary, Standing Committee on Legal and Constitutional Affairs, House of Representatives, Australia
17	G O'Brien, Principal Clerk of Committees, Senate, Canada
18	Hon K Rozzoli MP, Legislative Assembly, NSW
19	R Bryce
20	B Mills

¹¹⁹ Position titles shown for authors are those held at the time the submission was received, which in most cases was 1997.

Appendix 3

Provisions in other Parliaments

Provisions in other Parliaments

The disqualification provisions applying in other Australia Parliaments and New Zealand in relation to government contractors and office of profit are outlined below.

GOVERNMENT CONTRACTORS

Commonwealth

Current provisions

Section 44(v) of the *Constitution Act 1901* (Cth) states that any person who has a “pecuniary interest” in an agreement with the public service of the Commonwealth is incapable of being chosen or sitting as a Member. The disqualification does not apply to an interest held in common with other members of an incorporated company consisting of more than 25 persons. If a sitting Member becomes the holder of such an interest, his or her seat becomes vacant.¹²⁰ A monetary penalty applies to any Member who sits in the House while disqualified.¹²¹

Related provisions

Under section 45(iii) of the *Constitution Act*, a Member’s seat becomes vacant if he or she takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or rendered in the Parliament to any person or State.

Inquiries

In 1981 the Senate Standing Committee on Constitutional and Legal Affairs conducted an inquiry into the qualifications for membership of federal Parliament, including section 44(v) of the federal Constitution.¹²² In its report on the inquiry, the Committee expressed concern that section 44(v) is uncertain in scope, and may cover an unnecessarily broad range of transactions, including government insurance, leases of residential premises from the Crown, compensation payments for property compulsorily acquired, and loans made to or from the Commonwealth.¹²³ The Committee also noted that the meaning of “public service of the Commonwealth” is not entirely clear, and could include a variety of non-departmental instrumentalities.¹²⁴

In light of these difficulties, the Committee believed that section 44(v) required reform. Six possible options for reform were examined. The option preferred by the Committee was to replace the existing provisions with a general constitutional power enabling the Parliament to prescribe detailed provisions

¹²⁰ *Constitution Act 1901* (Cth), section 45(i).

¹²¹ *Constitution Act 1901*, section 46; *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth)

¹²² Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional qualifications of Members of Parliament*, 1981.

¹²³ Para 7.15.

¹²⁴ Para 7.16.

on this issue as it saw fit. The new provisions envisioned by the Committee were to be quite broad, setting out:

- the interests, direct or indirect, pecuniary or otherwise, which shall not be held by a Member;
- the circumstances which constitute the exercise of improper influence by or in relation to a Member, and action which shall be taken with respect to such an exercise; and
- the procedures by which any matters arising under such laws may be resolved.¹²⁵

Within this general framework, the Committee believed that the new provisions should deal with matters such as government contractors,¹²⁶ fees, honorariums and benefits,¹²⁷ gifts, hospitality and sponsored travel,¹²⁸ and bribery.¹²⁹

In 1985, the Structure of Government Sub-Committee of the Australian Constitutional Convention reported that it agreed with the 1981 Committee's recommendations.¹³⁰ In addition, it recommended that any repeal of sections 44(v) and 45(iii) should not come into effect until Parliament has legislated in relation to pecuniary interests pursuant to the proposed new provision.¹³¹

In 1988, the Australian Constitutional Commission noted that the meaning and extent of sections 44(v) and 45(iii) are uncertain.¹³² To address the issue, the Commission recommended that the Parliament have power to make laws to disqualify Members who hold interests which might constitute a material risk of conflict between their public duty and private interests, and to disqualify any person convicted of an offence relating to corrupt practices or improper influence.¹³³ Subject to such law, the existing constitutional provision should continue to apply to any person with a pecuniary interest in any agreement with the public service of the Commonwealth.¹³⁴ However, the disqualification within section 44(iii) regarding fees and honoraria should no longer apply.¹³⁵

¹²⁵ Para 7.37.

¹²⁶ Para 7.40.

¹²⁷ Para 7.41.

¹²⁸ Para 7.42.

¹²⁹ Para 7.43.

¹³⁰ Australian Constitutional Convention Structure of Government Sub-committee, *Report on Constitutional Qualifications of Members of Parliament*, February 1985, p. 7.

¹³¹ *ibid.*

¹³² Constitutional Commission, Final Report, 1988, Vol. 1, paras 4.877-8, 4.879.

¹³³ *ibid.*, para 4.864.

¹³⁴ *ibid.*, para 4.864.

¹³⁵ *ibid.*

Western Australia

The Western Australian Parliament repealed this ground of disqualification in 1984,¹³⁶ following recommendations by two committees in 1971 and 1982. In 1971, the Western Australian Law Reform Committee recommended that the disqualification be repealed, noting that the Standing Orders of the Legislative Assembly prohibit a Member from voting on a question in which he or she has a pecuniary interest, as well as the existence of provisions of the criminal code relating to bribing of Members.¹³⁷ The Committee also noted the arguments in favour of repeal which had been identified by a House of Commons select committee in 1956, namely:

- the extreme difficulty of drafting satisfactory provisions to cover all the possible contractual arrangements in which a Member may become subject to the influence of the Government;
- the inherent power of the House to deal with Members for contempt.¹³⁸

In 1982, the Joint Select Committee on Offices of Profit of Members of Parliament and Members Contracts with the Crown also recommended abolition of the contracts disqualification.¹³⁹ Apart from the reasons noted by the earlier committee, this Committee was concerned that disqualification as a penalty is severe, involving costs to the State in investigating claims and conducting elections to fill vacated seats. The Committee also recommended that the Joint Standing Orders Committee be required to consider preparing draft Standing Orders which would permit an appropriate body responsible to Parliament to investigate the conduct of Members in relation to their financial dealings with the Crown.¹⁴⁰

South Australia

Provisions corresponding to section 13 in NSW were repealed in 1994.¹⁴¹ Members are now required to disclose particulars of contracts made by them or by a related person with the Crown, where the monetary consideration is \$7500 or more.¹⁴²

¹³⁶ Gerard Carney, *Members of Parliament: law and ethics*, Prospect Media Pty Ltd, 2000, p. 113.

¹³⁷ Western Australian Law Reform Committee, *Disqualification for membership of Parliament: offices of profit under the Crown and government contracts*, First Programme - Project No. 14, March 1971, para. 40.

¹³⁸ *ibid.*

¹³⁹ Parliament of Western Australia, *Report of the Joint Select Committee of the Legislative Council and Legislative Assembly on Offices of profit of Members of Parliament and Members contracts with the Crown*, November 1982, p. 26, recommendation (24).

¹⁴⁰ *ibid.*, p. 27, recommendation (25).

¹⁴¹ Gerard Carney, *Members of Parliament: law and ethics*, Prospect Media Pty Ltd, 2000, p. 119.

¹⁴² *ibid.*; *Members of Parliament (Register of Interests) Act 1983* (SA), section 4(2)(ea).

Queensland

Current provisions

The current Queensland disqualification is similar to section 13, except that it is limited to contracts or agreements for the furnishing of *wares and merchandise* to be used in the service of the public.¹⁴³ Exceptions to the prohibition include interests in land held under the Crown, certain workers compensation contracts, and loans to the Crown.¹⁴⁴

A separate provision states that if a Member transacts any business or performs any service for the Crown, neither the Member nor any other person is entitled to receive fees for the service, and the question of whether the Member should continue as a Member must be determined by resolution of the Assembly.¹⁴⁵ There are various exceptions, including if the Member irrevocably waives the entitlement to the fee or reward.¹⁴⁶

Parliament of Queensland Act 2001

In 2000, the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament reported on the consolidation of the Queensland Constitution, and attached to its report a draft Parliament of Queensland Bill.¹⁴⁷ The Bill was passed in 2001 (*Parliament of Queensland Act 2001*), and comes into effect on 6 June 2002 (section 2).

This Act will introduce a prohibition on Members transacting business with an entity of the State (section 71(1)). “Transact business” is defined to mean: (a) has a direct or indirect interest in a contract with an entity of the State; or (b) performs a duty or service for reward for an entity of the State (section 70(1)). Exceptions include where the Member irrevocably waives any entitlement to reward (section 70(3)).

The consequences of transacting business with the State are:

- the contract is invalid to the extent of the contravention (section 71(2));
- the Member is precluded from receiving any reward in relation to the contract or service (section 71(2) and (3));
- the Member’s seat becomes vacant if the Legislative Assembly decides by resolution that the Member has contravened the provision and decides not to excuse the contravention. The Assembly may excuse the contravention if the ground of disqualification is no longer effective, was trifling, and arose without the knowledge or consent of the Member, or was inadvertent or accidental (section 72(1)(h)(ii); section 73(3)).

¹⁴³ *Constitution Act 1867*, sections 6, 7, and 7A(1); *Legislative Assembly Act 1867*, section 7(1).

¹⁴⁴ *Constitution Act 1867*, section 7A(2).

¹⁴⁵ *Legislative Assembly Act 1867*, section 7B.

¹⁴⁶ *ibid*, section 7B(4).

¹⁴⁷ LCARC, *Review of the Queensland Constitutional Commission’s recommendations relating to a consolidation of the Queensland Constitution*, Report No. 24, July 2000.

Tasmania

The Tasmanian contracts disqualification resembles the current NSW provision.¹⁴⁸ However, a number of different exceptions apply, including:

- a contract entered into before nomination for election as a Member that is terminated or rescinded within six months of the person's election;¹⁴⁹
- a contract with a corporation having more than 30 members, where the extent of the Member's interest, including that of his or her family, is no more than one-fifth of either the issued shares or the voting rights in the corporation, or a related corporation.¹⁵⁰

Victoria

A person who has an interest in any contract entered into by or on behalf of Her Majesty in right of the State of Victoria, or who participates in the profit of such a contract, shall not sit or vote in the House. The election of such person to Parliament is void.¹⁵¹ If any Member who acquires an interest in such a contract, his or her seat becomes vacant.¹⁵² Certain exceptions apply.¹⁵³

A further disqualification applies in the case of any Member who transacts business for or on behalf of the Crown for reward.¹⁵⁴

Northern Territory

The relevant provision in the Northern Territory is confined to contracts made by or on behalf of the Territory under which goods or services are to be supplied to the Territory. A Member who has an interest in such a contract may not take part in a discussion of or vote on a question which relates directly or indirectly to the contract.¹⁵⁵

A further provision states that if a Member takes any remuneration or honorarium for services rendered in the Legislative Assembly, other than in accordance with legislative provisions relating to remuneration of Members of Parliament, his or her seat becomes vacant.¹⁵⁶

¹⁴⁸ *Constitution Act 1934* (Tas), section 32(1).

¹⁴⁹ *ibid*, section 33(4).

¹⁵⁰ *ibid*, section 33(2)-(2B).

¹⁵¹ *Constitution Act 1975* (Vic), section 54.

¹⁵² *ibid*, section 55.

¹⁵³ *ibid*, section 56(2), and section 57.

¹⁵⁴ *ibid*, section 55(c).

¹⁵⁵ *Northern Territory (Self Government) Act 1978* (Cth), section 21(3).

¹⁵⁶ *ibid*, section 21(2)(e).

Australian Capital Territory

The ACT provisions are similar to the Northern Territory provisions except that they are not confined to contracts for goods or services.¹⁵⁷

OFFICE OF PROFIT

House of Commons (UK)

In 1956 a select committee of the House of Commons recommended that, rather than relying on a general disqualification for office of profit, the particular offices or classes of office which result in disqualification for membership of Parliament should be clearly specified. The Committee saw this approach as promoting two important principles:

- that qualification for membership of the House of Commons should be on as wide a basis as possible; and
- that any restrictions on membership of the House of Commons which might have to be imposed should be contained in legislation which is in a form easily interpreted by and readily available to those who might be directly affected.¹⁵⁸

Legislation reflecting the Committee's recommendations was passed in 1957, and re-enacted in 1975 (*House of Commons Disqualification Act 1975*). This Act provides that a person shall not be disqualified for membership of the House of Commons by reason of holding an office of profit under the Crown (or any other office), except as provided.¹⁵⁹ The following persons are disqualified:

- (a) Persons employed in certain capacities in the public service, including:
 - (i) persons employed either whole- or part-time in the Civil Service
 - (ii) members of the regular armed forces (which is defined; reserve and auxiliary forces are excluded)
 - (iii) persons employed as members of any police force maintained by a police authority within the meaning of specified legislation.
- (b) Persons holding particular offices mentioned in Schedule 1, including:
 - (i) judicial offices specified in Part I of Schedule 1;
 - (ii) members of public bodies specified in Part II of Schedule 1;
 - (iii) residual offices specified in Part III (eg Ambassadors, chairmen of specified public boards, councils, tribunals).

¹⁵⁷ *Australian Capital Territory (Self Government) Act 1988 (Cth)*, section 15.

¹⁵⁸ *Special Report from the Select Committee on the House of Commons Disqualification Bill*, House of Commons Paper 349 (1955-56), paragraph 1.

¹⁵⁹ Section 1(4).

If a person who holds a specified office is elected as a Member, their election is void.¹⁶⁰ If a Member becomes the holder of a specified office, the Member's seat becomes vacant.¹⁶¹ However, if it appears to the House that the grounds of disqualification have been removed, and it is otherwise proper to do so, the House may by order direct that any disqualification be disregarded.¹⁶²

Schedule 1 to the Act may be amended by Order in Council on resolution by the House of Commons.¹⁶³ Acts creating new offices or bodies commonly provide for the insertion of these offices or bodies in the relevant part of the Schedule.¹⁶⁴

The Act limits to 95 the number of holders of ministerial office entitled to sit and vote in the House of Commons at any one time.¹⁶⁵

Commonwealth

Current provisions

Under section 44(iv) of the Commonwealth Constitution, any person who holds an office of profit under the Crown, or pension payable during the pleasure of the Crown, is incapable of "being chosen" or of sitting as a Member.¹⁶⁶ If a Member becomes the holder of such an office of pension, his or her seat becomes vacant.¹⁶⁷ Exceptions include: Commonwealth or State Ministers; part-time members of the naval or military forces of the Commonwealth. The process of "being chosen" includes nomination for election as a Member.¹⁶⁸

Relevant inquiries since 1981

In 1981 the Senate Standing Committee on Constitutional and Legal Affairs conducted an inquiry into the constitutional qualifications for membership of federal Parliament, including section 44(iv). In its report, the Committee noted that the meaning of the expression "office of profit under the Crown" is uncertain. However, it supported preservation of the core concepts of the disqualification. Further, it believed that two issues should be taken into account in any reform of the section: the need to ensure that a Member is not simultaneously in receipt of two salaries from the public purse; and the need to

¹⁶⁰ *House of Commons Disqualification Act 1975*, section 6(a).

¹⁶¹ *ibid*, section 6(b).

¹⁶² *ibid*, section 6(2).

¹⁶³ *ibid*, section 5(1).

¹⁶⁴ *Erskine May's Parliamentary Practice*, 22nd ed, p. 50.

¹⁶⁵ *House of Commons Disqualification Act 1975*, section 2.

¹⁶⁶ *Constitution Act 1901*, section 44(iv).

¹⁶⁷ *ibid*, section 45(i)

¹⁶⁸ *Sykes v Cleary* (1992) 176 CLR 77.

ensure that public servants are not discouraged from standing for Parliament by a requirement (such as exists at present under section 44(iv)) to resign before nominating.¹⁶⁹

The Committee identified various broad classes of offices which it viewed as incompatible with the office of Member of Parliament, including: Commonwealth and State public servants, and persons who hold a position with a Commonwealth or State statutory authority. In relation to offices within these classes, the Committee recommended that:

- a Member who accepts such an office should be disqualified from the House;
- an elected candidate holding such an office should be deemed to have vacated the office at the time they become entitled to a parliamentary allowance.¹⁷⁰

The Committee recognised that there are circumstances where it would be undesirable for public servants to continue working during an election campaign, eg where the public servant position involves sensitive areas of government policy, or the potential for political controversy. However, it noted that its recommendations would not preclude such persons taking leave.¹⁷¹

In relation to statutory authorities, the Committee recommended an exception to the disqualification in cases where the authority is prescribed by Parliament, and no remuneration attaches to the position other than reimbursement of reasonable expenses.¹⁷² The purpose of this exception was to permit such bodies to benefit from the advice and experience of parliamentarians, and to ensure the Parliament's right to representation on such bodies where necessary.¹⁷³

The Committee suggested certain guidelines that could be used when the Parliament is deciding which statutory authorities should be included within the prohibition. The guidelines took account of matters such as whether membership of the particular authority will involve the member in political controversy, or affect the member's duty of impartial judgement.¹⁷⁴

In 1985 the Australian Constitutional Convention, Structure of Government Sub-Committee examined the recommendations of the 1981 Senate Committee inquiry. The Sub-Committee supported the Committee's recommendations in general, but expressed concern over some matters, in particular:

- the candidature of public servants could raise management problems for the employer body (but those problems were not considered to be insurmountable);

¹⁶⁹ Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional qualifications of Members of Parliament*, 1981, para 5.23.

¹⁷⁰ Para 5.83.

¹⁷¹ Para. 5.22.

¹⁷² Paras 5.47; 5.83.

¹⁷³ Paras 5.46; 5.52.

¹⁷⁴ Para 5.48.

- the specification of office-holders in the recommended provision needed further consideration, as certain officials, such as judges and employees of non-statutory authorities, were not included.¹⁷⁵

In 1988, the Final Report of the Australian Constitutional Commission noted the uncertainty of the meaning of section 44(iv), and its discriminatory impact on public servant candidates¹⁷⁶ (referred to earlier). However, it took the view that it is important to prevent “double-dipping” (ie remuneration from two sources under the Crown) and the appearance of divided loyalty (ie to the Commonwealth and a State or Territory).¹⁷⁷

The Report identified the following classes of office as being incompatible with the office of Member of Parliament:

- judicial office under the Crown in the Commonwealth, a State, or Territory
- public service of the Commonwealth, a State or a Territory
- member of a ‘public authority’ [as defined]
- officer of or employed by a public authority which has been declared by the Parliament to be a prescribed authority for the purpose of this paragraph
- member of the Defence Force
- Member of legislature of a State or Territory.¹⁷⁸

In relation to these classes, the Report recommended that:

- if a sitting Member becomes the holder of one these offices, the Member should lose his or her seat¹⁷⁹
- if a holder of any of such office is elected to Parliament, he or she should be deemed to have ceased to hold the office, on the day immediately preceding the day before he or she becomes entitled to an allowance as a Member.¹⁸⁰

In 1997, the Joint Standing Committee on Electoral Matters conducted an inquiry into the conduct of the 1996 Federal Election and related matters. In the course of its report, the Committee expressed concern at the impact of section 44(iv) on public servant candidates. To address this problem, the Committee recommended that a referendum be held on applying the “office of profit” disqualification in section 44(iv) from the start of a Member’s term, rather than from the time of nomination.¹⁸¹

¹⁷⁵ Australian Constitutional Convention Structure of Government Sub-committee, *Report on constitutional qualifications of Members of Parliament*, pages 4-5.

¹⁷⁶ Constitutional Commission, *Final Report*, 1988, Vol 1, para 4.855.

¹⁷⁷ Para 4. 860.

¹⁷⁸ Constitutional Commission, *Final Report*, 1988, Vol 2, p. 1001, Bill No. 8, Appendix K, clause 45.

¹⁷⁹ *ibid*, clause 46.

¹⁸⁰ *ibid*, clause 45.

¹⁸¹ Joint Standing Committee on Electoral Matters, *Report of the inquiry into the conduct of the 1996 Federal Election and matters related thereto*, June 1997, Recommendation 39; para 6.22.

In the same year, the House of Representatives Standing Committee on Legal and Constitutional Affairs, issued a report entitled *Aspects of Section 44 of the Australian Constitution, Subsections (i) and (iv)*. In line with previous inquiries, this report noted that the scope of the expression “office of profit under the Crown” is uncertain, and in particular noted that it is not clear whether it applies to employees and members of the governing bodies of statutory authorities, employees of authorities established under the Corporations Law and wholly or partially owned by the Commonwealth,¹⁸² or local government councillors.¹⁸³

The Committee considered that:

1. The holders of certain public offices (which would include most public servants¹⁸⁴) should be deemed to have vacated their public service office if elected to Parliament.¹⁸⁵ However, they should be required to take leave during the election campaign.¹⁸⁶
2. Some public sector positions are so sensitive that the occupants should be required to relinquish their office before nominating for election eg judges, governor of the Reserve Bank, heads of Commonwealth public service departments.¹⁸⁷ With the exception of judicial offices, these positions should be deemed to be vacated at nomination.
3. Judicial officers under the Crown in right of the Commonwealth, a State, or Territory, should be required by the Constitution to resign before nominating.

The Committee considered that the offices falling within the first two categories should be specified by the Parliament, in legislation or in a schedule to the Constitution. This reflected evidence received by the Committee that it was desirable to specify the particular offices which are inconsistent with membership of Parliament,¹⁸⁸ as in the UK and Western Australia,¹⁸⁹ rather than rely on a general provision. The Committee observed that incorporation of the list of offices in separate legislation would allow the list to be adjusted from time to time, as the subject matter is in constant flux.¹⁹⁰

The Government has issued a response to the Committee’s report. The response expresses support for the replacement of section 44(iv) with new provisions broadly consistent with those recommended by

¹⁸² House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of section 44 of the Australian Constitution, subsections 44(i) and (iv)*, July 1997, para 3.28.

¹⁸³ Paras 3.31-3.32, recommendation 3, para 3.96, fourth paragraph.

¹⁸⁴ Para 3.81.

¹⁸⁵ Para 3.81, 2.

¹⁸⁶ Para 3.73.

¹⁸⁷ Para 3.92.

¹⁸⁸ Para 3.75.

¹⁸⁹ Para 3.91.

¹⁹⁰ Paras 3.88; 3.91.

the Committee.¹⁹¹ However, it states that the Government needs to give consideration to a number of issues before deciding on the final form of the proposal.¹⁹² If there is adequate support for a suitable proposal, the Government would be disposed to put the constitutional issue to a referendum, at an appropriate time.¹⁹³

Western Australia

The current position in WA reflects the recommendations of two committees which investigated the issue in 1971 and 1982.¹⁹⁴ Both committees recommended that, as in the UK, the particular disqualifying offices or classes of office should be specified as it is not possible to set out general criteria with sufficient precision.¹⁹⁵

The current provisions are contained in the *Constitution Acts Amendment Act 1899*. Under that Act, no person is disqualified for membership of the legislature by reason of holding an office of profit under the Crown, except as provided by the Act.¹⁹⁶ All disqualifying offices, or classes of office, are listed in the Act and schedules. There are three different classes of office listed:

(1) *Offices listed in Part 1 of Schedule V*

The offices listed in Part 1 are the most senior offices of the State: members of judiciary, Auditor General, Senior Executive Officers. If a person holding such an office is elected to Parliament, their election is void.¹⁹⁷

(2) *Offices listed in Parts 2 or 3 of Schedule V*

Part 2 includes the office of any person employed in a department or SES organisation within the meaning of the Public Sector Management Act, members of the police force, and teaching staff appointed under the Education Act. Part 3 contains a list of statutory authorities. If a

¹⁹¹ *Government response to the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of section 44 of the Constitution', pp. 2-3, attached to correspondence from the Acting Secretary to that Committee, Catherine Cornish, to this Committee, dated 5 June 5001.*

¹⁹² *ibid*, p. 1.

¹⁹³ *ibid*.

¹⁹⁴ *Western Australian Law Reform Committee, Disqualification for membership of Parliament: Offices of profit under the Crown and government contracts, First Programme – Project No. 14, March 1971; Joint Select Committee on Offices of Profit of Members of Parliament and Members contracts with the Crown, Report, 1982.*

¹⁹⁵ *Western Australian Law Reform Committee, paras 24, 25; Joint Select Committee on Offices of Profit of Members of Parliament and Members Contracts with the Crown, pp 5-6, recommendations (3), (8), (10), (20) and (21).*

¹⁹⁶ *Constitution Acts Amendment Act 1899, section 33*

¹⁹⁷ *ibid*, sections 35(2), 34(1).

person holding any such office is elected, the person vacates the office on the declaration of their election.¹⁹⁸

- (3) *Offices or places in the service of the Crown in right of the Commonwealth or another State of the Commonwealth, etc.*

If a person holding such an office is elected to the Western Australian Parliament, the person's seat as a Member becomes vacant after a specified period of time following their election, unless he or she resigns from or otherwise ceases to hold the office within that time.¹⁹⁹

In the case of sitting Members, there is no distinction between the three classes of office. If a sitting Member becomes the holder of any office within any of the classes, his or her seat becomes vacant.²⁰⁰ However, if the Member resigns from or otherwise ceases to hold the office and it is otherwise proper to do so, the legislature may by resolution of both Houses direct that his or her becoming the holder of the office be disregarded.²⁰¹

The Governor may, by Order in Council, amend the schedule to the Act which contains the lists of offices, provided the making of the Order has been recommended by resolution passed by both Houses.²⁰²

Victoria

Under the Victorian *Constitution Act 1975*, if a person who holds an office of profit under the Crown is elected to Parliament, the person ceases to hold the office of profit on their election.²⁰³ If a Member becomes the holder of an office of profit under the Crown, the Member is disqualified.²⁰⁴ Exceptions include: Ministers,²⁰⁵ part-time member of Commonwealth defence forces.²⁰⁶

If it appears to the House that any matter has caused the seat of a Member to become vacant, and the matter has ceased to have effect, was of a trifling nature, and occurred without the actual knowledge or

¹⁹⁸ *ibid*, section 37(3).

¹⁹⁹ section 36(1), (9), (10).

²⁰⁰ Part I offices: section 38(b), section 34(1); Part 2 or 3 offices: section 38(c); offices in other jurisdictions: section 38(c).

²⁰¹ Section 39.

²⁰² Section 42.

²⁰³ *Constitution Act 1975* (Vic), section 61.

²⁰⁴ *ibid* sections 49 and 55(d); Carney, p. 86.

²⁰⁵ *ibid*, s. 50, and 53(1).

²⁰⁶ *ibid*, section 60.

consent of the person, the House may by resolution direct that the matter be deemed never to have occurred.²⁰⁷

A Member who accepts an office of profit under the Crown is liable to a penalty of \$100 for each week the office is held.²⁰⁸ In addition, any person who wilfully contravenes or fails to comply with any of the provisions of the *Constitution Act* relating to office of profit, among others, is liable to a penalty of \$500.²⁰⁹

South Australia

A person who holds an office of profit under the Crown is incapable of being elected to Parliament unless he or she resigns from the office before the declaration of the poll.²¹⁰

If a Member becomes the holder of an office of profit under the Crown, the Member's seat becomes vacant.²¹¹ Exceptions: offices required by any Act to be held by Members of Parliament;²¹² the office of Minister or Parliamentary Secretary to the Premier;²¹³ salaried member of a Royal Commission.²¹⁴

Tasmania

In Tasmania, the disqualification applies to a person who holds or accepts an:

office of profit or emolument by the appointment of –

- (a) the Governor or the Governor in Council; or
- (b) a State instrumentality²¹⁵(as defined²¹⁶)

Exceptions: Ministers;²¹⁷ where otherwise expressly provided.²¹⁸

²⁰⁷ *ibid*, section 61A.

²⁰⁸ *ibid*, s. 58.

²⁰⁹ *ibid*, s. 59.

²¹⁰ *Constitution Act 1934 (SA)*, section 45(2).

²¹¹ *ibid*, section 45(1).

²¹² *ibid*.

²¹³ *ibid*, section 45(1a).

²¹⁴ *ibid*, section 54A.

²¹⁵ *Constitution Act 1934 (Tas)*, section 32(1).

²¹⁶ *ibid*, sections 32(4), 33(6).

²¹⁷ *Constitution Act 1934 (Tas)*, section 32(2).

²¹⁸ *ibid*.

Under separate provisions, no judge of the Supreme Court, and no person holding any office of profit of the kind referred to above is capable of being elected to, or of holding, a seat in either House.²¹⁹ If any Member becomes the holder of such an office, his or her seat becomes vacant.²²⁰

Queensland

Current provisions

The provisions apply to an “office or place of profit under the Crown or any position of the prescribed description”.²²¹ The expression “position of the prescribed description” is defined.²²² The Crown is the Crown in right of Queensland.²²³

If the holder of such an office is elected to Parliament, their appointment to the office terminates on the date of their election.²²⁴ If a Member is appointed to such an office, the appointment is void.²²⁵

A Member is permitted to be appointed to an office of profit if he or she is not entitled to or does not receive any fee or reward, or “irrevocably waives” any entitlement to fee or reward from the office.²²⁶ “Fee or reward” does not include reimbursement of “reasonable expenses”, which includes accommodation, meals, domestic air travel, taxi fares, public transport charges or motor vehicle hire.²²⁷

Section 5 of the *Officials in Parliament Act 1896* contains certain other provisions relating to office of profit. The Queensland Crown Solicitor has advised that section 5 is impliedly repealed to the extent that it is inconsistent with the provisions of section 7A of the *Legislative Assembly Act 1867*.²²⁸

²¹⁹ *ibid*, section 32(3).

²²⁰ *ibid*, section 32(1).

²²¹ *Legislative Assembly Act 1867* (Qld), section 7A(1), (2).

²²² *ibid*, section 7D(1).

²²³ *ibid*, section 7D(2).

²²⁴ *ibid*, section 7A(3).

²²⁵ *ibid*, section 7A(2).

²²⁶ *ibid*, section 7A(4), (5).

²²⁷ *ibid*, section 7D(3).

²²⁸ LCARC, *Review of the Queensland Constitutional Commission’s recommendations relating to a consolidation of the Queensland Constitution*, Report No. 24, July 2000, Notes to the Bill, Part III, p. 16. See Electoral and Administrative Review Commission’s 1993 *Report on Consolidation and Review of the Queensland Constitution*, pp. 76-83, and Crown Solicitor’s opinion at Appendix E.

Parliament of Queensland Act 2001

In 2000, the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament reported on the consolidation of the Queensland Constitution, and attached to its report a draft Parliament of Queensland Bill.²²⁹ This Bill was passed in 2001 (*Parliament of Queensland Act 2001*), and comes into effect on 6 June 2002 (section 2).

The relevant provisions of the new Act use the expression "paid public appointment". The definition of this term includes an office under or employment by another State or the Commonwealth, or appointment to a local government of any State or the Commonwealth, or an entity of a State or the Commonwealth (section 65(1)). It excludes an appointment where neither the Member nor any other person is entitled to receive any "reward" (section 65(3)(c)). As under the current provisions, "reward" does not include reasonable expenses incurred for accommodation, meals, domestic air travel or motor vehicle hire (section 65(6)).

Candidates

Candidates holding a paid public appointment will be required to take leave for the election period (currently optional²³⁰) (section 66). However, candidates holding certain prescribed senior government positions will be required to resign before nominating, or else be deemed to have done so, eg auditor-general, Crown Solicitor, anti-discrimination commissioner (section 67).

Local Government councillors and holders of paid public appointments outside the State, will be required to resign before taking up their seat (section 68). Those occupying vice-regal positions and any judicial office will be expressly disqualified (section 64(3)).

Members

If a Member is appointed to a "paid State appointment", the appointment will be of no effect (section 69(2)), as at present. However, a Member's seat will become vacant if the Member accepts a paid public appointment outside the State (section 72(1)(f)) or becomes elected to a local government council (section 72(1)(g)).

The Assembly will be able to declare by resolution that a disqualifying ground is of no effect if satisfied that the ground has ceased to have effect, that it was in all the circumstances trivial in nature, and that it happened or arose without the actual knowledge or consent of the person or member or was accidental or due to inadvertence (section 73(3)).

Australian Capital Territory

In the ACT the relevant provisions apply to a person who holds an office under any law of, or is employed by, the Commonwealth, a State, or a Territory, and is entitled to remuneration or allowance (other than reimbursement of expenses reasonably incurred) in respect of the office, appointment or employment.²³¹

²²⁹ LCARC, *Review of the Queensland Constitutional Commission's recommendations relating to a consolidation of the Queensland Constitution*, Report No. 24, July 2000.

²³⁰ Carney, p. 87.

²³¹ *Electoral Act 1992* (ACT), section 103(2).

Such a person may nominate for election as a Member,²³² but must resign from the office in order to be eligible to become a Member,²³³ by the day their election as a Member is declared.²³⁴

If a Member becomes the holder of such an office, he or she is no longer “eligible to be a Member”.²³⁵

Northern Territory

In the Northern Territory, the relevant provisions apply to offices similar to those described in the ACT provisions.²³⁶

A person holding such office at the date of nomination is not eligible for election.²³⁷ If a Member becomes the holder of a relevant office his or her seat becomes vacant.²³⁸

New Zealand

Any “State servant” (which is defined) who desires to become a candidate for election as a Member is placed on leave of absence for the purposes of his or her candidature,²³⁹ from nomination day until the first working day after polling day.²⁴⁰

However, where the employer of any State servant is satisfied that the candidacy will materially affect the ability of the State servant to carry out satisfactorily his or her duties, or to be seen as independent in relation to particular duties, the period of leave commences before nomination day, on a day appointed by the employer following consultation with the State servant.²⁴¹

If any State servant is elected as a Member of Parliament, he or she is deemed to have vacated his or her office as a State servant on being declared elected.²⁴²

If a Member becomes a “public servant”, his or her seat becomes vacant.²⁴³

²³² *ibid*, section 104(b).

²³³ *ibid*, section 103(2).

²³⁴ *Australian Capital Territory (Self-Government) Act 1988 (Cth)*, section 10, referred to by Carney, p. 161.

²³⁵ *Electoral Act 1992 (ACT)*, section 103.

²³⁶ *Northern Territory (Self-Government) Act 1978 (Cth)*, section 21.

²³⁷ *Northern Territory (Self-Government) Act 1978 (Cth)*, section 21(1).

²³⁸ *Northern Territory (Self-Government) Act 1978 (Cth)*, section 21(2)(a).

²³⁹ *Electoral Act 1993 (NZ)*, section 52(1), (2).

²⁴⁰ *ibid*, section 52(3).

²⁴¹ *ibid*, section 52(4).

²⁴² *ibid*, section 53(2).

²⁴³ *ibid*, section 55(1)(e).

Appendix 4

Crown Solicitor's advice

(Not available electronically. For hard copy, contact Committee secretariat: privilege@parliament.nsw.gov.au)

Appendix 5

Minutes of the Committee's proceedings

Minutes from the 51st Parliament

Note: asterisks indicate text omitted as not related to this inquiry.

MEETING No 40

Wednesday 25 June 1997

at Parliament House (Waratah Room), Sydney at 10.25 am

MEMBERS PRESENT

Dr Burgmann (in the chair)

Ms Gardiner

Mr Vaughan

Apologies were received from Mr Johnson, Mr Manson, Mr Lynn, Mr Jones.

Minutes of previous meeting of 29 May 1997 were confirmed on the motion of Ms Gardiner.

(ii) Office of profit inquiry

The Committee deliberated.

Resolved, on motion of Mr Vaughan: That the Clerk prepare and place advertisements calling for submissions in relation to the Offices of Profit inquiry, to be published in the Sydney Morning Herald, the Daily Telegraph, the Australian, and selected regional newspapers and publications.

Resolved, on motion of Ms Gardiner: That the closing date for submissions to the Committee's Offices of Profit inquiry be 19 September 1997.

Resolved, on motion of Mr Vaughan: That the Chair write to Clerks in all Australian Parliaments, and to overseas Parliaments at the discretion of the Chair and Clerk, informing them of the Committee's inquiry and requesting details of any similar current or concluded inquiries in those Parliaments.

Resolved, on motion of Ms Gardiner: That the Clerk prepare a brief public discussion paper on the purpose and nature of the inquiry to be made available to any individual or organisation wishing to make a submission to the inquiry.

Resolved, on motion of Mr Vaughan: That the Chair write to the Premier, the Leader of the Opposition, the Leader of the House in the Legislative Council, the Leader of the Opposition in the Legislative Council, the cross-bench Members of the Legislative Council, and the independent Members of the Legislative Assembly, informing them of the Committee's inquiry into Office of Profit under the Crown.

The Committee adjourned at 10.55am, *sine die*.

Lynn Lovelock
Clerk to the Committee

MEETING No 41

Tuesday, 12 August 1997

at Parliament House, Sydney at 2.30pm

MEMBERS PRESENT

Dr Burgmann (in the chair)

Ms Gardiner Mr Vaughan
Mr Johnson

Apologies were received from Mr Manson, Mr Lynn, Mr Jones.

Minutes of previous meeting held 25 June 1997 were confirmed, on motion of Mr Johnson.

The Chair tabled the following correspondence.

Correspondence sent:

- (1) Letters from the Chair, outlining the Committee's inquiry into Office of Profit to:
 - (a) Premier; Leader of the Opposition; Leader of the House in the Legislative Council; Leader of the Opposition in the Legislative Council; Cross-bench Members of the Legislative Council; Independent Members of the Legislative Assembly; Clerks in all Australian Parliaments and Parliaments in New Zealand, United Kingdom, Canada and the United States. The letters to the Clerks of Parliaments also requested details of any similar current or concluded inquiries in those Parliaments.
 - (b) NSW Electoral Commissioner; Chairman of the NSW Law Reform Commission; NSW Crown Solicitor; NSW Parliamentary Counsel; and Commissioner of the ICAC.
- (2) Letters to three members of the public who were interested in the Office of Profit inquiry, enclosing the Inquiry Information.

Correspondence received:

- (1) Letters had been received from Clerks of Australian and overseas Parliaments acknowledging the inquiry and including various information. A letter had also been received from the ICAC Commissioner informing the Committee of the inquiry of the Joint Committee on the ICAC into section 13A of the NSW Constitution.

The Committee deliberations:

(i) Office of Profit Inquiry

The Committee agreed to hold public hearings from 10.00am to 1.00pm on Friday, 17 October; and from 10.00am to 4.00pm on Monday, 20 October 1997.

It was also agreed that the Office of Profit Inquiry Information be circulated to all Members of the NSW Parliament, as well as various academics including political scientists and legal academics with a particular knowledge of constitutional and electoral issues.

The Committee agreed that in light of the reference of the Joint Committee on the ICAC to inquire into section 13A of the NSW Constitution, the Members of that Committee be invited to attend this Committee's public hearings in October in relation to sections 13 and 13B of the NSW Constitution, as observers.

The Committee adjourned at 3.30pm, *sine die*.

Lynn Lovelock
Clerk to the Committee

MEETING No 42

Thursday, 25 September 1997

at Parliament House, Sydney at 1.00pm

MEMBERS PRESENT

Dr Burgmann (in the chair)

Ms Gardiner	Mr Manson
Mr Jones	Mr Vaughan
Mr Lynn	

Apologies were received from Mr Johnson.

Minutes of previous meeting held 12 August 1997 were confirmed, on motion of Ms Gardiner.

The Chair tabled the following correspondence.

Correspondence sent:

- (1) Letter from the Chair to Peter Nagle MP, inviting Members of the LA Standing Ethics Committee to attend hearings of this Committee in relation to the Office of Profit Inquiry, as observers.
- (2) Letters from the Chair, inviting submissions from Professor Enid Campbell; Antony Green; Professor Colin Hughes; John Waugh; and Professor George Winterton.
- (3) Letters from the Clerk acknowledging submissions received.

Correspondence received:

- (1) Further letters from Clerks of Australian and overseas Parliaments acknowledging the inquiry and including various legislation and reports.
- (2) A letter from the Hon Kevin Rozzoli MP indicating his intention to make a submission to the inquiry.
- (3) A number of submissions from academics, Members of Parliament, in addition to correspondence received from Clerks of Australian and overseas Parliaments.

*The Committee deliberations:***(i) Office of Profit Inquiry**

The Committee deliberated. The Clerk circulated a list of the submissions received, and a list of key inquiry issues and potential witnesses for the public hearings. The Clerk noted that the public hearings were scheduled for Friday, 17 October 1997 (10.00am - 1.00pm), and Monday, 20 October 1997 (10.00am - 4.00pm).

The Committee adjourned at 1.15pm, until 1.00pm on Thursday, 16 October 1997.

Lynn Lovelock
Clerk to the Committee

MEETING No 43

Thursday, 16 October 1997

at Parliament House, Sydney at 1.00pm

MEMBERS PRESENT

Dr Burgmann (in the Chair)	
Mr Manson	Miss Gardiner
Mr Vaughan	Mr Jones
Mr Johnson	

Apologies were received from Mr Lynn.

Minutes of the previous meeting held 25 September 1997 were confirmed, on the motion of Mr Manson.

The Committee deliberated.

(i) Office of Profit Inquiry

The Committee deliberated.

The Clerk announced that the hearing days had been cancelled as no person was available to make oral submissions to the Committee or felt that they could add to their written submission. The Clerk informed the Committee that there had been no reply from the Joint Committee on the Independent Commission Against Corruption regarding co-operation in the inquiry.

Miss Gardiner moved: That the Chair write to Mr Nagle MP, Chair of the Joint Committee on the ICAC, in relation to the possibility of co-ordinating the reference of the Joint Committee on the ICAC to inquire into section 13A of the NSW Constitution, and this Committee's reference to inquire into sections 13 and 13B of the NSW Constitution.

Debate ensued.

Question put and passed.

The Committee adjourned at 1.40pm, *sine die*.

Lynn Lovelock
Clerk to the Committee

MEETING No 44

Monday, 24 November 1997

at Parliament House, Sydney at 10.00 am

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Mr Manson	Miss Gardiner
Mr Kelly	Mr Lynn
Mr Johnson	Mr Jones

Minutes of the previous meeting held 16 October 1997 were confirmed, on the motion of Mr Johnson.

The Committee deliberated.

(i) Office of Profit inquiry

Resolved, on motion of Mr Johnson: That, in relation to the Committee's Office of Profit inquiry, the Committee shall accept submissions received after the advertised closing date of Friday, 19 September 1997.

The Committee adjourned at 12.21 pm, until 10.00 am on Monday, 1 December 1997.

Lynn Lovelock
Clerk to the Committee

Minutes from the 52nd Parliament

MEETING No. 2

Thursday 31 August 2000

at Parliament House, Sydney at 9.30 am

MEMBERS PRESENT

Ms Sham-Ho (in the Chair)

Ms Gardiner	Revd Mr Nile
Mr Hannaford	Mr Primrose
Mr Johnson	Ms Saffin

Apologies were received from Mr Kelly.

Correspondence sent:

- (iv) Letter dated 27 July 2000 from the Clerk to the Committee to Mr I V Knight, Crown Solicitor, requesting advice in relation to section 13 and 13B of the Constitution Act 1902.

The Committee deliberated.

Resolved, on motion of Mr Johnson: That the Committee's Issues Paper concerning the office of profit inquiry be distributed to members of the Committee, together with a list of the submissions received by the Committee in that inquiry.

The Committee continued to deliberate.

The Clerk informed the Committee that she had written to the Crown Solicitor seeking advice in relation to s 13 and 13B of the Constitution Act 1902, to assist the Committee with its office of profit inquiry. The Committee endorsed this action by the Clerk.

The Committee continued to deliberate.

Mr Johnson moved: That the Committee place on record its appreciation of Mr Hannaford's contributions to the Committee, and wish him well in the future.

Seconded by Revd Mr Nile.

Debate ensued.

Question put and passed.

The Committee adjourned at 10.40 a.m. *sine die*

Lynn Lovelock
Clerk to the Committee

MEETING NO. 3

Friday 3 November 2000

at Parliament House, Sydney at 9.30 am

MEMBERS PRESENT

Ms Sham-Ho (in the Chair)

Ms Fazio	Revd Mr Nile
Ms Forsythe	Mr Primrose
Mr Kelly	

In attendance: John Evans, Velia Mignacca, Janet Williams.

Apologies were received from Ms Gardiner and Ms Saffin.

The Chair welcomed the two new members of the Committee, Ms Fazio and Ms Forsythe.

Minutes of Meeting No. 2 were confirmed on motion of Revd Mr Nile.

The Chair tabled the following correspondence:

Office of Profit inquiry

The Committee continued to deliberate.

Resolved, on motion of Mr Kelly: That the Chair advise the Chairman of the Legislative Assembly Standing Ethics Committee that the Committee is prepared to hold a joint hearing with that Committee.

Resolved, on motion of Revd Mr Nile: That the Chair confer with the Chair of the Assembly Committee as to the procedures to be followed at the joint hearing.

Resolved, on motion of Revd Mr Nile: That the Chair advise the Chairman of the Standing Ethics Committee that the Committee will make available to that Committee any relevant documents or submissions received by the Committee.

The Committee adjourned at 10.30 a.m. until Wednesday 22 November 2000 at 2.15 pm.

Velia Mignacca
Senior Project Officer

Meeting No. 4

Wednesday 22 November 2000

at Parliament House, Sydney at 2.15 pm

MEMBERS PRESENT

Ms Sham-Ho (in the Chair)

Ms Fazio	Revd Mr Nile
Ms Forsythe	Mr Primrose
Ms Gardiner	Ms Saffin
Mr Kelly	

In attendance: John Evans, Velia Mignacca, Janet Williams.

Minutes of Meeting No. 3 were confirmed on motion of Ms Forsythe.

Correspondence sent:

- (ii) Letter dated 14 November 2000 from the Chair to the Chairman of the Legislative Assembly Standing Ethics Committee concerning the office of profit inquiry in reply to his letter dated 31 October 2000.
- (iii) Letter dated 14 November 2000 from the Chair to the Hon Michael Egan MLC requesting the moving of a motion granting leave to the Committee to meet with the Legislative Assembly Standing Ethics Committee

The Committee deliberated.

The Chair briefed the Committee on a meeting she attended on 15 November 2000 with the Chairman of the Legislative Assembly Standing Ethics Committee to discuss the office of profit inquiry.

The Committee adjourned at 2.28 p.m. *sine die*

Velia Mignacca
Senior Project Officer

Meeting No. 5

Wednesday 28 March 2001

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Ms Sham-Ho (in the Chair)

Ms Forsythe	Mr Primrose
Ms Gardiner	Ms Saffin
Revd Mr Nile	

In attendance: Mike Wilkinson, Velia Mignacca, Janet Williams.

Apologies were received from Ms Fazio and Mr Kelly.

Minutes of Meeting No. 4 were confirmed on motion of Ms Saffin.

The Chair tabled the following correspondence:

Correspondence received:

- (i) Advice dated 6 December 2000 from the Crown Solicitor to the Clerk to the Committee concerning s. 13B and s. 13 of the Constitution Act 1902.

Resolved, on motion of Revd Mr Nile: That an agenda be circulated to Members prior to the joint meeting to be held with the Legislative Assembly Standing Ethics Committee on Thursday 5 April 2001.

The Committee deliberated.

Resolved, on motion of Mr Primrose: (1) That a draft list of key issues relating to the office of profit inquiry be prepared and circulated to Members before the joint meeting on 5 April 2001, to be discussed at the joint meeting. (2) That one of the issues be identification of the appropriate authority to interpret and decide on exceptions to the office of profit provision.

The Committee adjourned at 1.40 p.m. until Thursday 5 April 2001 at 1.00 p.m.

Velia Mignacca
Senior Project Officer

Meeting No. 6/ Joint Meeting No. 1

Legislative Council Standing Committee on Parliamentary Privilege and Ethics
Legislative Assembly Standing Ethics Committee

Thursday 5 April 2001

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Legislative Council

Mrs Sham-Ho (Joint Chair)
Ms Fazio
Ms Forsythe
Mr Kelly
Revd Mr Nile
Mr Primrose

Legislative Assembly

Mr Price (Joint Chair)
Mr Brown
Mr Hickey
Mr Martin
Dr Flavel (community member)
Mr Godbee (community member)

In attendance: John Evans, Ronda Miller, Velia Mignacca, Janet Williams.

Apologies were received from Ms Gardiner, Ms Saffin, Dr Kernohan, Mr Fraser, Mr Richardson, Ms Megarrity.

Inquiry on office of profit

(a) Preliminary

The terms of reference for the Legislative Council inquiry and progress in the inquiry to date were discussed.

(b) Draft list of key issues

The 'Draft list of key issues' previously circulated to Members was considered.

Resolved, on motion of Mrs Sham-Ho: That the following words be added after section 2(f): "(g) to avoid a Member having two sources of remuneration from the Crown."

Deliberations continued.

(c) Joint hearings

The possible list of witnesses previously circulated to Members was considered.

Resolved, on motion of Mrs Forsythe: That the ICAC be added to the list of witnesses.

Deliberations continued.

Resolved, on motion of Mr Brown: That the Committees agree in principle to hold public hearings.

(d) Submissions

It was agreed that all persons who made a submission to the Legislative Council Committee in 1997 should be contacted and asked whether there are any updates to their submission.

Deliberations continued.

Resolved, on motion of Revd Mr Nile: (1) That a call for submissions in relation to the inquiry be advertised. (2) That the advertisement be approved by the joint Chairs.

(4) Adjournment

The meeting adjourned at 1.40 p.m. sine die.

John Evans
Clerk of the Parliaments

Ronda Miller
Clerk, Standing Ethics Committee

Meeting No. 13

Wednesday 14 November 2001

at Parliament House, Sydney at 10.00 am

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio

Revd Mr Nile

Ms Forsythe Mr Primrose
Ms Gardiner Ms Saffin
Mr Kelly

In attendance: David Blunt, Velia Mignacca and Janet Williams.

The Committee discussed progress in the inquiry on sections 13 and 13B of the Constitution Act 1902.

Resolved, on motion of Revd Mr Nile: That the Chair and A/Clerk Assistant-Committees meet with the Chair of the Legislative Assembly Standing Ethics Committee to discuss the conduct of the inquiry and the need or otherwise for a hearing.

The Committee adjourned at 10.25 am until Thursday 29 November 2001 at 1.00 pm.

David Blunt
A/ Clerk-Assistant Committees and Usher of the Black Rod

Meeting No. 14

Thursday 29 November 2001

at Parliament House, Sydney at 1.00 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio Revd Mr Nile
Ms Forsythe Mr Primrose
Ms Gardiner Ms Saffin
Mr Kelly

In attendance: Lynn Lovelock, Velia Mignacca and Janet Williams.

Resolved, on motion of Ms Fazio: That the minutes of meeting No. 13 be adopted.

Office of profit

The Committee discussed options outlined in a paper circulated by the Clerk entitled Section 13B: Problems and options for reform.

The Committee continued to deliberate.

Mr Kelly proposed that the Committee consider adopting Option 1 – abolishing section 13B.

The Committee agreed to further consider Option 1 at its next meeting.

Mrs Sham-Ho proposed that the Committee further consider Option 3.

The Committee adjourned at 2.40 pm sine die.

Lynn Lovelock
Clerk to the Committee

Meeting No. 15

Monday 10 December 2001

at Parliament House, Sydney at 10.00 am

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio	Revd Mr Nile
Ms Forsythe	Mr Primrose
Mr Kelly	Ms Saffin

Apologies were received from Ms Gardiner.

In attendance: Lynn Lovelock, Velia Mignacca and Janet Williams.

Correspondence sent

- (i) Memorandum from the Chair to Members of the Committee dated 6 December 2001 attaching a paper entitled Section 13B: Option 1 – Comments by the Chair.

The Committee deliberated.

Resolved, on motion of Mrs Sham-Ho: That the minutes of meeting no. 14 be amended by inserting after “The Committee agreed to further consider Option 1 at its next meeting.” the words “Mrs Sham-Ho proposed that the Committee further consider Option 3.”.

Resolved, on motion of Mr Kelly: That the minutes of meeting no. 14, as amended, be adopted.

Office of profit inquiry

The Committee continued to deliberate.

Resolved, on motion of Mr Kelly: That the Committee adopt Option 1 (abolition of section 13B), and adopt the same approach with regard to section 13.

Mrs Sham-Ho wished it to be noted that she supports Option 1 with reservations.

The Committee continued to deliberate.

Resolved, on motion of Revd Mr Nile: That the Clerk of the Parliaments be requested to provide a submission to the Committee in relation to the inquiry, to include details of all the ways in which Members of the NSW Parliament are currently accountable for their conduct.

Resolved, on motion of Ms Fazio: That the Chair prepare and submit a draft report on the inquiry into sections 13 and 13B.

The Committee continued to deliberate.

Resolved, on motion of Revd Mr Nile: That the Chair advise the Legislative Assembly Standing Ethics Committee of the decisions taken today in relation to the inquiry, and request that Committee's response.

The Committee adjourned at 11.10 am sine die.

Lynn Lovelock
Clerk to the Committee

Meeting No. 16

Monday 18 March 2002

at Parliament House, Sydney at 2.30 pm

MEMBERS PRESENT

Mrs Sham-Ho (in the Chair)

Ms Fazio	Mr Primrose
Mr Kelly	Ms Saffin
Revd Mr Nile	

Apologies were received from Ms Gardiner and Ms Forsythe.

In attendance: Lynn Lovelock, Velia Mignacca and Janet Williams.

Minutes of meeting no. 15 were confirmed on motion of Ms Fazio.

Correspondence sent:

- (i) Letter dated 11 December 2001 from the Chair to Mr John Price, Chair of the Legislative Assembly Standing Ethics Committee, advising him of the decisions of the Privileges and Ethics Committee made at the meeting of 10 December 2001 relating to the current inquiry.

Office of profit inquiry

The Committee deliberated.

The Committee considered the draft report.

Resolved, on motion of Ms Saffin: That paragraph 3.62 be amended by adding at the end “Since 1991 every member of the Legislative Council is elected by the people in a fixed term election.”

Resolved, on motion of Revd Mr Nile: That Recommendation 2 be amended by inserting at the end: (2) That the draft bill be referred to this Committee for comment before introduction.

Resolved, on motion of Mr Primrose: That the report, as amended, be adopted.

Resolved, on motion of Mr Kelly: That the report be signed by the Chair and presented to the House.

Resolved, on motion of Mr Kelly: That 100 copies of the report be printed.

Resolved, on motion of Mr Kelly: That the Committee records its appreciation of the efforts of the Chair and Secretariat in the conduct of this inquiry.

The Committee adjourned at 3.15 pm sine die.

Lynn Lovelock
Clerk to the Committee