

Appendix G Qualification and Disqualification of Members of Parliament

Qualification of members

Every person enrolled to vote in any electoral district is qualified to be a candidate for any seat in the Legislative Assembly or Legislative Council unless otherwise disqualified. (ss. 79(1) & 81B(1) *Parliamentary Electorates and Elections Act 1912*.)

Any person who has attained the age of 18 and is either an Australian citizen or was enrolled as an elector in Australia as a British subject prior to 26 January 1984 is entitled to enrolment.¹ A person is not entitled to vote at an election unless that person's real place of living was for some time within three months of the election within the subdivision for which the person is enrolled (s. 20).

A person may not be on the roll if they: (a) are, because of unsound mind, incapable of understanding the nature and significance of enrolment and voting; (b) are serving a prison sentence of 12 months or more; or (c) are the holder of a temporary entry permit or are a prohibited immigrant (s. 21).

Disqualification

A person is disqualified from being a member of the Assembly or of the Council if that person—

is a member of the other House (s. 13C *Constitution Act 1902*),

holds or benefits from a contract with the public service, with certain exceptions (s. 13),

holds an office of profit under the Crown or has a pension from the Crown (s. 13B),² or

is a member of the Commonwealth Parliament (ss. 79(7) & 81E *Parliamentary Electorates and Elections Act 1912*)

A member's seat is vacated if the member—

fails to attend the House for one entire session, unless excused (s. 13A(a) *Constitution Act 1902*),

makes any declaration or acknowledgment of allegiance to any foreign prince or power, or does any act whereby the member may become entitled to the rights of a subject or citizen of any foreign state or power (s. 13A(b)),³

becomes bankrupt or takes the benefit of any law for the relief of bankrupt or insolvent debtors (s. 13A(c)),

becomes a public defaulter (s. 13A(d)), or

is convicted of an infamous crime, or of an offence punishable by imprisonment for life or for a term of 5 years or more (s. 13A(e)).

In relation to what is considered to be an infamous crime, in 1940 the Court of Disputed Returns argued that an "infamous crime" depended upon the nature of the crime committed rather than the

¹ People who were not Australian citizens but who were enrolled as at 26 January 1984 on the basis of being a British subject were not removed from the roll. British subjects not enrolled at that date must become Australian citizens to enrol to vote.

² This disqualification provision was enacted in 1978 and was amended in 1980 to specify that members could hold or accept an office of profit under the Crown "in respect of which the member 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." The amendment also permitted appointment to boards of the Federal Government "or other sovereign jurisdictions", and introduced the provision that allowed transgressing members an opportunity to resign from the prohibited office before his seat was vacated. The explanatory notes to the amending bill mention that when the need arises the Standing Orders and Procedure Committee would need to draw up appropriate standing rules and orders to cover the giving of notice of a member holding a prohibited office of profit so that the seven sitting day period could commence within which the matter could be resolved prior to the resolution that the seat be vacated.

³ The holding of dual citizenship does not prevent a person from becoming a member of the Parliament of New South Wales. The provision applies in relation to persons who are already members of Parliament and subsequently take action to obtain foreign citizenship or establish a foreign allegiance. This differs from the provision in s. 44(i) of the Commonwealth Constitution that provides that a person is incapable of becoming a member of the Commonwealth Parliament if they are a citizen of a foreign power. In relation to the Commonwealth Parliament it has been held that the taking out of Australian citizenship, by people with dual nationality, is not enough to renounce a foreign nationality. Rather there must be some evidence that reasonable steps have been taken to renounce the foreign citizenship. See *Sue v Hill* (1999) 199 CLR 462.

terms of the offence and whether it is “contrary to the faith credit and trust of mankind”.⁴

The effect of the disqualifications providing for a member’s seat to be vacated should not be confused with the operation of the comparable part of s. 44 of the Commonwealth Constitution which provides that any person affected by the disqualifications “shall be incapable of being chosen or of sitting” giving rise to the circumstance where the Court of Disputed Returns has declared void the election of candidates successful at Federal elections.

A report on its inquiry into section 13A of the *Constitution Act 1902* by the Joint Committee on the Independent Commission Against Corruption recommended changes to the disqualification provisions in the Constitution Act including that s. 13A(e) be amended by the deletion of the reference to treason and that a member be disqualified on the imposition of a sentence of one year’s imprisonment.⁵ The *Crimes Legislation Amendment (Sentencing) Act 1999* enacted amendments to s. 13A(e) of the *Constitution Act 1902* removing the reference to treason and amending the disqualification provisions to provide that a person is disqualified from being a member if they are convicted of an infamous crime or an offence punishable by imprisonment for life or for a term of 5 years or more. Other recommendations in the report relating to the qualification and disqualification of members have not been adopted.

In June 2000 the *Constitution Amendment Act 2000* was passed to make provision for a member convicted of certain offences to lodge an appeal within a prescribed period and not have their seat vacated.⁶ This amendment had its origins in an Independent Commission Against Corruption report on the circumstances surrounding the payment of a parliamentary pension to Mr P.M. Smiles (April 1996) which found that until the appellate procedure was complete it cannot be known whether there has been a conviction.⁷

Under section 19AA of the *Parliamentary Contributory Superannuation Act 1971* any person who ceases to be a member while proceedings for a serious offence are pending against them will have their entitlement to receive a pension suspended. If the former member is not convicted the suspension to the entitlement is lifted. However, if the person is found guilty of a serious offence they will no longer be eligible for a parliamentary pension although the former member will be entitled to have their personal contributions refunded.

⁴ See comments by Maxwell J In re *Reference by the Legislative Council (NSW) In re Trautwein* (1940) 40 SR (NSW) 371 at 380.

⁵ Report presented 11/5/99, VP 11/05/1999, p. 16.

⁶ At the time that the bill was introduced a member of the Legislative Council (the Hon. Doug Moppett) was to come before the courts.

⁷ Legislative Council PD, 07/06/2000, p. 6688.