



PARLIAMENT OF NEW

SOUTH WALES

COMMITTEE ON THE ICAC

***Inquiry Into Section 13A
Constitution Act 1902***

December 1998

ISBN: 0 7313 5323 4



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COMMITTEE FUNCTIONS

Section 64 Independent Commission Against Corruption Act 1988

- (1) The functions of the Joint Committee are as follows:
 - (a) to monitor and to review the exercise by the Commission of its functions;
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
 - (c) to examine each annual and other report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
 - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission;
 - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

- (2) Nothing in this Part authorises the Joint Committee:
 - (a) to investigate a matter relating to particular conduct; or
 - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or
 - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

TERMS OF REFERENCE

The issues referred for inquiry and report were:

- (i) the options set out in the Second Report for amendment of section 13A(e) of the Constitution Act 1902 which provides for vacation of a Member's seat where he or she is attainted of treason or convicted of felony or any infamous crime;
- (ii) whether the grounds for vacation of a Member's seat set out in s 13A(b) ("allegiance to a foreign prince") and s 13A(d) ("public defaulter") should be reviewed in light of contemporary standards and circumstances and if so, the options which are available for their amendment;
- (iii) whether s 13A(c) ("becomes a bankrupt") gives rise to similar problems to those identified by the ICAC in relation to s 13A(e) because of the existence of appeal rights or the possibility of a bankruptcy being annulled; and
- (iv) the ICAC's recommendation in the Second Report that section 70 of the Parliamentary Electorates and Elections Act 1912 be amended to ensure that in all cases the reason for a vacancy in a seat in the Parliament be determined and stated by the relevant House or its principal officer.¹

¹Votes & Proceedings of the NSW Legislative Assembly, 19 June 1997, p 1053; Minutes of the NSW Legislative Assembly, 27 June 1997, pp 906–7

Section 13A, *Constitution Act 1902*

If a Member of either House of Parliament:

- (a) fails for one whole Session of the Legislative Council and Assembly to give his attendance in the House of which he is a Member, unless excused in that behalf by the permission of that House entered upon its journals;
- (b) takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power or does or concurs in or adopts any act whereby he may become a subject or citizen of any foreign state or power or become entitled to the rights, privileges or immunities of a subject of any foreign state or power;
- (c) becomes bankrupt or takes the benefit of any law for the relief of bankrupt or insolvent debtors;
- (d) becomes a public defaulter; or
- (e) is attainted of treason or convicted of felony or any infamous crime, his seat as a Member of that House shall thereby become vacant.

Section 70, *Parliamentary Electorates and Elections Act 1912*

- 70 When and so often as a vacancy occurs in the Assembly, the Speaker shall, upon a resolution by the Assembly declaring such vacancy, and the reason thereof, cause a writ to be issued for filling such vacancy; and on the death or resignation of any member of the Assembly, the Speaker shall, in like manner, upon a resolution of the Assembly, issue such writ, and in case the Assembly be not in session, or when such vacancy occurs during any adjournment for a longer period than seven days, he shall also issue the writ.

CONTENTS

COMMITTEE MEMBERSHIP & SECRETARIAT	i
COMMITTEE FUNCTIONS	ii
TERMS OF REFERENCE	iii
SECTION 13A, CONSTITUTION ACT 1902	iv
SECTION 70, PARLIAMENTARY ELECTORATES AND ELECTIONS ACT 1912 ...	iv
CHAIRMAN'S FOREWORD	v
EXECUTIVE SUMMARY	1
Guiding Principles for Disqualification Provisions	1
Recommendations	1
1. INTRODUCTION	3
Background to the Inquiry	3
Recommendations of the Independent Commission Against Corruption	3
History of s 13A, Constitution Act 1902	3
Operation of s 13A (or its predecessors)	4
Conduct of the Inquiry	4
2. GENERAL PRINCIPLES	5
The function of disqualification provisions	5
Loss of superannuation entitlements	5
Disqualifying the People's Choice	6
The Need for Clarity	6
Summary	7
3. DISQUALIFICATION MECHANISM	8
Existing mechanism	8

	Dealing with appeals	9
	Other Disqualification Mechanisms in New South Wales	10
	History	11
	Disqualification Mechanisms in Other Jurisdictions	12
	Options for Disqualification Mechanism	13
	Conclusions	16
4.	TREASON AND CRIMINAL BEHAVIOUR (S 13A(E))	18
	Attainted of treason	18
	Felony	19
	Infamous Crime	19
	For What Crimes Should a Member be Disqualified	20
	Issues raised regarding the equivalent provisions in the Commonwealth Constitution	22
	Comments made in submissions	22
	Provisions in other jurisdictions	22
	Conclusions	23
5.	FOREIGN ALLEGIANCE (S 13A(B))	25
	Conclusions	28
6.	BANKRUPTCY & INSOLVENCY (S 13A(C) & (D))	29
	Should bankruptcy result in disqualification	29
	13A(d) "Public Defaulter"	30
7.	DECLARATION OF VACANCIES	31

APPENDICES

Appendix 1 - List of Submissions

Appendix 2 - Minutes of Meetings

CHAIRMAN'S FOREWORD

This report is the first critical examination of the disqualification provisions now found in s13A *Constitution Act 1902* since the Report from the Select Committee on the Proposed New Constitution in 1852 decided that:

“With a view to prevent corruption, and maintain purity of election in the Assembly, and to preserve it, as far as possible, from sectarian influences, it has been deemed expedient to introduce those leading grounds of disqualification which exist in the Parent Country...”

The current disqualification provisions were written for a society, political system, and legal system which is significantly different to that which exists in New South Wales today. They come from a time when men had to satisfy property qualifications before they could vote, a person charged with a crime was considered incompetent to testify in their defence and New South Wales was a British colony rather than an Australian State. The provisions, with their origins in the early nineteenth century, have become of uncertain meaning in the late twentieth century, using terms that no longer have legal or common currency, and entrench some values which are no longer held by the community.

The Committee examined the language and the policy of section 13A of the *Constitution Act* with a view to adapting both to contemporary requirements. In its consideration, the Committee noted that the Houses of Parliament now have a clear common law discretionary power to expel a member for unworthy conduct. This discretionary power was seen to complement the automatic disqualification effected by breach of s 13A. The Committee considered that only conduct which, by community standards, was clearly incompatible with being a member of Parliament, such as committing a serious crime, should be dealt with by automatic disqualification by the force of the law. Conduct which may conceivably, but not necessarily, be incompatible with being a member is better dealt with by the Houses' discretion rather than the inflexible application of the law. The disqualification provisions should therefore encompass conduct necessarily incompatible with being a member; but, should leave borderline cases or ambiguous situations for the Houses' consideration.

With this in mind, the Committee has recommended changes to section 13A to make it clear and unambiguous in its terms and specifically targeted to uphold core democratic values of contemporary New South Wales. Provisions which do not meet this criteria should be deleted.

The Committee has also recommended administrative changes in line with section 13A operating of its own force. In addition to clarifying the role of the Speaker in declaring vacancies when the House is not sitting, the Committee has recommended that the Speaker be able to refer questions regarding vacancies to the Court of Disputed Returns. It is also recommended that any elector be able to seek a declaration from the Court regarding a vacancy. These changes should ensure that questions regarding disqualifications are dealt with as matters of law.

On behalf of the Committee, I would like to thank those who made submissions to the inquiry. On a personal note, I thank the members of the Committee, Ms M T Andrews MP, Mr D F Beck MP, The Hon. D J Gay MLC, Mr P G Lynch MP, The Hon. I M Macdonald MLC, Dr P A C Macdonald MP, Ms R P Meagher MP, Mr B R O'Farrell MP, The Hon. B H Vaughan MLC, and Mr J A Watkins MP for their work in completing this inquiry. Finally, I also thank the secretariat staff, Ms T Bosch, Mr R Keith, Ms R Miller, Ms H Minnican, Ms L Pallier and Ms N Shymko for their work and support for this inquiry and throughout the 51st Parliament.

Peter Nagle MP
Chairman

EXECUTIVE SUMMARY

Guiding Principles for Disqualification Provisions

The purpose of disqualification provisions is to ensure that electorates may maintain confidence in their candidates and that the Parliament is protected from disrepute by providing base standards of what is necessary for an elected representative. As disqualification provisions nullify a decision of the electorate, they should only apply in cases so extreme that disqualification from Parliament is necessary for community confidence in Parliament to be maintained.

Apart from s 13A, the Houses of the Parliament have power to expel a Member for conduct not worthy of a Member. It is therefore not necessary that the section cover the field of conduct incompatible with being a Member. Conduct which may only lead to loss of confidence depending on the circumstances of the case is better dealt with by the Parliament's common law discretion than the inflexible application of the law.

Section 13A operates of its own force to vacate a Member's seat whenever a Member breaches its terms. This provides a set of minimum standards according to the rule of law rather than political judgement or expediency. The section is also inflexible in application and harsh in its consequences. Such a law must be clear and unambiguous in its terms and be worded only to include cases where a Member would have necessarily lost the confidence of the electorate.

The Committee considers that the provisions of s 13A should:

- only apply to cases where a Member clearly would forfeit the electorate's confidence;
- be clear, precise and unambiguous in its terms; and
- only operate on circumstances which have occurred or come to light after the election of the Member.

Recommendations

3.48 The Committee recommends that section 13A continue to operate of its own force, with resulting vacancies being declared by the House, and that electors be given the right to make an application to the Court of Disputed Returns for the declaration of a vacancy arising from the operation of the section. Appropriate mechanisms would be required to discourage spurious and vexatious claims. The Committee also recommends that the Government cover the costs of any Member defending such an action.

- 3.49** The Committee recommends that, where the operation of section 13A is dependent on a ruling of a court, disqualification should only occur when avenues of appeal have been exhausted.
- 4.30** The Committee recommends that section 13A(e) be amended to provide for disqualification on a year's imprisonment being imposed on a Member.
- 4.32** The Committee recommends that reference to treason in section 13A(e) be deleted.
- 5.19** The Committee recommends that s 13(b) be deleted.
- 5.20** The Committee recommends that the *Parliamentary Electorates and Elections Act 1912* be amended to require candidates to declare any foreign citizenship when nominating for election.
- 6.7** The Committee recommends that s 13A(c) be deleted.
- 6.10** The Committee recommends that s 13A(d) be deleted.
- 7.9** The Committee recommends that section 70 of the *Parliamentary Electorates and Elections Act 1912* be amended along the lines suggested by the ICAC, namely:
- 1.** Whenever a vacancy occurs in the Assembly:
 - a)** when the Assembly is in session, the Assembly shall by resolution declare such vacancy to have occurred and state the reason for such vacancy, and the Speaker shall cause a writ to be issued for the filling of such vacancy; or
 - b)** when the Assembly is not in session, or during any adjournment which is longer than seven days, the Speaker shall cause a writ to be issued for the filling of such vacancy and report to the Assembly on the first day of business of the Assembly thereafter that such vacancy has occurred, the reason therefor and as to the issue of the writ to fill such vacancy.
 - 2.** The resolution of the Assembly or the report of the Speaker as to the reason for a vacancy in the Assembly shall be conclusive for all purposes of the matters stated therein.
- 7.10** In addition, the Committee recommends that the Act should be amended to allow the Speaker to refer a question regarding a vacancy in the Legislative Assembly to the Court of Disputed Returns when the Assembly is not in session, or during any adjournment which is longer than seven days.

1. INTRODUCTION

Background to the Inquiry

- 1.1 In February 1995 the Independent Commission Against Corruption (ICAC) reported on the circumstance surrounding the payment of a parliamentary pension to Mr P M Smiles. The ICAC found that the law and practice concerning the effects of a conviction of a Member of either House were in need of clarification. It then gave a Second Report on its *Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles*, in April 1996 (the Second Report) which made a number of recommendations for reform.
- 1.2 In response to recommendations made by the ICAC in the Second Report, the Legislative Assembly and the Legislative Council, on 19 and 27 June 1997 respectively, referred a number of issues regarding s 13A(e) of the *Constitution Act 1902* and s 70 of the *Parliamentary Electorates and Elections Act 1912* to the Joint Standing Committee on the Independent Commission Against Corruption. In addition to the problems raised by the ICAC, the Parliament referred some other general questions relating to s 13A.
- 1.3 Section 13A of the Constitution Act (together with ss 13 and 13B) lists certain conditions which, if breached, results in a Member losing his or her seat in Parliament. Section 70 of the Parliamentary Electorates and Elections Act sets out the procedure for declaring a Member's seat to be vacant and issuing the writs for a by-election, whether the vacancy is caused by resignation, death or any other reason.

Recommendations of the Independent Commission Against Corruption

- 1.4 In its *Second Report on the Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles*, the ICAC recommended:
 1. That the words "or any infamous crime" be deleted from Section 13A(e) of the NSW Constitution.
 2. That consideration be given by an appropriate committee of the Parliament to the options for amendment of Section 13A(e) of the NSW Constitution set out in [the] Report and a determination made as to which of those options should be adopted.
 3. That Section 70 of the *Parliamentary Electorates and Elections Act 1912* be amended in order to ensure that in all cases the reason for a vacancy in a seat in the Parliament be determined and stated by the relevant House or its principal officer.

History of s 13A, *Constitution Act 1902*

- 1.5 The terms of s 13A can be found in s xvi of the Imperial Act for the Government of New South Wales and Van Dieman's Land, 5 & 6 Victoria c.75 1842 and appear to have their origin in British electoral law of that time. That section was closely copied in ss 5 & 26 of

New South Wales' New Constitution Act (18 & 19 Vic 1855), which in turn became ss 19 & 34 of the Constitution Act 1902 and was moved to s 13A in 1978. There has been little change to the provisions over that time.

Operation of s 13A (or its predecessors)

- 1.6 Instances of Members' seats being vacated by s 13A or its equivalent in earlier forms of the Constitution Act are set out in the following table:

Seats Vacated by Operation of s 13A (or predecessors)

	Legislative Council		Legislative Assembly	
	Incidents	Most recent	Incidents	Most recent
(a) absence	12	1925	3	1925
(b) foreign allegiance	-	-	-	-
(c) bankrupt	1	1932	7	1931
(d) public defaulter	-	-	-	-
(e) conviction	1	1940	-	-
Total	14		10	

NB: This table does not include Members who resigned in circumstances likely to attract the operation of s 13A, such as Sir Henry Parkes who resigned twice because of insolvency.

Conduct of the Inquiry

- 1.7 The Committee released a discussion paper on issues raised for inquiry and advertised the terms of reference in the Sydney Morning Herald, the Daily Telegraph and the Australian on 15 August 1998, calling for submissions by 25 September 1998.
- 1.8 The Committee discussed the issues raised for inquiry on 11 August 1998 and 16 September 1998 and considered a draft report on 25 November 1998, where the report was adopted subject to certain changes and final approval on circulation.

2. GENERAL PRINCIPLES

The function of disqualification provisions

- 2.1 The Committee considers that the function of provisions disqualifying Members of Parliament is to ensure that Members who act in a manner incompatible with them being a Member vacate their seat in Parliament to enable the people to elect a new, or re-elect the former, Member. Disqualification provisions are not a code of conduct or proscriptive standards of what is desirable in a Member. They are base standards beyond which a Member is deemed to lack the confidence of the community and be incapable of being a Member.
- 2.2 Disqualification provisions foster public confidence in the Parliament by helping to ensure that it does not have Members who seriously breach the standards the community expects of them. As the people's representatives and makers of the law, Members of Parliament help set community standards. For Members of the legislature to behave in a manner which is in serious breach of the law or against the interests of the State brings the Parliament and the laws it makes into disrepute. The social obligation to obey the laws would be undermined if the makers of the law were seen to entertain disregard for the law, although this does not mean that minor breaches of the law should result in disqualification.
- 2.3 It should not be the function of disqualification provisions to punish a Member. If a Member commits a serious crime, it is the role of the criminal justice system to provide appropriate punishment. The object behind vacating a Member's seat is to ensure proper representation of the electorate and to protect the Parliament from disrepute. Although disqualification may clearly act as a punishment on a Member, punishment of a Member should not be the reason for disqualification.
- 2.4 In considering the function of s 13A, it is important to note that it is supplemented by the Houses' common law power to expel a Member for unworthy conduct. If a Member has behaved in such a manner that for him or her to sit would interfere with the operation of the House, the House may by resolution expel the Member and declare his or her seat vacant.
- 2.5 Given that s 13A is an inflexible provision that operates by its own force (see Chapter 3) and the House has the power, in a proper case, to expel a Member, the Committee considers that s 13A should only operate to vacate a Member's seat on grounds of conduct necessarily incompatible with being a Member. Section 13A is not well suited to borderline cases as it operates without discrimination or discernment. It is more appropriate that difficult or ambiguous cases should be left to the Houses' discretionary common law power to discipline or expel.

Loss of superannuation entitlements

- 2.6 Section 19(8) *Parliamentary Contributory Superannuation Act 1971* provides that a Member disqualified under s 13A loses all superannuation entitlements except for a refund of personal contributions. This can be reconciled with the notion that it is not the function of disqualification to punish on the grounds that such entitlements are rewards for the proper discharge of the high office of being a Member of Parliament; thus disqualification does not result in the losing of a right but indicates a failure to have obtained that right.

Whether this is appropriate was not within the terms of reference for this inquiry.

Disqualifying the People's Choice

- 2.7 There are inherent problems associated with laws to disqualify the elected representative of the people from sitting in Parliament. The law should invalidate the people's choice only in the most serious of instances. For an elected representative to be disqualified, the cause of the disqualification should have occurred or come to light after the election so that it could not have been a factor that was considered in the electorate's choice. The cause should also be of such a nature as to seriously affect the Member's ability to represent the people.
- 2.8 The disqualifications provisions of s 13A only intervene to cause a Member to lose his or her seat when a breach of the provision occurs after the Member has been elected. This does not prevent the Member being re-elected by the people. In this regard the section is consistent with democratic principle: removing the people's representative after something has occurred which brings into question the Member's ability to continue in that role but allows the people to reaffirm their choice despite the Member's infringement.
- 2.9 Such sound principle is not without its practical difficulties. A disqualified Member, even if re-elected, endures a period of disqualification during which he or she is not able to represent the electorate and during which he or she is denied the benefits of being a Member, such as salary and entitlements. Disqualification would also affect the Member's superannuation entitlements regardless of whether they maintained the electorate's confidence. The fact of disqualification occurring could effect the Member's electoral prospects over and above the electorate's view regarding the events that gave rise to the disqualification.

The Need for Clarity

- 2.10 The ICAC made its Second Report because of the lack of clarity in certain provisions relating to the disqualification of Members of Parliament. This lack of clarity can be found in a number of the provisions in s 13A, with one term, "public defaulter" appearing to have no definition in present law or common meaning and other terms, such as "infamous crime", being imprecise and of arguable meaning.
- 2.11 Section 13A currently does not require any declaration by any court, House of Parliament or any other body to come into effect. Under the section, a Member loses his or her seat the moment they infringe one of its provisions. It is clearly absurd for a law which operates of its own force in this manner to be unclear and at times obscure in its meaning.
- 2.12 Apart from the various policy issues raised by s 13A and addressed in this report, the Committee believes that it is essential that any provision which automatically results in the disqualification of a Member of Parliament must be precise and unambiguous.

Summary

- 2.13 The Committee considers that the provisions of s 13A should:

- only apply to cases where a Member clearly would forfeit the electorate's confidence;
- be clear, precise and unambiguous in its terms; and
- only operate on circumstances which have occurred or come to light after the election of the Member.

3. DISQUALIFICATION MECHANISM

3.1 There are two broad issues for inquiry regarding s 13A:

- 1) What should be the mechanism by which a Member's seat is vacated following a breach of the section? This chapter examines the problems that have been raised regarding the mechanical operation of s 13A and recommends solutions.
- 2) For what conduct should a Member be disqualified? This is addressed by paragraphs (a) to (e) of s 13A and is discussed in the following chapters.

Existing mechanism

3.2 Section 13A provides that a Member's seat becomes vacant upon any of the events listed in paragraphs (a) to (e) occurring. The section operates of its own force. In theory, no person or body, such as the Parliament, a court, or the Governor, has a discretion to determine whether the seat shall be vacated.

3.3 The automatic operation of s 13A gives rise to two problems:

- there may be uncertainty as to whether a certain event falls within its terms and therefore uncertainty as to whether a Member's seat has become vacant;
- as convictions and declarations of bankruptcy may be overturned, in which case they are deemed never to have occurred, whether a Member's seat has been vacated by s 13A may retrospectively change.

3.4 Both of these problems arose following the conviction of Mr Smiles on tax fraud charges. Following conviction, Mr Smiles purported to resign his seat and then appealed his conviction, which was subsequently quashed. It was arguable, but never finally determined, that the offences with which Mr Smiles was charged were infamous crimes under s 13A(e). If they were, then his seat was already vacated when he purported to resign and his superannuation entitlements should have been forfeited. However, in the absence of any declaration that his seat had been vacated, the Speaker accepted his resignation and his superannuation entitlements were paid.² Mr Smiles' conviction was subsequently quashed. If his resignation had not been accepted but his seat deemed vacant, this would have raised questions regarding whether his seat was ever legally vacated and the status of any superannuation entitlements which might have been denied.

3.5 When a vacancy occurs in the Legislative Assembly, the Assembly itself (if it is sitting) declares the existence of a vacancy and the reason thereof (s 70 *Parliamentary Electorates and Elections Act 1912*). This is discussed further in Chapter 7. When a vacancy occurs in the Legislative Council, the Governor responds by convening a joint sitting of the two Houses (s 22D *Constitution Act 1902*). If the Assembly or the Council has a question regarding a vacancy, it can refer the matter to the Court of Disputed

²These circumstances prompted the ICAC's inquiry, from which no findings of corrupt conduct were made but led to further inquiry and the recommendation that the law in this area needs to be clarified.

Returns (ss 175B & 175H *Parliamentary Electorates and Elections Act*). It appears that no one else has standing to raise a question regarding a vacancy with the Court.

- 3.6 Thus, while s 13A acts of its own force, it is the Legislative Assembly or, in the case of a Legislative Council seat, the Governor who declare the existence of the vacancy or, if the relevant House chooses to refer the matter, the Court of Disputed returns.

Dealing with appeals

- 3.7 The status of a seat being held by a Member who successfully appeals a conviction is problematic. The law considers that a conviction occurs when a person is first convicted. While an appeal is pending, the conviction is not affected but the execution of any sentence may be stayed. If the conviction is set aside, it is *void ab initio*, ie, it is considered to have never existed.
- 3.8 Once a conviction for the purposes of s 13A has occurred the Member's seat automatically becomes vacant and processes are to commence to issue a writ for a by-election or convene a joint sitting. The legal implications of later declaring that the conviction that started those processes never existed are unclear, especially if a new Member has been elected in the meantime. Advice has been given that if a conviction was overturned, the Member's seat would never have been vacant and any writ and subsequent by-election would be invalid. However, if the 40 day appeal period following any such election had passed, no person would be able to seek a declaration from the Court of Disputed Returns to overturn the ostensibly void by-election, although the House may be able to ask the Court for a ruling on the matter under s 175B of the *Parliamentary Electorates and Elections Act*. Another view is that, as any declaration of a vacancy by the House under s 70 of the *Parliamentary Electorates and Elections Act* is conclusive of that vacancy, any subsequent acquittal would have no effect. In practical terms, given the length of time for appeals and the political and legal implications of disqualification, a Member is unlikely to be able to regain his or her seat on successful appeal of a conviction except by being re-elected.
- 3.9 The most appropriate timing of the vacation of a Member's seat on conviction is not easy to determine. To allow a Member convicted of a crime of the nature that disqualifies them from being able to represent the community to continue as a Member may bring the Parliament into disrepute and deprive the electorate of a worthy representative. On the other hand, injustice can result if consequences are attached to a conviction which is subsequently overturned and the electorate deprived of its Member unnecessarily.
- 3.10 An alternative to the moment of conviction being the time of disqualification would be the date on which all appeals would be exhausted, either by adverse decision or expiry of the time in which an appeal may be lodged. However, the practical implications of such a change would make a mockery of the disqualification provisions. A Member convicted of a serious crime could evade disqualification by lodging an appeal regardless of its merits. The protracted nature of the appeal process could result in the Member continuing to sit for many months or for years before the matter is determined. Members who had no intention of appealing a serious conviction could continue to sit until the relevant provisions elapsed and could be assured of preserving their superannuation entitlements by resigning before disqualification.

- 3.11 This problem is not open to a simple solution. Disqualification has a significant affect on a Member's rights and it is to deny the Member due process to have those rights affected while he or she may have grounds for appeal. At the same time, for a Member convicted of a crime worthy of disqualification to sit in the House brings the House into disrepute. The law is not a stranger to this kind of dilemma. There are recent instances of people having spent considerable periods in prison only to be finally acquitted, sometimes having served out the sentence for which they were wrongly convicted, or being acquitted after years on remand. In such situations, however, it is considered that the risk of unjustly detaining someone is outweighed by the possible consequences of letting the person go free. Similarly, with disqualification of a Member, whether time should be allowed for appeals depends on whether the greater evil is more likely to result from denying either fully effective appeal rights or fully effective disqualification provisions.
- 3.12 The ICAC suggested an appropriate mechanism might be for disqualification to follow conviction with the House having an overriding discretion. Under such a proposal, a Member convicted of a serious crime would remain a Member until the House had an opportunity to consider the matter, at which time it would have a discretion as to whether it would declare the seat vacant. This would make clear the timing and reason for a Member's seat becoming vacant while allowing the House to decide whether the Member should be allowed to sit pending the outcome of any appeal. However, while allowing the circumstances of each case to be taken into account, it also transforms the disqualification process from a legal to a political one.
- 3.13 The Committee considers that this problem is best dealt with by a discretionary power rather than the automatic operation of the law. To extend the above analogy regarding custody, the discretion to grant bail to those charged or awaiting determination of appeals exists to be used according to the circumstances of the case. The Houses would have a common law power to suspend or expel a Member guilty of unworthy conduct. The Committee therefore considers that disqualification by s 13A should only occur after the exhaustion of the opportunity of appeal. This would leave the operation of s 13A as a legal process while leaving the House to deal with the matter as an interim measure.
- 3.14 Allowing time for appeals would provide convicted Members with an opportunity to resign following conviction and thereby preserve their superannuation entitlements. The Committee does not consider that this provides sufficient reason for denying Members the opportunity to have appeals heard before losing their seats. If it is considered necessary to ensure that Members guilty of unworthy conduct forfeit their superannuation entitlements, a matter not under consideration by the Committee, this could be more effectively done by some better targeted mechanism. The Committee notes that while 24 Members have lost their seat by disqualification, no Member has been declared disqualified since the introduction of superannuation entitlements for Members in 1946.

Other Disqualification Mechanisms in New South Wales

- 3.15 Under the common law, Australian Parliaments have the power to expel a Member as a power necessary for their self protection. Such an expulsion is effected by a resolution passed by the majority in the House in which the Member holds a seat. This power was used by the Legislative Council and upheld by the Supreme Court in 1969 when a Member, the Hon Alexander Armstrong, was expelled by the House after being found by a judge to have conspired to produce false evidence and contemplated attempting to bribe

a Supreme Court judge.³ In the Legislative Assembly, this power is expressed by Standing Order 294 which provides that:

A Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the seat declared vacant.

- 3.16 Standing Order 295 provides that consideration of an expulsion may be deferred and the Member suspended pending an outcome of a criminal trial.

History

- 3.17 The English House of Commons won the power to determine its own Membership from the Crown in the sixteenth century and then began to delegate it to the courts from the seventeenth. In her case notes on *Ellis v Atkinson*, Professor Enid Campbell notes:

The claim by the Commons House of the English Parliament to an exclusive jurisdiction to decide questions about the qualifications of a person to be, and remain, Members of the House was first asserted during the reign of Elizabeth I. It was one of the claims made in the course of the Commons' endeavours to establish their independence from both the Lords and the Crown, at a time when the judges of the royal courts were not assured independence from the Crown.

Eventually the Commons came to recognise that courts of law could assist them in enforcement of the laws regarding qualifications for Membership of the House. From the reign of William III, the Parliament enacted a series of statutes which endowed courts with jurisdiction to entertain proceedings by common informers for recovery of monetary penalties from person who sat and voted in the House whilst disqualified...

All Australian Houses of Parliament retain jurisdiction to determine whether a Member who has been validly elected has, since being elected, become disqualified from sitting and voting in the House, but most of the Houses have been authorised by statute to refer such questions to the relevant Court of Disputed Returns for determination.⁴

- 3.18 Campbell goes on to quote Barton J, Australia's first Prime Minister and one of the first Justices of the High Court, who said in 1906:

The validity of elections, and kindred questions, such as that of Membership, were, until the passing of recent statutory law, within the exclusive privilege of elective Houses of legislature. They had the right to determine, by their own domestic tribunals, questions of that kind as they arose, and had always asserted that right, so far as the House of Commons was concerned, and the legislative bodies of Australian and other colonies were in fact given power to assert it by the various Constitution Acts, and used to assert it by such tribunals as their own Committees of Elections and Qualifications composed respectively of Members of the House concerned. It was found, no doubt, that the feeling of partisanship which necessarily arose from such a method of determination tinged that method with disadvantages outweighing the advantage of keeping in the hands of Parliament the right of determining these questions. Parliament has therefore in many instances ... transferred the right to a separate tribunal, not on the ground that it wished to deal with these questions as matters of litigation; but, as I judge, on the ground that it wished to remit such matters to men of experience and known fairness of mind, who should merely declare their findings upon the questions involved, and any enforcement of such decision by the substituted tribunal was, in

³*Armstrong v Budd* (1969) 71 NSWLR 386

⁴Enid Campbell, "Case Notes: *Ellis v Atkinson*" *Melbourne University Law Review* 21 (1997) 693, pp 696–7

the absence of clear legislative authority, quite out of the question.⁵

- 3.19 The history of Parliament's power to determine its own Membership reveals a tension between two principles which are central to our system of parliamentary democracy:
- the independence of the Parliament as the only directly elected arm of government; and
 - the rule of law, whereby questions of rights and legality are determined by the application of judicial principles rather than political numbers.

Disqualification Mechanisms in Other Jurisdictions

Commonwealth

- 3.20 Sections 20, 38, 44 and 45 of the Commonwealth Constitution provide for the automatic vacation of the seat of Members of the Federal Parliament on terms broadly similar to those in the NSW Constitution Act.
- 3.21 Either House may refer a question regarding a vacancy to the Court of Disputed Returns which then has jurisdiction to decide the matter.⁶
- 3.22 The mechanism by which a disqualification of an elected Member occurs in the House of Representatives has never been tested, although a number of persons have had their election declared void due to being disqualified from being elected. In regards to vacation by bankruptcy, *House of Representatives Practice* states that:
- The proper channel of communication would seem to be between the court and the Speaker and this could be achieved by a notification to the Clerk of the House who would then advise the Speaker. The Speaker would then inform the House, if it were sitting, and issue a writ for a by-election following the usual consultations. If the House was not sitting, the Speaker could issue the writ as soon as convenient and not wait for the House to reconvene.⁷
- 3.23 Notwithstanding that the House does not declare when a vacancy occurs, it is arguable that the House retains the jurisdiction to determine whether a duly elected Member's seat has been vacated.⁸
- 3.24 In addition, the Commonwealth Constitution provides that any person may sue a person who sits in Parliament while disqualified.⁹ This gives the court jurisdiction, on the motion

⁵*Homes v Angwin* (1906) 4 CLR 297, 307–8, in Campbell, op cit, p 697

⁶s 376 *Commonwealth Electoral Act 1918*

⁷Barlin (ed), *House of Representatives Practice*, 3rd ed, Australian Government Publishing Service, Canberra 1997, p 156

⁸cf Campbell, op cit, p 700

⁹Section 42: “Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a Member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred

of any person, to determine whether a Member has been disqualified under the Constitution.

- 3.25 The power for the Houses to expel Members was abolished by the *Parliamentary Privileges Act 1987*.

United Kingdom

- 3.26 There are two general mechanisms by which Members may be disqualified from the House of Commons United Kingdom.
- 3.27 First, there are a range of laws which operate of their own effect to disqualify a Member from sitting. This is a similar mechanism to that in New South Wales. The House is not regarded as having a discretion on the matter and in one instance did not think it necessary to declare a Member's seat vacant following disqualification but merely resolved to issue a writ for a by-election.¹⁰ It is also similar to the mechanism in New South Wales in that only the House can refer questions regarding such disqualifications to Judicial Committee of the Privy Council. This leaves disqualifications in the ambiguous situation of operating by the force of law but only being put into effect by the House. The causes of disqualification dealt with by this mechanism include being an alien, mental illness, bankruptcy, treason and being under a sentence of imprisonment for more than a year.
- 3.28 The second mechanism was introduced by the *House of Commons Disqualification Act 1957* (now 1975) (UK). This Act provides for the disqualification of Members who hold various crown offices. Members who breach the terms of that Act are disqualified automatically, although the House may provide relief from the effects of such disqualification if it considers that the grounds of disqualification have been removed and it is otherwise proper to do so. Anybody who believes a Member may be disqualified under the Act may apply to Her Majesty in Council which must refer the matter to the Judicial Committee of the Privy Council to determine the matter.

Options for Disqualification Mechanism

Option 1: No substantial change

- 3.29 The current system could be maintained, whereby a Member's seat is vacated by the "automatic" operation of s 13A but declarations as to whether such a vacancy has occurred may only be made by the House or, if the House chooses to refer the matter, the Court of Disputed Returns.
- 3.30 This system leaves the control of the Membership of the House in the hands of the House while at the same time subjects Members to objective requirements through the operation

pounds to any person who sues for it in any court of competent jurisdiction.” The Parliament has provided otherwise inasmuch as the Common Informers (Parliamentary Disqualifications) Act 1975 which limits the penalty for sitting when disqualified to \$200 for having sat on or before the commencement of the suit and for every day the person sits after the commencement of the suit.

¹⁰Limon & McKay (eds) *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed, Butterworths, London, 1997, p 42, note 1

of the law. The procedural laws in the *Parliamentary Electorates and Elections Act* could be amended to remove the anomalies encountered in the Smiles' case where there was no declaration as to the reason for a vacancy without changing the operation of s 13A itself.

- 3.31 Although there is no mechanism to compel the House to declare a vacancy, accountability for a failure of the House to enforce the law is available through the ballot box. Uncertainties resulting from the automatic operation of disqualification and inaction by the House and the position of a vacancy following a successful appeal could be reduced by providing that a declaration by the House is conclusive as to the existence of a vacancy.
- 3.32 Under this option, the House has a judicial power to declare whether the vacancy had occurred, not an administrative discretion as to whether to declare the vacancy.

Option 2: Making a disqualification subject to a discretion of the House

- 3.33 Section 13A could set out triggers which give rise to a discretion in the House to declare a Member's seat vacant. This would change the time the vacancy occurred from the time the Member breached the section to the time of the House's declaration. Whether this was expressed in terms of the Member being disqualified subject to a declaration by the House, with the disqualification effective from the time of the declaration, or in terms of giving the House the power to consider declaring the Member's seat vacant would merely be of persuasive value as to how the House should approach its task rather than making any practical difference to the mechanism.
- 3.34 Such a provision would be supplementary to the Houses' common law power to expel a Member and would act, in the relevant circumstances, to put that power on a clear statutory footing. An alternative would be for such a power to replace the Houses' common law power. This would remove the flexibility available in the common law power. Armstrong, who was expelled from the Legislative Council after a Supreme Court Judge made adverse findings against him in a civil matter, did not fall within any of the provisions of s 13A.

Option 3: Giving the Court of Disputed Returns jurisdiction to determine a vacancy

- 3.35 In addition to the existing mechanism of automatic disqualification declared by the House with the House having the power to refer a question to the Court of Disputed Returns, the Court could be given a broad jurisdiction to declare whether there was a vacancy.
- 3.36 This jurisdiction could be engaged by any elector commencing an action. Such general provisions apply in the Commonwealth, South Australia and Western Australia. In Western Australia and the United Kingdom the remedy provided by the Court is a declaration of a vacancy. In contrast, the Commonwealth Constitution provides that any person may sue a person who sits in a federal House while disqualified by the Constitution and the person who so sits must pay a fine to the person bringing the action.¹¹ South Australia has similar provisions to that of the Commonwealth. In New South Wales, s 14(2) *Constitution Act* currently provides that any person may sue a person who presumes, while disqualified under s 13, to sit in the Council or Assembly.

¹¹Section 42; see note 10 above.

- 3.37 Enabling the Court to determine, not merely advise on, a vacancy is a significant shift but one that is logically consistent with the notion of the automatic operation of s 13A. If a Member's seat is to be vacated by the operation of the law rather than by a decision of the House, it is consistent with the notion of the rule of law that the determination of a vacancy should be by a court.
- 3.38 While giving the court such jurisdiction reduces the power of the House to control its own Membership, the courts have increasingly been considered competent to be trusted with such matters with the increased entrenchment of the separation between the courts and the executive.
- 3.39 Although Parliament, unlike the courts, is directly accountable to the people, parliamentary history is dotted with occasions when Houses have subjugated individual rights or democratic freedoms to the political demands of the majority. Two occasions when the Australian House of Representatives has used what is arguably a judicial power have come under strong criticism: expelling the Member for Kalgoorlie in 1920 for "seditions and disloyal utterances" concerning British policy in Ireland¹² and imprisoning Fitzpatrick and Browne for publishing articles "intended to influence and intimidate [a Member] in his conduct in the House, and in deliberately attempting to impute corrupt conduct as a Member against him, for the express purpose of discrediting and silencing him."¹³ In response to these incidents the Commonwealth Parliament has removed its power to expel a Member and has made any arrest by the Parliament reviewable by the court.
- 3.40 The jurisdiction of the Court of Disputed Returns would be to consider whether a person purporting to be a Member had in fact been disqualified. It would not be jurisdiction to review the merits of a declaration by the House that a seat was vacant. If, however, a House made a declaration without any proper basis, such a declaration would be beyond its powers and could be nullified by the Supreme Court on application from the Member concerned. In *Armstrong v Budd*, the court noted:

...this Court has a jurisdiction to determine whether in a particular case the House has exceeded the powers conferred upon it by the Constitution. In the exercise of that jurisdiction the Court will determine whether the limits upon the power of expulsion enjoyed by the House have been exceeded or not... The Court has power in a proper case to declare a resolution for expulsion null and void.¹⁴

¹²*House of Representatives Practice*, pp 171–2

¹³Odgers, *Australian Senate Practice*, 6th ed, RAIPA, Canberra, 1991, p 1038

¹⁴(1969) 71 SR(NSW) 386 at 398

Option 4: Formal notification to the Speaker via the Clerk

- 3.41 Section 13A could be amended to provide that a disqualification occurs on the Clerk of the House certifying to the Presiding Officer that he or she has conclusive notice that a Member has infringed the section. What would constitute conclusive notice could be specified for each of the paragraphs in the section.
- 3.42 The Hon Kevin Rozzoli MP, former Speaker of the Legislative Assembly recommended in his submission such a scheme with notice for each paragraph of s 13A being as follows:
- (a) (absence from session) coming from the Clerk;
 - (b) (allegiance to foreign power) comprising conclusive evidence of infringement;
 - (c) (bankruptcy) coming from the Registrar of Bankruptcy;
 - (d) (public defaulter) comprising advice of the same;
 - (e) (conviction) coming from the Court of Disputed Returns.
- 3.43 If such a scheme were to be established, it would be necessary that the notice the Clerk received was conclusive so that the Clerk was not placed in the position of determining whether evidence of certain events amounted to a violation of the Constitution. Notice of bankruptcy or conviction according to the set standard (see Chapter 6) could be given by the body enforcing the bankruptcy or conviction directly or they could give notice to the Court of Disputed Returns which could then notify whether s 13A had been infringed. A difficulty lies with paragraph (b) in that there is no existing mechanism to initiate the notification process. Mr Rozzoli's recommendation presumes a system of "common informer" with the Clerk acting as the arbiter.

Conclusions

- 3.44 The Committee prefers Option 4 whereby s 13A continues to operate of its own force but jurisdiction to declare that this has happened is opened to the Court of Disputed Returns on the application of any elector.
- 3.45 This system has the advantages that:
- disqualification under s 13A remains a question of law rather than politics;
 - it is administratively efficient, a clear case being dealt with by resolution of the House;
 - it provides judicial expertise for the determination of difficult cases;
 - it maintains public confidence in Parliament by assuring the possibility of judicial determination regarding the base standards of what is acceptable behaviour for Members as set in law by the Parliament.
- 3.46 However, the Committee is also mindful that giving the Court such jurisdiction is open

to abuse by people bringing spurious claims and thereby distracting Members from their duties and imposing on them inappropriate costs. The Committee considers that some mechanism should be in place to discourage vexatious claims and prevent the Member having to answer claims which clearly have no basis. The Parliament adopted this recommendation, it may wish to refer the question of the appropriate mechanism to the Committee for further consideration. Such a mechanism could include:

- Requiring the applicant to deposit a sum with the court, such as \$1000, for security for costs;¹⁵ and
- Requiring the applicant to establish a prima facie case before a Member is called on to defend the matter.

3.47 The Committee also notes that such a provision exposes Members of Parliament to legal action in their capacity as Members of Parliament rather than as private individuals. The Committee therefore considers money should be made available from Government funds for the defence of such action.

3.48 The Committee recommends that section 13A continue to operate of its own force, with resulting vacancies being declared by the House, and that electors be given the right to make an application to the Court of Disputed Returns for the declaration of a vacancy arising from the operation the section. Appropriate mechanisms would be required to discourage spurious and vexatious claims. The Committee also recommends that the Government cover the costs of any Member defending such an action.

3.49 The Committee recommends that, where the operation of section 13A is dependent on a ruling of a court, disqualification should only occur when avenues of appeal have been exhausted.

3.50 As already noted, for disqualification of elected Members by the operation of the law to be acceptable, it is necessary that the law be clear in its terms and does not disqualify Members where it may reasonably be considered that the Member might maintain the confidence of the community. Categories of behaviour which sometimes, but not always, may affect the community's confidence may be dealt with under the Houses' common law power to expel a Member unworthy of being a Member. In its current form, s 13A does not meet the standard required for an absolute disqualification provision.

¹⁵ cf Section 154 *Parliamentary Electorates and Elections Act 1912*; Section 41 *Constitution Act Amendment Act 1899* Western Australia

4. TREASON AND CRIMINAL BEHAVIOUR (S 13A(e))

s 13A(e) is attainted of treason or convicted of felony or any infamous crime;

- 4.1 Section 13A(e) sets out the scope of criminal behaviour which disqualifies a Member from sitting in Parliament. It addresses three kinds of behaviour: treason, serious crime, and crimes demonstrating bad moral character or lack of trustworthiness. The general object of this provision is appropriate. A Member who commits treason or a serious crime fails to act according to the standards expected by the community, may be assumed to have forfeited the confidence of the electorate and brings disrepute onto the Parliament.
- 4.2 While sound in general principle, the language of the paragraph is archaic and of imprecise meaning. As noted above, it is not appropriate for the automatic vacation of a Member's seat to be dependent on terms of vague meaning. Also, the community standards from which the original wording of the provision developed have changed, as has the law.
- 4.3 Being convicted of treason is incompatible with being a Member of Parliament. Similar can be said for conviction of serious crime. However, while it is not consistent with community standards for a Member to be guilty of any crime, it does not necessarily follow that disqualification should follow from any offence. Conviction in an increasing number of offences can result without the court giving any consideration of the offender's intent or whether he or she was morally blameworthy. Speeding is perhaps the most common but not the only example. While it is considered that the regulatory needs of modern society require that significant penalties attached to such offences, they do not necessarily result from a significant degree of moral turpitude or necessarily reflect behaviour that should result in a Member's seat being vacated. The ICAC's Second Report noted offences which attract a severe penalty but should not necessarily result in disqualification include resisting arrest (one year's imprisonment), polluting (seven years'), lighting a fire to clear land without proper authorisation or failing to comply with a fire hazard reduction notice (one year's), or failure to operate a trust account properly (one year's).¹⁶

Attainted of treason

Attainder. When a person convicted of treason or felony was sentenced to death, or when judgement for outlawry for treason or felony was pronounced against any one, he was said to be *attainted*, and the fact was called an *attainder*. His property was forfeited and his blood was said to be corrupted. This result was abolished by the Forfeiture Act 1870...¹⁷

- 4.4 Despite this archaic meaning, the term "attainted of treason" is preserved in the disqualification provisions of a number of State constitution Acts and in the

¹⁶ICAC, *Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles, Second Report*, April 1996, pp 12–3

¹⁷E R Hardy Ivamy, *Mozley & Whitleys Law Dictionary*, 10th ed, Butterworths, Sydney, 1998

Commonwealth Constitution.

- 4.5 The *Final Report of the Constitutional Commission* which gave extensive consideration to amendment of the Commonwealth Constitution and reported in 1988 stated:

The expression 'attainted of treason' dates far back into English legal history but its precise meaning is not clear. Different treason provisions in federal and State legislation (and perhaps the common law) make the basis on which disqualification could rest unclear. The words may not require that the person has been convicted of treason.

- 4.6 The Senate Standing Committee on Constitutional and Legal Affairs noted that "[i]n its present-day context, the words 'attainted with treason' imply someone blackened or stained with treason ... but not necessarily convicted of treason", although the committee suggested a court would interpret it as simply meaning "convicted".¹⁸
- 4.7 The Constitutional Commission recommended using the words "any person who has been convicted of treason under a law of the Commonwealth, and not subsequently pardoned, should be disqualified..."¹⁹

Felony

- 4.8 Section 21 *Interpretation Act 1987* provides:

felony means an indictable offence that is punishable by penal servitude.

indictable offence means an offence for which proceedings may be taken on indictment, whether or not proceedings for the offence may also be taken otherwise than on indictment.

- 4.9 Consequently, a Member is disqualified on conviction for a crime which may be tried on indictment and which is punishable by penal servitude. There is no requirement that the offence actually be tried on indictment, nor that the Member be sentenced to penal servitude.

Infamous Crime

- 4.10 "Infamous crime" was an old common law term used to describe the type of offence which would make a person unable to testify in court. Exclusion of witnesses convicted of an infamous crime was abolished in 1843 but at that time the law continued to forbid persons convicted of an infamous crime from being on a jury and now only remains as a subject of disqualification of Members of Parliament.²⁰ It was a crime reflecting adversely upon a person's moral character and trustworthiness, such as fraud or perjury.

¹⁸Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 2 June 1981, Parliamentary Paper No. 131/1981

¹⁹*Final Report of the Constitutional Commission 1988*, vol 1, AGPS, Canberra 1988, p 275

²⁰"Infamous crime" has a defined meaning for the purpose of ss 101–4 *Crimes Act 1900* but this is not relevant to its common law meaning used in s 13A.

Infamous crimes have been described as offences "contrary to the faith credit and trust of mankind", and "evinced of a want of regard for those moral and religious principles that constitute the obligation of an oath".²¹

- 4.11 The infamy of a crime did not stem from the punishment given but from its reflection on a person's ability to testify:

if a Judge should sentence a man to stand in the pillory for a trespass, a riot, a libel or seditious words, and he should so stand, yet this would not make him infamous, so as never to be admitted as a witness, because the crimes in their own nature are not perfectly infamous, but rather exorbitant in point of rashness and misbehaviour; but he that has been convicted of, or stood in the pillory for, perjury or forgery, is truly infamous ... and it were against reason to admit that man as a good witness, who has been convicted of bribing and corrupting of a witness as such.²²

- 4.12 In 1940, the Legislative Council sought advice from the Court of Disputed Returns as to whether a Member convicted of making false representations orally and in writing to the Tax Commissioner had been convicted of an infamous crime. In judgement, Maxwell J held that it was necessary to use the meaning "infamous crime" bore in the judgements at common law prior to 1843. Maxwell J noted that:

whilst illustrations of what is an infamous crime abound, no definition has been attempted nor yet any complete enumeration of the species that are comprehended under it. "It was, perhaps, more convenient to leave such a matter to the known wisdom and integrity of the tribunals acting upon the particular occasion as it occurred, than to shut it up within the limits of any exact definition".²³

For What Crimes Should a Member be Disqualified

ICAC Options

- 4.13 The ICAC put forward four options for defining the scope of convictions for which a Member should be disqualified, suggesting it could relate to:

- 1) the nature of the offences—by specific enumeration of those offences which, whilst not amounting to treason or felony, nonetheless are regarded as being of sufficient seriousness to warrant vacation of the seat of the Member the subject of the conviction. This could be done by a schedule of the relevant offences;
- 2) offences for which the maximum penalty which could be imposed is of a specified severity;
- 3) the penalty in fact imposed by the court and which is of a specified severity;
- 4) a discretion in the relevant House of the Parliament to declare the seat in question vacant once the ultimate outcome of the proceedings is known, including the penalty imposed.

1) Schedule of Specific Offences

²¹*Re Reference by the Legislative Council (NSW); In re Trautwein* (1940) 40 SR(NSW) 371, 375

²²*Clancey's case*, in *In re Trautwein*, 377

²³*In re Trautwein* 377–8

4.14 Parliament could specify in a schedule what offences are included within the terms of s 13A. This option has the advantage of clarity and certainty. However, it would require regular review to keep in step with legislative changes and community attitudes. It also does not allow the specific circumstances of the case being taken into account.

2) *Offences Punishable by a Specific Penalty*

4.15 Section 13A could specify that being convicted of an offence which has a maximum possible sentence of a particular severity causes a Member's seat to become vacant. This option provides clarity and certainty and would not require regular review as offence severity should keep in step with community views. However, it does not allow specific circumstance to be taken into account. This is particularly important for offences which have a severe maximum penalty but encompass actions which include a wide range of moral opprobrium, eg resisting arrest is punishable by one year's imprisonment but may be only symbolic; seven year's imprisonment may be imposed for a pollution offence which could conceivably be caused by a technical or mechanical failure. It also does not take into account the different penalties given in different jurisdictions. Consequently, whether a Member is expelled for an offence may depend on where the offence was committed.

3) *Severity of Penalty Imposed*

4.16 This option provides clarity and certainty. The relevant determination is also taken by a body which is skilled in assessing facts and their import and can assess the severity of the offence in the particular circumstances. In effect, it gives the decision of whether a Member's seat becomes vacant on commission of a range of offences to a court.

4) *Discretion of the House*

4.17 The vacation of a Member's seat on any of the above conditions could be subject to a resolution of the House. This would give the House control over determining whether a Member convicted of a particular offence should be expelled and at what stage after a conviction such a decision should be made in the particular case. This protects the House from outside control but also leaves it vulnerable to abuse by the majority of the House for political ends. As the Houses already have a discretion to expel a Member for conduct unworthy of a Member, such a new discretion would arguably not be increasing the Houses' power to expel a Member.

4.18 Making the operation of s 13A subject to the discretion of the House could also give the House power over the timing of the operation of the section. The House could postpone the exercise of its discretion to the time when it saw fit according to the circumstances of the case. Standing Orders could also be amended to provide for the suspension of a convicted Member pending the outcome of an appeal, although this raises policy, and perhaps constitutional, issues regarding the rights of the Member's constituents to be represented if the appeal process is protracted, as is often the case.²⁴ The Legislative Assembly's Standing Order 295 currently provides for suspension of a Member by resolution pending the outcome of a criminal trial.

ICAC's Conclusion

²⁴cf *Harnett v Crick* (1908) AC 470 & *Barton v Taylor* (1886) 11 AC

4.19 The ICAC's discussion favoured the vacation of a seat on a Member being sentenced to a given penalty subject to an overriding discretion of the House but did not make a recommendation.

Issues raised regarding the equivalent provisions in the Commonwealth Constitution

4.20 In discussions on the Commonwealth Constitution, it has been questioned whether, apart from treason, there should be any automatic disqualification provision for committing a crime or whether such questions should be left to the House or the electorate.

4.21 It has also been pointed out that making the period of imprisonment, whether actual or potential, the trigger for disqualification is not an accurate measure of the severity of a crime, not only because of the inconsistency both within and between jurisdictions, but also because of the increasing use of alternatives to imprisonment for punishment. The example was raised of certain serious tax offences which could only be punished by fine.

Comments made in Submissions

4.22 Submissions that commented on the issue all considered that it was appropriate that the severity of a crime should be measured by the actual sentence imposed. The submission from the Hon Kevin Rozzoli suggested the appropriate sentence should be 28 days imprisonment or a fine exceeding 30 penalty units (currently \$3,300). Another considered that it should be limited to indictable offences under the *Crimes Act*, although did not suggest what level of sentence.

Provisions in other jurisdictions

4.23 Disqualification provisions relating to criminal convictions in other States use the following triggers:

- attainted of treason, or convicted of felony or other infamous crimes (Qld & SA)
- attained of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer (Commonwealth)
- has been attainted of treason or convicted of any crime and is sentenced or subject to be sentenced to imprisonment for any term exceeding one year (Tas)
- convicted for treason or treachery or an indictable offence punishable by at least five years imprisonment when, at the time the offence was committed, the person was over the age of 18 years (Vic)
- attainted or convicted of treason or felony (WA)

Conclusions

4.24 There is no clear line of what kind of conviction should disqualify a Member. Committing an offence is almost never appropriate behaviour for a Member, but that does not make it a ground for disqualification. Although passing a cheque when there is insufficient

funds in your account may amount to an offence punishable by one year's imprisonment,²⁵ it is not necessarily an offence for which a Member should lose his or her seat. The Committee also again notes that automatic disqualification provisions should only apply to situations which necessarily breach community standards of what is compatible with being a Member of Parliament; there being other disciplinary and expulsion remedies available to the House where a Member is guilty of conduct unworthy of a Member.

- 4.25 The Committee considers that the mechanism for measuring the severity of the crime should be the actual sentence imposed. Many offences are couched in terms which cover a wide range of severity, leaving judicial discretion to determine the severity of particular instances. There may also be extenuating circumstances which amount to moral justification or excuse which would be considered in sentencing but are irrelevant to the nature of the offence itself.
- 4.26 The Committee notes that imprisonment is not the only form of punishment for serious crimes and that a variety of sentencing options are available around Australia, including fines, periodic detention and community based sentences. Ideally, s 13A(e) would include a reference to alternative sentences equivalent to the prescribed period of imprisonment. However, imprisonment remains the dominant sentence for more serious crime. Also, in New South Wales, an order for periodic detention attaches to a prison sentence rather than being an alternative form of sentence. Providing for alternative sentences presents difficulties of defining what is the equivalent severity of sentence. Given the need for clarity and simplicity in disqualification provisions, the committee considers that Members sentenced to non-custodial sentences are best dealt with the Houses' common law discretionary powers.
- 4.27 Suspended sentences also provide the possibility for uncertainty if s 13A(e) is triggered by the sentence imposed. Although there is currently no provision for suspended sentences in New South Wales, the NSW Law Reform Commission has recommended their reintroduction and a Member may currently receive a suspended sentence if convicted in other Australian jurisdictions. As a sentence being suspended demonstrates some exculpatory factor which might indicate disqualification is inappropriate, the Committee considers that automatic disqualification should not follow. However, any consequent imposition of the sentence would provide reasonable grounds for disqualification. The Committee therefore suggests that the appropriate trigger for s 13A would be the sentence imposed.
- 4.28 Some Australian jurisdictions and the United Kingdom disqualify Members sentenced to a year or more of imprisonment. The Committee is of the view that it could reasonably be assumed that a Member given a sentence of such severity would have lost the confidence of the electorate he or she represents.
- 4.29 The Committee considers that what should be the relevant level of sentence imposed also depends on the disqualification mechanism. If s 13A sets out when a Member will be disqualified, the level of severity should be set to not include crimes that could reasonably be not incompatible with being a Member. If s 13A were amended to give the House a discretion to consider whether a Member will be disqualified, then the level of severity should be much lower. It is arguable that the commission of any but the most minor

²⁵178B *Crimes Act 1900*

crimes raises a question as to whether the Member maintains the confidence of the electorate.

4.30 The Committee recommends that section 13A(e) be amended to provide for disqualification on a year's imprisonment being imposed on a Member.

4.31 The Committee notes that any genuine act of treason is a crime of such severity that it is likely to be punished by more than a year's imprisonment. However, the notion of treason requires a political norm which is not to be transgressed. It is conceivable that a political action, while not being within the community standard of what is treasonable, could fall within some legal definition of treason. The Committee therefore considers that there is no advantage gained by maintaining a reference to treason within s 13A.

4.32 The Committee recommends that reference to treason in section 13A(e) be deleted.

5. FOREIGN ALLEGIANCE (S 13A(B))

s 13A(b) takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power or does or concurs in or adopts any act whereby he may become a subject or citizen of any foreign state or power or become entitled to the rights, privileges or immunities of a subject of any foreign state or power;

5.1 Section 13A(b) provides for the disqualification of any Member who does any act of allegiance to a foreign state or any act which entitles him or her to rights under that state. This provision differs significantly from the provision regarding foreign allegiance in the Commonwealth Constitution (s.44(i)) as the Commonwealth provision disqualifies persons "entitled to the rights or privileges of a subject or a citizen of a foreign power". Under that provision no action on the part of the Member is necessary; the mere entitlement to the rights from the foreign power disqualifies a person. Under the New South Wales Constitution Act, the entitlement to rights or existing allegiance to a foreign power does not disqualify a Member. It is only if a Member does some act while a Member in acknowledgement of allegiance or to obtain such rights that the provision applies. Thus, having dual citizenship in itself should not activate the provision, but obtaining foreign citizenship while a Member would cause the Member's seat to be vacated.

5.2 All other States except Victoria provide that a Member's seat becomes vacant if the Member acknowledges allegiance to any "foreign prince or power", although South Australia also provides that a Member is not affected because the Member acquires or uses a foreign passport or travel document. Victoria does not have any provisions relating to foreign allegiance.

5.3 It should be noted that to be qualified to be elected to the New South Wales Parliament, a person must be an Australian Citizen or a British Subject who was enrolled to vote in Australia prior to 26 January 1984.²⁶

5.4 The object of preventing divided loyalty of Members of Parliament is clearly sound. Members should only represent the interests of their electorate and the State. However, it may be questioned whether s 13A(b) is the most effective or appropriate way of achieving that end.

5.5 First, the provision is not well targeted to the ill it wishes to prevent. As Professor Hughes noted to the House of Representatives Standing Committee on Legal and Constitutional Affairs, divided loyalties are more likely to arise from foreign commercial interests than through formal or legal allegiance.²⁷ While failing to encompass such interests, the provision may result in a Member being disqualified for action which arguably does not affect his or her ability to represent the electorate, such as a Member with dual citizenship obtaining a foreign passport to facilitate personal travel.

5.6 It may also be questioned whether the scope of the provision is too broad or imprecise.

²⁶*Parliamentary Electorates and Elections Act 1912* ss 20(1)(b)(ii), 79(1), 81B(1)

²⁷House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)*, July 1977, p 34

The meaning of "become entitled to the rights, privileges or immunities of a subject of any foreign state or power" is imprecise. It could include applying for a foreign passport, obtaining certain social security rights or entry rights. Alternatively, it is arguable that such action may only involve making use of an existing right or privilege rather than becoming entitled to it and therefore not the subject of s 13A. It may also include actions which are entirely innocent or beneficial to the interests of the State. Citizenship rights might be conveyed by marrying a citizen of some countries.²⁸ Professor Blackshield noted that during the 1980s the then Prime Minister, the Hon R.J.L. Hawke, was arguably disqualified from being a Member of the House of Representatives for being made an honorary citizen of Israel.²⁹ There could be potential for similar rights granted in a goodwill gesture in the development of "sister-state" or other foreign relationships falling within s 13A.

- 5.7 The language of the provision is archaic, phrased in terms of princes and subjects. One submission suggested the term "foreign prince" was originally targeted to Roman Catholics who held an allegiance to the Pope. The provision reflects its origins as applying to a colony in the British Empire when New South Wales was populated by British subjects rather than Australian citizens. The application of the provision to acts of allegiance to or becoming entitled to rights from Great Britain is also uncertain. When enacted "foreign" meant "non-British". Despite the Queen of Great Britain also being the Queen of Australia, there are clear and strengthening arguments for British allegiance and entitlements being foreign in Australian law.
- 5.8 The potential for a Member of a State Parliament to have some loyalty to another nation may be considered to have become less significant since federation with international relations becoming a Commonwealth rather than a State matter.
- 5.9 Becoming entitled to rights from dual citizenship may not reflect a significant conflict of interest for a Member in contemporary New South Wales. Dual citizenship is commonplace in Australia, with an estimated three to five million Australians, around a quarter of the population, also being citizens of other countries.³⁰
- 5.10 While preventing Members of Parliament acting according to divided loyalties remains an appropriate goal, that object needs to be balanced against the gravity of disqualifying an elected Member of Parliament and the need for clarity in the disqualification provisions. The Committee considers that the potential for s 13A(b) to disqualify a Member for conduct not inconsistent with the interests of the State is not balanced by its effectiveness in preventing possible conflicts of interest. Although it is targeted to only prevent action in accordance with a foreign interest rather than the existence of some foreign allegiance, its targeting remains imprecise.
- 5.11 Options for addressing these problems include:
- rewording the provision in terms suited to Australia being an independent state and contemporary international relations;

²⁸*Aspects of Section 44 of the Australian Constitution*, p 21

²⁹*Aspects of Section 44 of the Australian Constitution*, p 18

³⁰*Aspects of Section 44 of the Australian Constitution*, p 20

- rewording in contemporary terms and removing the provision relating to becoming "entitled to the rights, privileges or immunities of a subject of any foreign state or power";
- including a provision similar to that in South Australia exempting obtaining or using a foreign passport or travel document; and
- removing the provision.

The Status Quo in Contemporary Language

- 5.12 Although arguments can be brought against the current provisions, the Committee has not identified any pressure for change. Section 13A(b) was not mentioned in the ICAC report and there are no instances of a Member being disqualified as a result of its operation. The provision also avoids the major pitfalls of the equivalent Commonwealth provision in that it does not affect a Member who has dual citizenship so long as the Member does nothing to affirm or obtain rights under that citizenship.
- 5.13 However, the Committee considers that provisions disqualifying Members cannot be justified on the basis that they are largely harmless. The provision is targeted at active divided loyalty while accepting that a Member may hold a legally passive allegiance to a foreign state. When it is considered that it is provided elsewhere that a Member must be an Australian citizen and that treason disqualifies a Member, it is difficult to determine what positive role this provision plays. When balanced against the uncertainty of its scope, the committee does not recommend maintaining the current provision.

Narrowing the Scope of the Provision

- 5.14 The main harm that could conceivably arise from the provision is that the lack of clarity in its language could lead to a Member unwittingly being disqualified for action which does not conflict with the interest of the State or his or her role as a Member. To narrow the scope of the provision to clear acts of allegiance such as taking up new foreign citizenship would minimise the risk of this problem occurring while keeping within the Constitution Act a statement that a Member must act with undivided loyalty to the State.

Removing the Provision

- 5.15 The Committee is of the view that the purpose that the provision is to serve does not warrant such an untargeted, ineffective yet severe provision. A law disqualifying an Member must be clear in its terms and be justified in terms of the Members inability to represent his or her electorate measured according to accepted community values. Section 13A(b) fails to meet this test.
- 5.16 In considering changing the equivalent Commonwealth provision, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended replacing it with a requirement that Members, when nominating for election, should be required to declare any foreign citizenship, with failure to declare resulting in disqualification. Such a provision would recognise the multicultural nature of our society while ensuring that electors were aware of any potential the

Member might have for a conflict of interest arising from foreign allegiance. Such a provision would be better targeted than the current s 13A, which is more suited to catching the unwary than the disloyal.

Conclusions

- 5.17 The Committee considers that the wording of s 13A(b) is unacceptable due to its uncertainty of scope and archaic language. While this may be remedied by rewording the provision and narrowing and clarifying its scope, the utility of the provision may be doubted altogether. While a Member should not act under a conflict of interest or divided loyalty, legal ties is not a good indicator of such conflicts. The Committee notes that it is not aware of Victoria suffering any detriment from not having an equivalent provision.
- 5.18 Conflicts of interest are often adequately dealt with by full disclosure. The Committee therefore considers that the declaration of any foreign citizenship prior to election is better targeted to avoiding divided loyalties. It also leaves the evaluation of any potential harm to the State in the hands of the electorate. However, the Committee also notes the difficulties that have arisen in regards to disqualification provisions in the Commonwealth Constitution regarding candidates not being aware of their legal ties to foreign nations. Any provision requiring such declaration needs to take into account the uncertainty or lack of knowledge that sometimes exists regarding citizenship.

5.19 The Committee recommends that s 13(b) be deleted.

5.20 The Committee recommends that the *Parliamentary Electorates and Elections Act 1912* be amended to require candidates to declare any foreign citizenship when nominating for election.

6. BANKRUPTCY & INSOLVENCY (S 13A(c) & (d))

s 13A(c) becomes bankrupt or takes the benefit of any law for the relief of bankrupt or insolvent debtors;
s 13A(d) becomes a public defaulter...

6.1 Similar problems may arise with 13A(c) as to those outlined under 13A(e) regarding the vacation of a Member's seat and the consequences of the success of any subsequent appeal against a bankruptcy declaration.

Should bankruptcy result in disqualification

6.2 The origins of the provision that a Member's seat is vacated on bankruptcy goes back at least until 1812.³¹ Around that time, bankruptcy was often considered a crime and it was presumed that bankruptcy involved moral turpitude. It was also a time when property qualifications applied to the franchise, it being considered one must have independent means to have a sufficiently independent mind to be able to vote. Since that time attitudes and laws in relation to bankruptcy and credit have changed considerably. Such attitudes were already changing at the turn of the century and the New South Wales Legislative Assembly recommended to the Constitutional Convention of 1897 that provisions regarding bankruptcy not be included in the Commonwealth Constitution. This may have been in part due to Henry Parkes, the "Father of Federation" and the longest serving Premier of New South Wales, being twice forced to resign due to insolvency.³²

6.3 Bankruptcy is clearly of a different moral nature to criminal conviction. Bankruptcy may result from bad luck, bad business management, the actions of a partner or spouse, going guarantor or from losing a defamation action rather than from bad character; only the latter affects a Member's ability to represent his or her electorate. Although bankruptcy may be used as a device to avoid debt in a manner that would attract moral obloquy, bankruptcy in itself is not evidence of any kind of disreputable behaviour. Bankruptcy is clearly not a moral basis for automatically disqualifying a Member from sitting in Parliament.

6.4 Arguments have been made that a bankrupt Member might be distracted from his or her duties, under the undue influence of his or her creditors or others, or may abuse his or her position in Parliament to ameliorate his or her circumstances. However, there is no reason why any of these may necessarily be the case. A Member should not be disqualified because their work as a Member is affected because of personal crisis, be it economic or otherwise. Nor is mere vulnerability to undue influence a basis for disqualification. Also, a provision relating to bankruptcy increases a Member heavily in debt's vulnerability to undue influence from creditors as it may give such creditors power to vacate the Member's seat by calling in the debt.

6.5 In considering the Commonwealth Constitution, the Constitution Commission, the Constitutional Convention Structure of Government Sub-Committee and the Senate Committee on Constitutional and Legal Affairs all recommended the abolition of

³¹53 Geo. IV c. 144 (1812)

³²*Australian Dictionary of Biographical 1851-1890*, vol 5, Melbourne University Press, 1974, pp 400 & 401

provisions regarding bankruptcy as being based on moral views inapplicable to our modern credit society.³³

- 6.6 In his submission, the Auditor-General commented that "the Committee might consider similar provisions which the NSW Parliament has imposed on statutory office holders" such as the Auditor-General. The Committee notes that the *Public Finance and Audit Act 1983* provides for a discretion for the Governor to suspend the Auditor-General on bankruptcy and for removal from office only on an address from both Houses of Parliament. Whether bankruptcy should give rise to a discretion to suspend a Member or statutory officer is not a question for consideration by the Committee. The Committee does believe, however, that it is not a cause for automatic disqualification of an elected Member of Parliament. The position of the ICAC Commissioner, who does lose office on bankruptcy, can be distinguished in that that office is not subject to dismissal by the resolution of the Houses or the same accountability through the political process and elections. Also, the nature of the role of that office, being quasi-judicial rather than representative, is different to that of a Member of Parliament.

6.7 The Committee recommends that s 13A(c) be deleted.

13A(d) "Public Defaulter"

- 6.8 The meaning of "public defaulter" is obscure and does not appear to be the subject of any statutory or judicial definition. It presumably relates to the non-payment of debts. Advice from the Crown Solicitor's Office (primarily on a different issue) noted that "extensive research [by the Office] failed to yield any clear indication as to ["public defaulter's"] meaning".³⁴ It is clearly inappropriate that a provision which escapes definition should result in the disqualification of a Member.
- 6.9 Being a "public defaulter" is included amongst the disqualification provisions of Queensland and South Australia.

6.10 The Committee recommends that s 13A(d) be deleted.

³³*Final Report of the Constitutional Commission*, pp 293-4; Senate Standing Committee on Constitutional and Legal Affairs *The Constitutional Qualifications of Members of Parliament*, Parliamentary Paper No 131/1981, pp 34-7; Australian Constitutional Convention Structure of Government Sub-Committee *Report on Constitutional Qualifications of Members of Parliament*, February 1985, pp 3-4

³⁴LGA087/73 A6:RME, 20/2/1995

7. DECLARATION OF VACANCIES

Section 70 Parliamentary Electorates and Elections Act 1912

When and so often as a vacancy occurs in the Assembly, the Speaker shall, upon a resolution by the Assembly declaring such vacancy, and the reason thereof, cause a writ to be issued for filling such vacancy; and on the death or resignation of any Member of the Assembly, the Speaker shall, in like manner, upon a resolution of the Assembly, issue such writ, and in case the Assembly be not in session, or when such vacancy occurs during any adjournment for a longer period than seven days, he shall also issue the writ.

- 7.1 Section 70 of the *Parliamentary Electorates and Elections Act 1912* provides for the mechanism whereby a vacancy is declared in the Legislative Assembly. When the Assembly is sitting, this involves the Legislative Assembly declaring the existence of the vacancy and the reason for the vacancy, following which the Speaker issues a writ for a by-election to fill the vacancy.
- 7.2 The effect of the section when the Legislative Assembly is not in session or adjourned for more than seven days is not clear. The provision that "in case the Assembly be not in session, or when such vacancy occurs during any adjournment for a longer period than seven days, he shall also issue the writ" has traditionally been interpreted by Speakers as applying "when and so often as a vacancy occurs". However, its position after the semicolon and in the clause commencing "on the death or resignation of any Member" suggests that the Speaker's ability to issue a writ for a by-election without a resolution of the House only arises on the death or resignation of the Member; not when a vacancy arises from the operation of s 13A of the Constitution Act.
- 7.3 It is arguable that s 70 does not give the Speaker power to issue a writ on the disqualification of a Member because the fact of a disqualification is only known by the resolution of the House and it is considered not to be within the proper capacity of the Speaker to declare a disqualification. This argument is supported by the Speaker not having any capacity to refer a question regarding a vacancy to the Court of Disputed Returns. However, the inability of the Speaker to declare a vacancy due to disqualification while the House is not sitting sits uncomfortably with the automatic operation of s 13A.
- 7.4 The ICAC recommended that s 70 be amended to bring it into clear conformity with what has been the practice to date, that the Speaker may issue a writ whenever a vacancy arises.
- 7.5 Another issue raised by the ICAC that there was no requirement that the Speaker, when issuing a writ without a resolution of the House, declared the reason for the vacancy. Thus when Mr Smiles resigned immediately after conviction for what may have been an infamous crime, there was no authoritative declaration as to whether his seat was vacated by disqualification or resignation. The ICAC therefore recommended that s 70 be amended along the following general terms:

"1. Whenever a vacancy occurs in the Assembly:

- a) when the Assembly is in session, the Assembly shall by resolution declare such vacancy to have occurred and state the reason for such vacancy, and the Speaker shall cause a writ to be issued for the filling of such vacancy; or

- b) when the Assembly is not in session, or during any adjournment which is longer than seven days, the Speaker shall cause a writ to be issued for the filling of such vacancy and report to the Assembly on the first day of business of the Assembly thereafter that such vacancy has occurred, the reason therefor and as to the issue of the writ to fill such vacancy.
2. The resolution of the Assembly or the report of the Speaker as to the reason for a vacancy in the Assembly shall be conclusive for all purposes of the matters stated therein."
- 7.6 An amendment in these general terms would facilitate the efficient administration of vacancies in the Assembly and would make the law clear according to the interpretation previously applied by Speakers. It does so by giving the Speaker, whenever the House is not sitting, the power unilaterally to declare that a Member's seat is vacated due to disqualification. It also puts upon the Speaker a new burden of having to declare the reason for any vacancy.
- 7.7 The power to conclusively declare a seat vacant for disqualification is significant but it is appropriate that it should reside in the Assembly's chosen representative. At the same time, while the Speaker's declaration would be conclusive, his power to make such a declaration would be reviewable by a court if a genuine case did not exist.
- 7.8 While it is appropriate that the Speaker should have the power to unilaterally declare a vacancy, situations may arise where he or she may require a definitive ruling on a point of law. In such a case, it would be appropriate for the Speaker to have the capacity to refer a question regarding a vacancy to the Court of Disputed Returns. While such a referral might take longer to conclude than for the House to sit again, at which time it could declare or refer the matter, that may not always be the case. It is appropriate that the Speaker has the capacity to refer a question whenever he or she has the capacity to declare a vacancy.

7.9 The Committee recommends that section 70 of the *Parliamentary Electorates and Elections Act 1912* be amended along the lines suggested by the ICAC, namely:

1. Whenever a vacancy occurs in the Assembly:

- a) **when the Assembly is in session, the Assembly shall by resolution declare such vacancy to have occurred and state the reason for such vacancy, and the Speaker shall cause a writ to be issued for the filling of such vacancy; or**
- b) **when the Assembly is not in session, or during any adjournment which is longer than seven days, the Speaker shall cause a writ to be issued for the filling of such vacancy and report to the Assembly on the first day of business of the Assembly thereafter that such vacancy has occurred, the reason therefor and as to the issue of the writ to fill such vacancy.**

2. The resolution of the Assembly or the report of the Speaker as to the reason for a vacancy in the Assembly shall be conclusive for all purposes of the matters stated therein.

7.10 In addition, the Committee recommends that the Act should be amended to allow the Speaker to refer a question regarding a vacancy in the Legislative Assembly to the Court of Disputed Returns when the Assembly is not in session, or during any adjournment which is longer than seven days.