



The Constitution Amendment (Restoration of Oaths of Allegiance) Bill 2011: background and commentary

by Gareth Griffith

1 Introduction

On 11 November 2011 the [Constitution Amendment \(Restoration of Oaths of Allegiance\) Bill 2011](#) [the Restoration of Oaths of Allegiance Bill] was introduced in the Legislative Council, sponsored by the Reverend the Hon Fred Nile. The [Second Reading speech](#) for the Bill explained:

The object of the bill is to amend the Constitution Act 1902 to give a member of the Legislative Council, the Legislative Assembly or the Executive Council the option of taking or making an oath or affirmation of allegiance to Her Majesty Queen Elizabeth II, her heirs and successors as an alternative to the pledge of loyalty to Australia and the people of New South Wales. Taking the pledge of loyalty is currently required before a member of Parliament can sit or vote and before a member of the Executive Council can assume office.

It was also explained that:

This bill also makes it clear that a member of Parliament who has taken or made an oath or affirmation of allegiance does not have to take or make a further oath or affirmation

in the event of the demise of the Crown.

The Restoration of Oaths of Allegiance Bill passed the Legislative Council without amendment and was sent to the Assembly for concurrence on 24 November 2011.

The purpose of this e-brief is to set out the background to the 2011 Bill and to comment on its provisions. Brief comparison is also made with other Australian jurisdictions.

2 The current position

At present, ss 12 and 35CA of the NSW Constitution Act provide that both members of the NSW Parliament and members of the Executive Council respectively must take a pledge of loyalty in the following form:

Unto God, I pledge my loyalty to Australia and to the people of New South Wales.

Note that, where an affirmation is made, the words "Unto God" may be omitted.

In respect to Members of Parliament only, s12(4) expressly states that:

A Member is not required, despite any other Act or law, to swear allegiance to Her Majesty Queen Elizabeth II or her heirs and successors before sitting or voting in the Legislative Council or the Legislative Assembly.

In addition to taking the pledge of loyalty an Executive Councillor must also take an oath or affirmation of office, as set out in s 35CA(4).¹

3 Historical note on the parliamentary oath

It is sometimes assumed that the parliamentary oath of allegiance is feudal in origin. That is not the case. Its origins are in fact religious and political, a product of: the Protestant Reformation of the 16th century; the Civil War of the mid-17th century and of the Restoration of the Stuart monarchy that followed; and of the succeeding "Glorious Revolution", which saw Catholic James II replaced by Protestant William and Mary.²

It seems that a specific oath for Members of the House of Commons was not required until 1563, in the form of an *oath of supremacy*. Wilding and Laundry describe this as:

a repudiation of the spiritual or ecclesiastical authority of any foreign prince, person or prelate, and of the doctrine that princes deposed or excommunicated by the Pope might be murdered by their subjects.³

Following the Gunpowder Plot of 1605, an oath of allegiance was introduced, but this was not strictly a "parliamentary" oath, as it was not taken in Parliament. Only with the Restoration of the monarchy were *oaths of supremacy and allegiance* imposed on Members of Parliament and Peers, under the terms of the

Parliament Act 1678, this time in response to the false allegations made by Titus Oates of a Catholic conspiracy to assassinate Charles II. As revised in 1689 the oath of allegiance was a declaration of fidelity to the Sovereign in a recognisably modern form:

I A.B. do sincerely promise and swear, That I will be faithful, and bear true Allegiance to Their Majesties King William and Queen Mary, so help me God.

By the *Act of Succession 1701*, after the French King had proclaimed the son of James II to be the rightful heir to the British throne, an *oath of abjuration* was added, pledging support for the exclusion of the Stuarts and for the maintenance of the Protestant succession.

Each oath was therefore "directed against a specific perceived political threat" and, prior to 1831, had to be made before the Lord Steward before entering "the Parliament House".⁴

During the 19th century various statutory exceptions were made, for Catholics, Quakers, Moravians and Jews. For example, the *Roman Catholic Relief Act 1829* provided for a special oath deemed acceptable to Roman Catholics. But not until 1858 did a single parliamentary oath emerge in place of the former three. By 1868 this had been revised, shorn of its religious content, making it similar in form and content (if not in origin) to the feudal oath of allegiance.⁵

While a specific right to make an affirmation was granted by statute to such groups as Catholics and Quakers, a general right to make an affirmation was not introduced until the passing of the *Oaths Act 1888*. This followed the controversy attending the

election of the atheist Charles Bradlaugh to the House of Commons.

4 New South Wales

4.1 Before 2006

From the start of responsible government in 1856⁶ until 2006, in order to sit and vote members of both Houses of Parliament were required to take the oath of allegiance to the Crown.⁷ Under s 33 of the Constitution Act of 1855, which included provision for the demise of the sovereign, the oath was in this form:

I...do sincerely promise and swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria as lawful sovereign of the United Kingdom of Great Britain and Ireland and of this colony of New South Wales dependent on and belonging to the said United Kingdom. So help me God.

By s 34 of the same Act an affirmation could be made by "every person authorized by law to make an affirmation instead of taking an oath"

After federation, when the NSW Constitution Act was revised in 1902, the requirement to take the oath of allegiance was continued under section 12 of the Act, only now the form of the oath of allegiance was set out in the *Oaths Act 1900*, as follows:

I...,do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her Heirs and Successors according to law. So help me God.⁸

Section 12 of the Constitution Act included provision for the making of an affirmation, using the same form of words as the 1855 Act. Provision was also made for the demise of the sovereign. The only substantive

amendment to the section over the next century was in 1936, to take account of the abdication of Edward VIII:

In this section the word *demise* shall include abdication.

4.2 The Oaths and Crown References Bills 1993 and 1995

In 1993, and again when in government in 1995, Bob Carr introduced Bills to amend the oath of allegiance. In Opposition, Carr sponsored a Private Member's Bill – the Oaths and Crown References Bill 1993 – which, among other things, sought to replace the existing oath of allegiance, which was described as an "anachronism",⁹ with an oath in the form of a pledge of loyalty that declared:

Under God I pledge my loyalty to Australia.

Provision was also made for the making of an affirmation, in these words:

I pledge my loyalty to Australia.

The 1993 Bill did not proceed beyond the Second Reading stage. In the first days of his Government, Premier Carr introduced the Oaths and Crown References Bill 1995, which was in similar terms.¹⁰ The Bill passed through the Assembly but stalled at the First Reading stage in the Council.¹¹ The Second Reading speech described the changes proposed by the Bill as "symbolic rather than constitutional in nature", but significant nonetheless as focusing on "what it means to be Australian". The oath of allegiance existing at the time was said to be "altogether inadequate as a definition of loyalty in Australia in the 1990s". It was further argued that the

"concept of allegiance" implied in that oath was an "anachronism", to be replaced by a pledge of loyalty.

In the Second Reading speech a distinction was noted between the proposed pledge of loyalty, which would have applied to members of Parliament,¹² and the proposed oaths of office taken by the Governor, Executive Councillors, judicial officers and police officers:

the first refers to Australia, the latter to New South Wales: that is, one declares one's loyalty to Australia, but one's service and duty is to the people of New South Wales.¹³

In respect to the Bill's proposed pledge of loyalty to "Australia", Twomey commented on the jurisdictional differences that would have to be resolved if the "Queen" or the "Crown" were removed from our constitutional system. According to Twomey:

In choosing "Australia", the government was concerned that the concept of "allegiance" is one that relates to a nation, but not to a sub-national entity. One reason for this is that allegiance involves reciprocal duties, including a duty of protection in matters such as defence, external affairs and citizenship, which is more relevant to the national level of government. Further, "Australia" encompasses the State as well as the nation and the Queen. A proposed amendment to change the oath to one of loyalty to New South Wales was rejected by the government.¹⁴

4.3 Constitution Amendment (Pledge of Loyalty) Act 2006

The current position was established under the *Constitution Amendment (Pledge of Loyalty) Act 2006*, by which a "pledge of loyalty" to "Australia and

to the people of New South Wales" was introduced.

This legislation was initiated in the form of a [Private Member's Bill](#), sponsored by Paul Lynch in the Legislative Assembly, where it was introduced on 6 May 2004 but not debated and passed until 7 April 2005. On the same day the Bill received its First Reading in the Legislative Council, but again debate was delayed, with the Second Reading only occurring in early March 2006. The Bill finally passed the Third Reading stage in the Upper House without amendment on 7 March 2006, 21 votes to 14.¹⁵

Introducing the 2006 Bill in the Assembly, Mr Lynch noted that, unlike the 1993 and 1995 Bills, the current proposal made reference to "the people of New South Wales and not just to Australia". The pledge, it was said, was neither:

monarchist nor republican: the pledge is about democratic theory and about accepting that our real legitimacy comes from Australia and from the people of New South Wales.¹⁶

The purpose of the Bill was said to replace a "largely meaningless" oath with a declaration expressing "where sovereignty actually resides". The Second Reading speech stated:

Sovereignty does not lie with a State or with a head of State but with the country in which we live and with the people of his State. Presently, members state their allegiance to a head of State. That seems to me to have the priorities wrong. Our allegiance is not to a head of State, or even to the State itself, but to the people who elect us and whom we represent.

Against the Bill, leading for the Opposition in the Upper House, Don Harwin observed (in part):

"Sovereignty" is the exclusive right to exercise supreme authority over a geographic region or group of people. Where a nation has a constitution, that document defines the nature of sovereignty. As we are a sovereign State within a national federation of such States and Territories, our Australian Constitution and the Constitution Act 1902 of New South Wales define "sovereignty" in our nation. Under our constitution, sovereignty is vested in an individual, a hereditary monarch who is the sovereign. Our sovereign exercises her authority on the advice of her Ministers, with a constitutionally defined role for Parliament.

In swearing an oath of allegiance a citizen acknowledges his duty of allegiance and swears loyalty to the sovereign...There is no incompatibility between this oath of loyalty to the sovereign and a system of responsible and representative government.¹⁷

5 Constitution Amendment (Restoration of Oaths of Allegiance) Bill 2011

As noted, on 11 November 2011 the Restoration of Oaths of Allegiance Bill 2011 was introduced in the Legislative Council, sponsored by the Reverend the Hon Fred Nile. Its objects were outlined above. On its behalf, the [Second Reading speech](#) set out three key considerations, as follows:

Firstly, under the Constitution of the Commonwealth of Australia we remain an indissoluble Federal Commonwealth under the Crown. Therefore, we should unite all States of Australia with the Commonwealth. Secondly, under the Constitution of New South Wales we remain a

constitutional monarchy, and thirdly, on all the evidence, the Australian people support and have affirmed the role and function of the Crown in the Constitution.

Having noted that "our service men and women take a similar oath", the [Second Reading speech](#) added:

The oath is not simply to the Queen as an individual but to the Crown, which embodies far more than just the physical characteristics of our country. It is the basis on which our Constitution is founded, the font of our laws and the single entity which unites all Australians into one nation.

It was further argued that:

What we are doing today is bringing New South Wales back into harmony with the Commonwealth Constitution and with the other States of Australia.

6 Comparing Australian jurisdictions

The last decade or so has seen some major shifts in the terms of the oaths of allegiance required to be taken by members of Australian Parliaments, as shown in the table below.

Jurisdiction	Parliamentary Oath/Affirmation of Allegiance or Pledge of Loyalty
Commonwealth	The Queen ¹⁸
New South Wales	Australia and the people of NSW
Queensland	The Queen <i>and</i> the people of Queensland ¹⁹
South Australia	The Queen ²⁰
Tasmania	The Queen ²¹
Victoria	The Queen ²²
Western Australia	The people of WA/or the Queen <i>and</i> the people of WA ²³
ACT	The Queen <i>and/or</i> the people of the ACT ²⁴
Northern Territory	The Queen ²⁵

6.1 Queensland

The amendments in Queensland were introduced in 2001, as part of a lengthy process of constitutional consolidation. In addition to swearing to bear true allegiance to the Sovereign, Members are required to take an oath or affirmation of office, swearing to "well and truly serve the people of Queensland and faithfully perform the duties and responsibilities of a member of the Legislative Assembly to the best of my ability and according to law". In support of this oath of office, in its 2001 report the Legal, Constitutional and Administrative Review Committee (LCARC) said it believed:

that, upon taking office, members should be required to make a personal commitment to the people of Queensland – the actual font of sovereign power in this State.²⁶

In 2005, following a further report by the LCARC,²⁷ the [Constitution and Other Legislation Bill](#) proposed to provide members, ministers and judges with the option of not taking an oath or affirmation of allegiance to the Sovereign. The Bill lapsed on the dissolution of the Legislative Assembly in August 2006.

Subsequently, in April 2009 the [Legislative Assembly's Law, Justice and Safety Committee](#) received a referral asking it to "develop options for modernising the oaths or affirmations of allegiance" contained in the *Constitution Act 2001*. With a diversity of views expressed in the submissions it received, a majority of the Committee concluded that:

making it optional to take an oath of allegiance to the Sovereign best caters for these differences of opinion. This allows each individual to make a decision that reflects their

own beliefs. Such a decision mirrors the current choice available to all those who are about to take office to either take an oath or make an affirmation, based on their personal beliefs.

At the same time, the Committee sees it as important that there be an oath (or affirmation) of allegiance. The Committee therefore proposes that, where an election is made to not swear (or affirm) allegiance to the Sovereign, there be a requirement to swear allegiance in terms "to Australia" and to Australia's "Head of State".²⁸

This recommendation has not been acted upon to date. The choice it provides between swearing allegiance to the Sovereign by name, on one side, and to the Head of State "and his or her successors in office", on the other, seems rather curious. Under our present constitutional arrangements they are one and the same. Three dissenting Committee members saw it as a "latent republican exercise". They recommended that:

the Queen be styled in the oath and affirmation as lawful sovereign both of Australia and Queensland, to reflect our current constitutional arrangements.²⁹

6.2 Western Australia

The position in Western Australia since 2005 is that a choice is available between swearing to serve "the people of Western Australia", or swearing to bear true allegiance to the Queen *and* to faithfully serve the people of the State. In other words, making an oath or affirmation to serve the people is mandatory, whereas making an oath or affirmation to the Queen is optional.

6.3 The Australian Capital Territory

Since 1995, a threefold choice is available to members of the ACT

Legislative Assembly, that is, to swear allegiance to: the Queen; to swear to serve the people of the Territory; or both. In the Second Reading speech, Ms Follett said that the legislation was introduced as part of the broader debate about Australia becoming a republic; and she noted that the oath of citizenship no longer required "an empty rhetorical expression of loyalty to the Queen". Ms Follett further argued that it was an "anachronism" for Members of the Assembly to swear or affirm allegiance to the Queen when, unlike all other States and Territories, the ACT "does not have its own representative of the Queen in the form of a governor or an administrator".³⁰

6.4 Comments

Commenting on these arrangements in the [Second Reading speech](#) for the *Constitution Amendment (Pledge of Loyalty) Act 2006*, Mr Lynch said that while he understood:

the political process that gave rise to the Australian Capital Territory result, I think that it is probably wrong in principle. If we are to pledge our allegiance to something, we cannot have half of us pledging our allegiance to one thing and the other half pledging allegiance to something else. It is silly to go through the process of having a pledge and having mixed allegiances.

Similarly, he criticised the current Queensland model, whereby an oath is made to both the Queen and the people of the State. Not only did he consider an oath of allegiance to the Queen, or to any Head of State, wrong in democratic theory, the Queensland model was for him:

susceptible to the same criticism I just made of the Australian Capital

Territory model in that there are mixed allegiances, that is, one is pledging allegiance to two different things in that one pledge. I think that is confusing and wrong, and defeats the entire purpose of having a pledge. As I said, we should not have mixed or conflicting allegiances.

7 Issues in the debate

Several issues arise in respect to the Restoration of Oaths of Allegiance Bill 2011. Some of these go to the heart of our constitutional arrangements. Even the terminology is problematic. Do the terms "the Queen", "Her Majesty", "the Sovereign" and "the Crown" mean the same thing?

7.1 What is sovereignty and where is it located?

One focus of the current debate relates to the concept of sovereignty. What is it? Where is it located? The approaches to this contested and "notoriously ambiguous concept" are many and varied.³¹ For the moment, it is enough to outline two views, one of which can be described as "legal", the other as "political".

In respect to the "legal" doctrine, sovereignty is in this context often associated with the idea of possessing the authority to make commands which cannot be countermanded and with the power to make and unmake laws. In the setting of our constitutional monarchy, this finds expression in the bifurcation in modern times between executive and legislative powers: defined in terms of "the King [or Queen or Crown] in Council", which can be associated with prerogative power; and in terms of "the King [or Queen or Crown] in Parliament", which is associated with the doctrine of the sovereignty of Parliament.³² In its pristine legal form, as formulated by

AV Dicey, this last doctrine asserts the power of the British Parliament "to make or unmake any law whatever", except one that would have the effect of binding later Parliaments.³³

The doctrine finds expression in the NSW Constitution Act, which defines "the Legislature" as "His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly". By s 5, it is this composite body, "the Legislature", which has the power "to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever".

Notwithstanding the "manner and form" provisions which have enabled the NSW Legislature to delegate some of its law making powers to popular referendum, the legal foundations of sovereign power under the Constitution Act conforms to the doctrine of parliamentary sovereignty, as understood first in a colonial and afterwards in a federal context.³⁴

In recent times it has been argued that "legal" sovereignty can be established on the basis of the doctrine of popular sovereignty. At least, that is the argument which has been made in respect to the Commonwealth Constitution, as articulated by the High Court in a series of implied freedom cases in the 1990s. The upshot of those cases was the discovery of an implied freedom of political communication, informed by and based on the constitutionally prescribed system of representative and responsible government. "Sovereignty" in this context was considered by reference to the source from which the Commonwealth Constitution derived its authority, and secondly from the location of the power to amend it.³⁵

As to the source of its authority, Mason CJ contended that "The *Australia Act 1986* (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people".³⁶ As for the location of the power to amend the Commonwealth Constitution, in support of popular sovereignty McHugh J observed that "ultimate sovereignty resides in the body which *made and can amend* the Constitution".³⁷ Significantly, the Commonwealth Constitution was agreed to by popular referendum and can only be amended by the same means.

The correctness of this account of popular sovereignty as a legal doctrine has been questioned, with Professor Zines concluding that:

The concept of sovereignty of the people...must be regarded as either purely symbolic or theoretical. Seen as a symbol it might be regarded as similar to the symbol of the Crown, uniting the various organs and elements of the organisation of government under one concept and, in particular, symbolising the system of representative government that has been discovered in the [Commonwealth] Constitution".³⁸

While the constitutional position in NSW is subtly different,³⁹ the same broad argument may apply. But that is not to downplay the significance of popular sovereignty as a political doctrine. In a crucial sense the legitimacy of the laws and decisions made by the NSW Parliament and Government rests on their status as representatives of the people of the State. After all, in a constitutional monarchy the Sovereign may reign but it is the representatives of the people who rule.⁴⁰

Another perspective on the issue can be gained by reference to the work of the constitutional lawyer, AV Dicey. As noted, the doctrine of parliamentary sovereignty is associated with Dicey. What is sometimes overlooked is the emphasis Dicey placed in a British context on the "political" sovereignty of the electors. Having confirmed that "as a matter of law Parliament is the sovereign power in the state", Dicey went on to say:

It is however equally true that in a political sense the electors are the most important part of, we may even say are actually, the sovereign power, since their will is under the present constitution sure to obtain ultimate obedience.⁴¹

As Wade and Bradley commented:

Dicey suggested that political sovereignty, as opposed to legislative sovereignty, lay in the electorate, and that ultimately the will of the electorate was sure to prevail on all subjects to be determined by the British government.⁴²

As a matter of political practice a similar argument could be made to the same effect in an Australian context, including NSW.⁴³ The argument might be used in support of a "political" doctrine of popular sovereignty, on the basis that in a representative democracy, the people are the real and actual source of political authority and legitimacy. From the standpoint of this "political" doctrine of sovereignty it might be argued that its "legal" counterpart is something of a second-order explanation, one that is dependent ultimately on the political realities of popular and institutional approval. As Professor George Winterton observed, the doctrine of parliamentary sovereignty was

established by "political struggle, not judicial decision" and is:

in fact, *sui generis*, a unique hybrid of law and political fact deriving its authority from acceptance by the people and by the principal institutions of the state, especially parliament and the judiciary.⁴⁴

7.2 Can sovereignty be divided or separated?

Constitutional monarchy is not so much a product of theory as of practice and, as such, does not always pass the test of logical consistency, still less of theoretical purity. It might be suggested that the very term "constitutional monarchy" implies a shared sovereignty, combining the Sovereign and the people. Theoretically, however, that is problematic, for the reason that sovereignty is usually conceived of as indivisible and even absolute, encapsulated in Jean Bodin's idea of "the absolute and perpetual power of a commonwealth".⁴⁵ Practically speaking, on the other hand, the dual "legal" and "political" sovereignty envisaged by Dicey may be just another compromise or accommodation within our system of government.

What, then, is implied in the Restoration of Oaths of Allegiance Bill 2011, where members are presented with a choice of sovereign allegiances or loyalties? Does it favour compromise over consistency, political history over legal theory?

Of course, it may be that s 12 of the NSW Constitution Act in its current form already implies a divided sovereignty, between "Australia" and "the people of NSW". This is because, in the Australian federation, where there is a Queen of Australia and

possibly a Queen of NSW, power is divided or distributed between the Commonwealth and the States, with each level of government enjoying "sovereign power" within their jurisdictional limits. As Twomey writes:

McHugh J also observed in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* that "[w]ithin their respective domains, the polities that make up a federation are regarded as sovereign". He further noted in *Austin v Commonwealth* that the sovereignty of a federated nation "is divided on a territorial basis". Another way of looking at it is that "sovereignty is shared between the Commonwealth and the member States of the federation".⁴⁶

In this way the untidy exigencies of federalism are added to the accommodations of constitutional monarchy.

An added comment is that, by its reference to "Australia", current s 12 may also incorporate a reference to the Crown. This arises from another comment made by Twomey, to the effect that "Australia", understood as a polity with a defined head of state, "encompasses the State as well as the nation and the Queen".⁴⁷ If that is the case, then those who favour omitting any express or implied reference to the Queen, may argue that the pledge of loyalty in s 12 should be limited to "the people of NSW".

7.3 Can allegiance or loyalty be divided or mixed?

As noted, an argument made in the context of the *Constitution Amendment (Pledge of Loyalty) Act 2006* was that swearing allegiance or loyalty to either the Queen or the people of NSW was both wrong in principle and confusing in practice. On one side, the issue was

about mixed allegiances between the Crown and the people; on the other the concern was that some Members would be swearing different oaths/affirmations to others.

As to what is meant by swearing allegiance, one point to make is that references in a constitutional context to the Queen "are to the office, rather than the person of the Queen, and allegiance relates to the body politic, rather than the Queen personally".⁴⁸ As such the taking of an oath can be seen as an express recognition of one's political obligation.⁴⁹

A second point is that, once made, the parliamentary oath (unlike its feudal counterpart) does not appear to be of any legal significance.⁵⁰ Queensland's LCARC explained that in making an oath or affirmation, a member is making a solemn public declaration or promise to comply with its terms. The LCARC added:

As the commitments or promises made in an oath or affirmation are morally and not legally binding, an oath or affirmation does not impose any penalty for a failure to comply with its commitments.⁵¹

Taking these two points together, the parliamentary oath of allegiance can be viewed as a political oath of loyalty to the body politic, giving rise to no legally binding undertakings, but one that is nonetheless of moral and symbolic note.

The question that arises is whether such an oath, affirmation or pledge can be divided or separated between different bodies or entities? Can there be mixed allegiances? Historically, the answer would have been "no", for the simple reason that the oath was intended to cement support against the external and internal enemies of the

Crown. It was the preservation of the King's person and with it the body politic itself that was at issue.

In a contemporary constitutional setting, based on representative and responsible government, one question to consider is whether the body politic (as represented by the Queen) and the people of NSW are, in effect, two sides of the same coin? Theoretically and practically, is not an identity of interests and loyalties at issue here?

A further question is what purpose is served by the parliamentary oath today? Is it merely part of the symbolism and ceremony that attaches to becoming a Member of Parliament? If so, does it matter if some Members express their loyalty differently to others? If what it amounts to is a promise, a moral statement, is not the weight of subjective meaning that attaches to it more important than consistency as to the object of allegiance or loyalty?

On the other hand, it might be argued that if symbolism matters then should it not at least achieve some consistency of form and content? In addition, if taking an oath or pledge is to be a qualification for sitting and voting in the NSW Parliament, one that is an expression of loyalty and of one's duty as a parliamentarian, does it not make sense for all Members to make that promise in the same form?

One possible compromise is found in the Queensland model where, effectively, two distinct oaths are made; parliamentarians are required to take an oath of allegiance (to the Sovereign) *and* an oath of office (to the people Queensland). But that is not a compromise that will appeal to everyone. Just as some Members may have a strong preference for

expressing their allegiance to the Crown, others will be reluctant to swear allegiance to the Queen, albeit as the encapsulation of the body politic.

7.4 An oath/pledge of loyalty or of service?

A further thought is whether it would be more meaningful to call the pledge of loyalty required by s 12 of the Constitution Act a pledge or oath of "office" or "service". The word "loyalty" has echoes of citizenship, nationhood and, historically, of the duties owed by subjects to the monarch. In the ACT, Members can swear *allegiance* to the Queen or swear to *serve* the people of the Territory.

7.5 Is there any need for a parliamentary oath or pledge?

While no legal rights or duties attach directly to the making of a parliamentary oath or pledge, it is the case that its making is a requirement for a Member to sit and vote in either House. As such, it might be considered a qualification for office, which begs the question why such a qualification or additional hurdle is needed for an elected Member to sit and vote in the NSW Parliament.

It is [reported](#) that in the UK:

Some have argued that in a democracy the electorate should have the sole responsibility (subject to electoral law) for determining who sits in the House of Commons to represent them; and that Parliament should have no right to overturn the decision of the people.⁵²

One member of the House of Commons (Kevin McNamara) is quoted as saying:

The era in which it was thought to be appropriate for legislators to set a political or religious test for those deemed acceptable to enter the parliamentary club has long since passed...The only test for inclusion and membership of this House should be the will of the electorate, freely expressed.⁵³

Even if that argument has some force in respect to Members of Parliament, the same may not apply to Members in their capacity as Executive Councillors. When discussing whether oaths or affirmations should continue to be required, Professor Enid Campbell observed that:

Were requirements to take oaths or affirmations of allegiance to be removed, there could still be good reasons for retaining provisions under which installation in certain public offices depends on the tendering and taking of an oath or affirmation of office. Swearing in to office, at least, if it is a matter of public record, establishes a firm date on which the occupant of the office has assumed the powers and duties attached to the office.⁵⁴

Campbell discussed oaths of office in various republican constitutions, including the United States and Ireland. She noted that, for the US, the constitutional prescriptions require "a commitment to the Constitution rather than fidelity to a person or loyalty to the country itself".⁵⁵ Campbell wrote that the same applies under the Constitution of the Republic of Ireland, although in that context only the President and judges of the Supreme Court are required to take an oath of office. Members of the Oireachtas and of the Government do not take any oath.⁵⁶

The contrary argument would seem to be that the time of taking up one's

duties as a parliamentarian is an appropriate moment for making an express recognition of political obligation, by way of a solemn promise, in whatever form that takes.

8 Conclusions

The issues raised by the Restoration of Oaths of Allegiance Bill 2011 are many and varied. The foregoing discussion has suggested a number of different approaches to the content of s 12 of the NSW Constitution Act, including:

- A pledge of loyalty to Australia and the people of NSW (the current position).
- A pledge of loyalty or service to the people of NSW.
- Either a pledge of loyalty to Australia and the people of NSW *or* an oath/affirmation of allegiance to the Queen (the Restoration of Oaths of Allegiance Bill 2011 model).
- An oath of office to Australia and the people of NSW *and* an oath/affirmation of allegiance to the Queen (the Queensland model).
- An oath/affirmation to serve the people *or* of allegiance to the Queen *and* to serve the people (the WA model).
- Either an oath/affirmation of allegiance to the Queen *or* an oath/affirmation to serve the people, *or both* (the ACT model).
- Removing the requirement to take the parliamentary oath as a condition for sitting and voting in the NSW Parliament.

Reviewing the various options, Enid Campbell wrote:

Whether oaths or affirmations should continue to be required of

those appointed or elected to particular public offices and, if so, what forms that oaths and affirmations should take, are questions on which there are likely to be differences of opinion.⁵⁷

¹ It takes the following form: "I...being appointed as a member of the Executive Council of New South Wales, do swear that I will perform the functions and duties of an Executive Councillor faithfully and to the best of my ability and, when required to do so, freely give my counsel and advice to the Governor or officer administering the Government of New South Wales for the time being for the good management of the public affairs of New South Wales, and that I will not directly or indirectly reveal matters debated in the Council and committed to my secrecy, but that I will in all things be a true and faithful councillor. So help me God".

² House of Commons Library, [The Parliamentary Oath](#), Research Paper 1/116, p 15. This account is on that paper, which in turn is based largely on RW Perceval and PDG Hayter, "The oath of allegiance" (1964) 23 *The Table* 85.

³ N Wilding and P Laundy, *An Encyclopaedia of Parliament*, 4th ed, 1972, p 503.

⁴ House of Commons Library, n 2, p 18.

⁵ In the UK the right to affirm was only an option after 1888, following the controversial case of the atheist Charles Bradlaugh. The case is discussed in the House of Commons Library Research Paper 1/116, as is the later refusal of Sinn Fein Members to take the oath.

⁶ For the position before 1856 see – A Twomey, *The Constitution of New South Wales*, The Federation Press 2004, pp 384-385.

⁷ The NSW Parliament could not have dispensed with the requirement that Members take an oath of allegiance, as this was mandated by s 12 of the *Australian Constitutions Act 1850* (13 & 14 Vic c 59): E Campbell, "Oaths and affirmations of public office" (1999) 25(1) *Monash University Law Review* 132 at 142-143.

⁸ As Twomey notes, the reference to the dependent status of NSW was removed from the oath - Twomey, n 6, p 385.

⁹ *NSWPD*, 4 March 1993, pp 338-339.

¹⁰ *NSWPD*, 23 May 1995, p 50.

¹¹ *NSWPD*, 8 June 1995, p 855.

¹² Under the Bill, s 12 of the Constitution Act would have been amended to read: "No

Member of either the Legislative Council or the Legislative Assembly is permitted to sit or vote in the House to which the Member has been elected until the Member has taken and subscribed the pledge of loyalty prescribed by the *Oaths Act 1900* before the Governor or other person authorised by the Governor to administer the pledge".

¹³ *NSWPD*, 23 May 1995, p 51.

¹⁴ Twomey, n 6, p 385.

¹⁵ Supported by Labor Government members, along with Peter Breen (Reform the Legal System), Arthur Chesterfield-Evans (Australian Democrats) and Peter Wong (Unity); and opposed by Coalition members, along with Reverend Nile (Christian Democrats) and John Tingle (Shooters)

¹⁶ *NSWPD*, 6 May 2004, pp 8567-8571.

¹⁷ *NSWPD*, 2 March 2006, p 20937.

¹⁸ *Commonwealth Constitution*, s 42 read with the Schedule to the Constitution.

¹⁹ [Constitution of Queensland 2001](#) (Qld), s 22 read with Schedule 1.

²⁰ [Constitution Act 1934](#) (SA), s 42.

²¹ [Constitution Act 1934](#) (Tas), s 30, read with [Promissory Oaths Act](#) 1869 (Tas), s 2.

²² [Constitution Act 1975](#) (Vic), s 23 read with Schedule 2.

²³ [Constitution Act 1889](#) (WA), s 22 read with Schedule E.

²⁴ [Oaths and Affirmations Act 1984](#) (ACT), s 6A read with Schedule 1A, Part 1A.1 and Part 1A.2

²⁵ [Northern Territory Self-Government Act 1978](#) (Cth), s 13 read with Schedule 2. Members of the Legislative Assembly are also required to take an oath or affirmation of office, as set out in Schedule 3, to "render true and faithful service" in that capacity.

²⁶ Queensland Parliament, LCARC, Report No 31, *Review of the Members' Oath of Affirmation of Allegiance*, October 2001, p 7.

²⁷ Queensland Parliament, LCARC, Report No 36, *The Queensland Constitution: Specific content issues*, August 2002.

²⁸ Queensland Parliament, Law, Justice and Safety Committee, Report No 71, [Options for modernizing the oaths and affirmations of allegiance in the Constitution of Queensland Act 2001](#), September 2009, p 6.

²⁹ Queensland Parliament, Law, Justice and Safety Committee, Report No 71, n 28, pp 9-11 (Dissenting Report).

³⁰ *ACT Debates*, 21 June 1995, p 970.

- ³¹ G Winterton, "Popular sovereignty and constitutional continuity" (1998) 26(1) *Federal Law Review* 1 at 4. Different views about sovereignty and its historical and contemporary meaning are explored in H Kalmo and Q Skinner eds, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, Cambridge University Press 2010. Skinner contrasts Hobbes' "fictional" theory of sovereignty in which, based on a political covenant agreed to by all individuals, power resides in the "artificial person" of the state, with the legal positivist theory of John Austin. Further to this positivist approach, HWR Wade and HLA Hart ascribed ultimate authority to the observance by the higher judiciary of a "rule of recognition" – the doctrine of parliamentary sovereignty.
- ³² M Sunkin and S Payne eds, *The Nature of the Crown*, Oxford University Press 2000, pp 36-37. According to Professor Goldsworthy, "parliamentary sovereignty might in principle have existed well before the nineteenth century, when responsible government became firmly established" - J Goldsworthy, *The Sovereignty of Parliament*, Clarendon Press 1999, p 9. Goldsworthy presents a detailed account of the history and philosophical foundations of the doctrine of parliamentary sovereignty.
- ³³ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 6th ed, Macmillan 1902, p 38. In a positivist vein, Dicey adds that "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament". The application of the doctrine of parliamentary sovereignty to the British Parliament is currently a matter of debate, in particular having regard to the relationship between European and UK law and the devolution of power within the UK. For a commentary see – V Bogdanor, *The New British Constitution*, Hart Publishing 2009, Chapters 2 and 11. See also the chapter by Neil MacCormick in H Kalmo and Q Skinner, n 31. The powers of the NSW Parliament have of course always been subject to limits, originally in respect to the Imperial Parliament and later under the Commonwealth Constitution.
- ³⁴ Goldsworthy (n, 32, p 234) writes that "the doctrine applies in Australia only in a heavily qualified form". As Twomey explains, the "sovereignty" of NSW is "limited to the extent that the State is a constituent element of a federation and its powers are limited by the Commonwealth Constitution": A Twomey, n 6, p 45. Issues relating to parliamentary sovereignty are discussed in - "BLF v Minister for Industrial Relations" by Fiona Wheeler in G Winterton ed, *State Constitutional Landmarks*, The Federation press 2006.
- ³⁵ Winterton, n 31, p 4.
- ³⁶ ACTV (1992) 177 CLR 106 at 138.
- ³⁷ *McGinty* (1996) 186 CLR 140 at 237 (emphasis added).
- ³⁸ L Zines, *The High Court and the Constitution*, 5th ed, The Federation Press 2008, p 557.
- ³⁹ Twomey, (n 6, p 21) explains that the NSW Constitution Act has something of a hybrid status, as an indigenous NSW statute and as a schedule to an Imperial Act.
- ⁴⁰ According to Vernon Bogdanor, "A constitutional monarchy...can be defined as a state which is headed by a sovereign who reigns but does not rule" – *The Monarchy and the Constitution*, Clarendon Press 1995, p 1
- ⁴¹ AV Dicey, n 33, p 73. For a commentary on parliamentary and popular sovereignty in the UK see – R Weill, "Centennial to the Parliament Act 1911: The Manner and Form Fallacy" [January 2012] *Public Law* 105.
- ⁴² ECS Wade and AW Bradley, *Constitutional and Administrative Law*, 11th ed, Longman 1993, p 94.
- ⁴³ Wade and Bradley, n 42, p 94. Admittedly, the argument is not without its difficulties. Wade and Bradley noted in this respect that "the control which it [the electorate] provides is very generalized and sporadic in effect", depending on a range of factors, including the "means by which public opinion is formed and expressed".
- ⁴⁴ Quoted in Goldsworthy, n 32, p 243.
- ⁴⁵ J Bodin, *On Sovereignty* edited by JH Franklin, Cambridge University Press 1992, p 1 (first published 1576 and quoted in Kalmo and Skinner, n 31, p 223.
- ⁴⁶ Twomey, n 6, p 44 (footnotes omitted).
- ⁴⁷ Twomey, n 6, p 385.
- ⁴⁸ Twomey, n 6, p 386.
- ⁴⁹ It is said that, irrespective of whether a person has taken an express oath of allegiance, at common law, all Australian citizens owe allegiance to the Queen - Campbell, n 7, p 159.
- ⁵⁰ But note that, by s 13A(1)(b), a Member may be disqualified for, among other things, taking an oath of allegiance to a foreign power. However, it is the making of an oath of allegiance to a foreign power that carries legal consequences, not the

- taking or breaching of the parliamentary oath itself. For a commentary on the s 13A(1)(b) see Twomey, n 6, p 423.
- ⁵¹ Queensland Parliament, LCARC, Report No 31, n 26, p 5. Presumably, the same applies to the pledge of loyalty taken by members of the Executive Council in NSW.
- ⁵² House of Commons Library, *The Parliamentary Oath*, Research Paper 1/116, p 27
- ⁵³ HC Deb, 29 July 1998, Vol 317 c 377.
- ⁵⁴ Campbell, n 7, pp 164-165.
- ⁵⁵ Campbell, n 7, p 157.
- ⁵⁶ The oath to the British monarch, a controversial requirement of the 1921 Anglo-Irish Treaty, was abolished by Fianna Fáil in 1932–33.
- ⁵⁷ Campbell, n 7, p 163.

Information about Research Publications can be found on the Internet at the:

[NSW Parliament's Website](#)

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

© 2012

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent from the Librarian, New South Wales Parliamentary Library, other than by Members of the New South Wales Parliament in the course of their official duties.

ISSN 1838-0204