CHAPTER 3

Criminal Offences (s. 44 (ii))

INTRODUCTION

3.1 Section 44 (ii) of the Constitution provides:

> Any person who—
>
> (ii) Is attainted of treason or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer:
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> shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives.

3.2 The authors of the Commonwealth of Australia Constitution Bill, while adopting the language of the equivalent provision in the British North America Act, made express provision in the early drafts for the disqualification on the grounds of treason or criminal conviction to be removed in certain circumstances.[1] Although the wording was subsequently modified, this general approach was confirmed in the committee stage and a proposal to make the disqualification permanent was negatived.[2] The clause was subsequently amended to substitute the language now contained in s.44 (ii) for the words 'felony or any infamous crime',[3] but the disqualification remained temporary in the case of offences other than treason. The provision in its present form disqualifies any person who is 'attainted of treason' (as to which, see below) and convicted persons under sentence or subject to be sentenced, for a year or longer. In the case of convicted persons, therefore, the disqualification ceases to apply once they have served the sentence.

TREASON

3.3 This provision has the effect of disqualifying from membership or candidature persons 'attainted of treason'. The word 'attainted' is somewhat obscure, having its roots far back in English legal history. A person was said to be attainted when he was under, or subject to, attainder. Attainder was that extinction of civil rights and capacities which formerly took place under English law when judgment of death or outlawry was recorded against a person convicted of treason or felony. The two principal consequences were the forfeiture and escheat of the lands of the criminal and the corruption of his blood, by which was meant that he became incapable of holding or inheriting land, or of transmitting a title by descent to any other person. These consequences of attainder were mitigated by various statutes and finally the British Forfeiture Act 1870 wholly abolished attainder, corruption of blood, forfeiture, and escheat for treason or felony, preserving them, however, in the case of outlawry. Of historical note is Coke's statement that a man attainted of treason was not eligible for election because the writ which was addressed to the sheriff called for the return of 'fit and proper' persons 'which they cannot be said to be when they are attainted of treason.'[4] However this term does not appear to have had a precise legal application in Britain by the year 1900, and has even less application in Australia today —a point which was raised by Professor Geoffrey Sawer in his submission to the Committee.[5] In its present-day context the words 'attainted of treason' imply someone blackened or stained with treason (from the Latin root 'attinctus'), but not necessarily convicted of treason. However Professor

Sawer suggests that 'a court might interpret it as meaning now simply "convicted of treason" '[6] and Lumb and Ryan[7] by implication adopt this view.

3.4 An issue which arises for consideration in relation to this part of section 44 (ii) is whether it is necessary or desirable to retain the offence of treason as a specific ground of disqualification or whether it can be subsumed under a more general class of serious offences. Professor Sawer, commenting on the obscurity of this provision, remarks that 'the following provisions of the sub-section would in any event cover the case.'[8] This may not be strictly true as the present wording of section 44 (ii) provides for a permanent disqualification in the case of a person attainted of treason while, in the case of other offences, the disqualification is only for the period during which the person is under sentence or subject to be sentenced.

3.5 We have, nevertheless, considered the desirability of abolishing the special ground of disqualification based on treason, and rejected such a course. The express inclusion in the Constitution of treason as a permanent ground of disqualification is a clear indication that the authors of the Constitution regarded it as the most serious crime which would preclude a person from membership of Parliament. The nature of treason and the abhorrence which it, not unnaturally, arouses are such as to justify its retention as a ground of permanent disqualification. It is, after all, the most serious offence which a citizen can commit against his fellow countrymen, striking at the very roots of the nation's security. As such, it is fitting that it should permanently bar a convicted person from national parliamentary office.

3.6 Nevertheless, the present constitutional formula, 'attainted of treason', is obscure. Given our view that treason should be retained as a ground of disqualification, it is desirable that the nature of this ground should be spelt out more clearly. The first step in achieving greater clarity is the replacement of 'attainted' by 'convicted'. Whether a person has been *convicted* of treason is a matter of fact, readily ascertainable by reference to court records. Once this fact is established, the disqualification arises. (The matter of a pardon will be discussed below.)

3.7 Treason is a statutory offence[9] defined under Commonwealth legislation in s. 24 of the *Crimes Act* 1914. The material part of s. 24 provides as follows:

> 24. (1) A person who—
> (a) kills the Sovereign, does the Sovereign any bodily harm tending to the death or destruction of the Sovereign or maims, wounds, imprisons or restrains the Sovereign;
> (b) kills the eldest son and heir apparent, or the Queen Consort, of the Sovereign;
> (c) levies war, or does any act preparatory to levying war, against the Commonwealth;
> (d) assists by any means whatever, with intent to assist, an enemy—
> (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
> (ii) specified by proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth;
> (e) instigates a foreigner to make an armed invasion of the Commonwealth or any Territory not forming part of the Commonwealth; or
> (f) forms an intention to do any act referred to in a preceding paragraph of this sub-section and manifests that intention by an overt act,
>
> shall be guilty of an indictable offence, called treason, and liable to the punishment of death.

By virtue of ss. 4 and 5 of the *Death Penalty Abolition Act* 1973 the penalty of imprisonment for life has been substituted for the punishment of death. Section 24 is a modification of the grounds of treason set down in a series of English statutes dating from 1351.[10]

3.8 It is possible, therefore, to determine whether a person has been convicted of treason as defined by the Commonwealth Parliament in s. 24 of the Crimes Act. This is

the basis on which the disqualification should rest, thereby keeping this particular ground of disqualification within the control of the Commonwealth Parliament, the appropriate body to exercise such control.[11]

3.9 Even though in this way the scope of the offence of treason will be kept within parliamentary control, we recognise that, with changing circumstances and the effluxion of time, it is possible that perceptions of deeds which earlier led to a conviction for treason may alter. This may result in the grant of a pardon for the offence. The effect of such a pardon will be to clear the person pardoned from all infamy and from all consequences of the offence for which it is granted. In addition he is cleared from all statutory or other disqualifications following upon conviction.[12] Expressed another way, the recipient of the pardon is given 'a new credit and capacity'.[13] Accordingly, it seems he would enjoy renewed capacity to seek election to the Parliament. It is fitting, therefore, that allowance should be made in s. 44 (ii) for the grant of a pardon to remove what would otherwise be a permanent disqualification, namely a conviction for treason.

3.10 We note in passing that the 1891 draft of the equivalent provision to s. 44 provided that the grounds of disqualification contained therein would have effect 'until the disability is removed by a grant of a discharge, or the expiration of the sentence, or a pardon, or release, or otherwise.'[14] This form of words was substantially modified in a later draft and its intent was, to a large extent, encompassed within the wording of the second aspect of s. 44 (ii). Nevertheless we think that it is appropriate, in relation to the offence of treason, to restore the reference to the possibility of a pardon, thereby regaining, in a sense, the spirit of the earlier draft. Our consideration of this aspect of s. 44 (ii) has led us to the view that a substantial re-wording is necessary and we recommend accordingly.

3.11 Recommendation: Section 44 (ii) of the Constitution should be amended by repealing the words 'is attainted of treason' and substituting the following words: 'has been convicted under the law of the Commonwealth, and not subsequently pardoned, of the offence of treason.'

OFFENCES PUNISHABLE BY IMPRISONMENT FOR ONE YEAR OR LONGER

3.12 The second aspect of s. 44 (ii) disqualifies any person who '. . . 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'. This provision was less specific in earlier drafts of the Constitution in that the disqualification arose if a person was convicted of '. . . felony or of any infamous crime'. This wording appears in successive drafts of the Constitution from 1891 until 1898. However, the following words of the clause made it clear that the disqualification for such a conviction was not to be permanent by providing that it should last '. . . until the disability is removed by a grant of a discharge, or the expiration of the sentence, or a pardon or release, or otherwise.'[15]

3.13 At the Sydney session of the Convention of 1897 Edmund Barton referred to an amendment proposed by Sir Samuel Griffith. This proposal was to substitute for the words 'felony or any infamous crime' the following:[16]

> Any offence of such a nature that by the law of the State of which he is a representative, the person convicted of it is liable to undergo deprivation of liberty for a term of three years.

This proposal was apparently considered by the Drafting Committee after the 1897 session,[17] and in Melbourne in 1898 a much more specific provision, adopting the thrust of the Griffith proposal, emerged. This provision was, in fact, the same as the current s. 44 (ii) except that the period of imprisonment referred to was three years, not one as now.[18] During the short debate on this amendment the only question of principle which arose was whether a criminal conviction should operate permanently to disqualify a person from election to Parliament or only serve to disqualify him for the duration of his sentence.[19] Generally, however, there was little support for permanent disqualification on this ground and an amendment which would have had this effect was soundly defeated.[20]

3.14 Clearly, the purpose of the second part of s. 44 (ii) is to prevent persons convicted of offences of a certain degree of seriousness (indicated by their carrying a minimum penalty of a year's imprisonment) from either standing for Parliament or continuing to sit in Parliament during the period of their sentence. This provision is based on the view that someone who has been found guilty of a serious offence is not a fit and proper person to seek or hold parliamentary office while he is under sentence.

3.15 While we are in no doubt that this purpose remains valid, we are by no means certain that s. 44 (ii) is still the most effective way to achieve it. Professor Sawer in his submission[21] suggests the need to investigate whether existing or potential sentencing systems might create difficulty in deciding whether a particular offence is punishable for a year or longer. Indeed society's approach to the treatment of offenders has changed so much since the end of the nineteenth century, when this provision was included in the Constitution, as to throw its efficacy into doubt. Since that time society's methods of treating criminal offenders have become more complex; we have seen the development of the new field of criminology where the emphasis is on a criminal justice system which seeks to rehabilitate offenders as useful members of society rather than mete out harsh penalties in retribution for wrongs inflicted on society.

3.16 In its recent Interim Report, *Sentencing of Federal Offenders*,[22] the Australian Law Reform Commission discusses the fluctuating state of the debate on methods of punishing offenders, noting that the philosophy of rehabilitation appears to be 'undergoing a period of challenge or eclipse' while the philosophy of retribution 'is enjoying a renaissance under the "fresh guise" of the concept of "just desserts".'[23] After an extended discussion of the debate, the Commission, while acknowledging that there are many factors to be weighed up, concludes that imprisonment should be used only as a punishment of last resort. In the words of the Interim Report:

> Imprisonment should be used only in cases where it is necessary for the protection of society or where a lesser penalty would depreciate the seriousness with which society views a particular crime, or where lesser sanctions may have been applied in the past and ignored by the offender. Nevertheless, rational and humane sentencing reform should be guided by the principle that Commonwealth laws on punishment of convicted Federal offenders should adopt and encourage the use of the least punitive sanction necessary to achieve social protection. So far as is consistent with social protection, preference should be given to the use of non-custodial sentencing options and the use of such options should be facilitated by reform of Commonwealth law.[24]

We refer to these views because they serve to emphasise the inappropriateness of using as a yardstick for parliamentary disqualification the criterion of being under sentence or subject to be sentenced for any offence punishable by imprisonment. While as the Law Reform Commission itself acknowledges,[25] imprisonment as a form of punishment will be with us for the forseeable future, the trend of informed opinion is towards the greater

adoption of non-custodial sanctions. In this context, the entrenchment within the Constitution of a criterion based on nineteenth century methods of punishing serious offences is likely to become increasingly irrelevant.

3.17 An even more compelling criticism of this aspect of s. 44 (ii) as a basis for disqualification is the lack of consistency in attaching penal sanctions to offences. This is true both for terms of imprisonment and fines, and has been highlighted as regards Commonwealth offences by the Law Reform Commission. Thus, in the Interim Report on sentencing, the following conclusion is stated:

> The Commission's study of the range of penalties which provide periods of imprisonment for offences under Commonwealth Acts has revealed a lamentably confused morass of sanctions which lack any apparent consistency, rationale or planning.[26]

The Interim Report provides a number of examples of the inconsistency which prevails in the setting of maximum terms of imprisonment for similar offences.[27] One example, relating to the forging and uttering provisions in certain Commonwealth Acts,[28] will suffice to illustrate the reason for our concern. Under s. 47 of the *Reserve Bank Act* 1959 a penalty of 14 years' imprisonment is provided for persons who forge or utter Australian bank notes. Section 57 of the *Crimes Act* 1914, on the other hand, provides a term of imprisonment for 3 years for persons who utter any counterfeit coin knowing it to be counterfeit. Section 54 of the same Act provides a term of imprisonment of 10 years for persons who make, or begin to make, any counterfeit coin. Forging or uttering Treasury bills under s. 13 (1) of the *Treasury Bills Act* 1914, carries a penalty of 10 years' imprisonment. In relation to this example the Law Reform Commission remarks:

> It is difficult to see why the relativity provided for in the case of forging and uttering should evaporate entirely in the case of making coins and forging Treasury bills.[29]

3.18 Further incongruity arises in the case of some offences, which, although they are of a relatively minor nature, are punishable by long periods of imprisonment. Thus, for example, under s. 19 (2) of the *Antarctic Treaty (Environment Protection) Act* 1980 a person who, among other things, flies an aircraft in such a manner as to disturb a concentration[30] of birds or seals, or, while on foot, disturbs a concentration of birds or seals is liable to a fine of $2,000 or imprisonment for 12 months, or both. While accepting the policy behind this legislation, it is in our view quite extraordinary that a person convicted of an offence of such a character would thereby be disqualified from Parliament.

3.19 Another incongruity lies in the existence of serious offences which are punishable, upon conviction, only by the imposition of a fine without any provision for imprisonment. Such offences would not come within the terms of s. 44 (ii) and therefore would not operate to disqualify a convicted person from Parliament or candidature for Parliament. Thus, under s. 231 of the *Income Tax Assessment Act* 1936, any person who fraudulently avoids or attempts to avoid assessment or taxation is guilty of an offence for which the maximum penalty is $1,000 with a discretion in the Court to order the person to pay a sum up to twice the amount of tax that has been avoided or attempted to be avoided. Thus, under the law as it presently stands, a person convicted of a serious offence against the tax laws would not be thereby disqualified, although this is surely an area, if ever there was one, which demands probity from those seeking, or holding, parliamentary office.

3.20 Another area where pecuniary penalties are the only option available to deal with a convicted person is that of trade practices. Thus, under s. 76 of the *Trade Practices Act* 1974, a natural person who is convicted of a contravention of Part IV of the Act is liable to a maximum fine of $50,000. Part IV deals with such offences as contracts in restraint of trade, pricing covenants, secondary boycotts, monopolisation, exclusive

dealing, resale price maintenance, price discrimination and mergers. Under s. 79 a maximum penalty of $10,000 can be imposed on a natural person who contravenes the consumer protection provisions of the Act. Part V deals with consumer protection and includes provisions prohibiting practices such as false representations and false descriptions, and provisions creating implied undertakings as to quality or fitness. It is clear from the level of penalties imposed that Parliament regards these offences under the Trade Practices Act as serious. However, because they are not punishable upon conviction by a term of imprisonment, their commission would not render the offender liable to disqualification.

3.21 Further incongruities arise where there are differences in penalties for similar offences as between different jurisdictions. For example, in the A.C.T. sub-s. 5(2) of the *Poisons and Narcotics Drugs Ordinance* 1978 provides for a maximum penalty of 2 years' imprisonment, or a fine of $2,000, or both, for the possession of a quantity of cannabis in excess of 25 grams in mass. If the offence relates to a quantity of 25 grams or less, the penalty is a maximum fine of $100. In Queensland, on the other hand, s. 130 of the Health Act 1937-1980 prescribes a penalty of a fine of $2,000, imprisonment for 2 years with hard labour, or both, for possession in whatever quantity. Thus a serving member or a candidate who was convicted for possession of less that 25 grams of cannabis would be disqualified if convicted under the law of Queensland but not under the law of the A.C.T.

3.22 Even within the same jurisdiction there can be inconsistencies between penalties attaching to the same offence& This has been recently illustrated in a manner highly pertinent to the matter here under discussion when Senator Georges was convicted under the law of Queensland on two occasions, once in 1978 and again in 1979, for taking part in an unlawful procession and disobeying an order given by a member of the Police Force. Senator Georges was convicted under s. 36 of the Traffic Act 1949-1980, and reg. 124 made under that Act. Under those provisions, the maximum penalty is $200 or six months' imprisonment for an offence under the Act, or $100 or three months' imprisonment for an offence under the Regulations. If, however, he had been charged, as he might have been, and convicted under s. 61 of the Queensland Criminal Code for taking part in an unlawful assembly, he would have been disqualified from Parliament. This is because, under s. 62 of the Criminal Code, conviction for taking part in an unlawful assembly carries a penalty of imprisonment for one year, thereby bringing it squarely within s. 44 (ii).

3.23 This situation, and the sort of situation we have referred to in paragraph 3.21, are intolerable. Such inconsistencies in penalties attaching to similar offences, whether between the various Australian jurisdictions or within a particular jurisdiction, lead to uncertainty and injustice. Not only that, in the context of our discussion in this chapter, they place membership of the Commonwealth Parliament at the caprice of State Parliaments. The only appropriate body to determine the criteria for membership of the Commonwealth Parliament is that Parliament itself.

3.24 In a submission to the Committee, made before the publication of the Interim Report on sentencing but after the Law Reform Commission had done considerable research in this area, the Commission Chairman, Mr Justice Kirby, noted that the Commission's research demonstrated inconsistencies and lack of uniformity in the penalties provided under Commonwealth and A.C.T. law. His Honour remarked:

> If the Committee were to reach a similar view, it might consider that the provision disqualifying a person from being chosen or sitting in the Parliament by reason of being convicted of an offence punishable by imprisonment for one year or longer is unsafe or at best irrelevant.[31]

Indeed, on the basis both of the Commission's findings and of our own understanding of the situation, we have come to a similar view. It is notorious that, because of the increased number and complexity of offences which have been created by Parliaments, both Commonwealth and State, in recent times, many inconsistencies have been allowed to develop. The very fact that the Attorney-General has seen fit to give the Commission a reference on the punishment of Commonwealth offenders, as a matter of urgency,[32] is indicative of the gravity of the problem.

3.25 Modern developments in methods of sentencing, such as the suspended sentence and the conditional discharge, create anomalies and incongruities in the operation and effect of the second criterion of disqualification within s.44 (ii), thereby further emphasising its inappropriateness. Conditional discharge[33] means that the offender is released upon certain conditions, expressed in a bond, to which he must adhere for a specified time. If the offender abstains from re-offending during the period of his bond, that is the end of it. If he does not, he becomees liable to further sentence for the offence for which he was conditionally discharged and also to sentence for his new offence. Suspended sentence, although similar to conditional discharge, can nevertheless be distinguished from it. Whereas on conditional discharge no further sentence is imposed unless and until there is a breach of condition, under suspended sentence a sentence is imposed at the time of discharge which does not come into operation unless and until there is a breach of condition, when it comes into operation automatically.

3.26 Section 556A of the Crimes Act 1900 (NSW) provides an example of the option of conditional discharge.[34] It provides, in part, that where a court before which a person is charged thinks that the charge is proved but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed or to any other matter which the court thinks it proper to consider, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, either dismiss the charge, or discharge the offender conditionally on his entering into a recognizance to be of good behaviour and to appear for conviction and sentence when called on at any time during whatever period, not to exceed three years, as may be specified by the court. Section 558 of the NSW Crimes Act makes provision for a deferred sentence to be imposed in circumstances where the court before whom a person comes to be sentenced thinks fit. The court may order the offender's release upon a good behaviour bond for such period as it thinks fit. Until the period of the bond has elapsed, the offender, if he breaches the bond, is liable to be called up for sentence.

3.27 The incongruity of the second criterion of s. 44 (ii) which speaks of a person 'under sentence, or subject to be sentenced' should be apparent from this discussion. In cases where an order for a suspended sentence or conditional discharge is made for an offence which, upon conviction, carries a penalty of imprisonment for, say, a year, it is quite possible that an offender would have entered into a recognizance to be of good behaviour for a period extending beyond his sentence. Under s. 556A this period can be up to 3 years; under s. 558 there is no set period of time, being only such period 'as the Court thinks proper'. Yet the offender would still be liable to sentence at any time during the period of the recognizance, as provided by the terms of s. 556A (1) (b) or s. 558. Thus situations could arise where, even though the period of sentence to which the offender would have been liable if convicted has passed, because the period of recognizance has still not terminated he would still be liable for sentence or subject to be sentenced. Thus situated, he would, on a strict interpretation of s. 44 (ii), be disqualified

from being chosen as a member of Parliament, or, if already a member, from sitting. Such a state of affairs is, in our view, quite unsatisfactory and can only be regarded as going well beyond the purpose intended by the authors of s. 44 (ii).

3.28 These considerations have led us to conclude that the second aspect of s. 44 (ii) in its present form is quite unsatisfactory, and should either be amended or repealed. One obvious way of amending s. 44 (ii) would be to provide that the imposition of fines of a certain magnitude would lead to disqualification, thereby overcoming one of the problems we discussed earlier in the chapter. Such an amendment has several drawbacks. First, a similar lack of uniformity exists here as in the case of terms of imprisonment, as the Law Reform Commission points out in its Interim Report,[35] so that there is great difficulty in using a certain level of monetary penalty as an indication of the seriousness of offences. Secondly, even if the problem of inconsistency were overcome, it is quite inappropriate to entrench in the Constitution an amount of money to be used as a determinant of the right of people to stand for Parliament or, in the case of existing members, to continue to hold their seats. The difficulties of constitutional amendment mean that time and the effects of inflation could result in an alteration of the nature of the provision from one dealing with offences of a serious nature to one concerned with those of a quite trivial nature. This, of course, could lead to a situation where disqualification occurred as a result of a conviction for a minor offence.

3.29 Another method of amending s. 44 (ii) would be to provide that, upon conviction for offences of a certain level of seriousness, a sitting member of Parliament could be disqualified by decision of the House of which he is a member and forced to face the judgment of the electorate. This option is fraught with difficulties of definition, and these algne are sufficient to warrant its rejection. Examples are the question of the nature and seriousness of offences necessary to invoke an expulsion procedure; whether it would apply to offences tried summarily or only upon indictment; whether the expulsion procedure could in invoked only after all avenues of appeal had been exhausted, or at some earlier stage.

3.30 Undoubtedly both Houses of the Federal Parliament have the power to expel a member guilty of wrongful conduct.[36] The power of expulsion is one of the principal powers of the House of Commons and, as the Federal Parliament has not exercised its power under s. 49 of the Constitution to declare its powers, privileges and immunities, they are, by virtue of that section, those of the House of Commons at the establishment of the Commonwealth.[37] Thus an expulsion procedure could be implemented under Standing Orders to deal with disqualification for criminal offences.

3.31 The power of expulsion has only once been exercised —by the House of Representatives in 1920 when the Honourable Hugh Mahon, A.L.P. Member for Kalgoorlie, was expelled by resolution of the House. The motion, which was agreed to by a division on party lines, read as follows:

> That in the opinion of this House, the Honourable Member for Kalgoorlie, the Honourable Hugh Mahon, having, by seditious and disloyal utterances at a public meeting on Sunday last, been guilty of conduct unfitting him to remain a member of this House and inconsistent with the oath of allegiance which he has taken as a Member of this House, be expelled this House.

A further motion was moved, and agreed to, in the following form:

> That accordingly the seat of the Honourable Hugh Mahon, the Honourable Member for Kalgoorlie, be declared vacant by his expulsion from this House.[38]

The Mahon case, which was debated amid great acrimony, arose because of remarks attributed to Mr Mahon in a speech he made about the situation which existed in

Ireland in 1920. Mahon claimed in a letter to Prime Minister Hughes that the report of the speech was incomplete and that, read in its entirety, the speech was neither seditious nor disloyal, as claimed by the Prime Minister. The Leader of the Opposition moved an amendment to the effect that Parliament was not the proper tribunal to try a charge of sedition against a member arising out of the exercise of his right of free speech at a public assembly outside the Parliament. Rather, if there were grounds for a charge of sedition, it was a matter which should be tried in a court by a jury.

3.32 The vitriolic, highly-charged and emotional nature of the debate in the Mahon case, dealing as it did with extremely sensitive questions among the Australian people at that time, does little credit to the case for allowing Parliament itself to decide matters of disqualification. It should be remembered, however, that Parliament was there dealing with what was, in reality, an alleged political offence. The charge levelled against Mahon was of a highly political nature. We are concerned with matters which will already have been the subject of a court decision, thereby removing the danger of abuses of the legal process and denial of justice. Nevertheless, given that issues relating to a parliamentarian's personal conduct would be involved, there is still the possibility of a bitter debate with strong elements of personal attack and political point-scoring.

3.33 Arguably, it would be preferable to adopt a system whereby questions as to whether a member convicted of an offence would continue to sit would be referred to a parliamentary committee which would make a recommendation, for consideration by the whole House, as to whether the member's place should be declared vacant, thereby leaving the ultimate judgment to the electors. This procedure has the potential for a bipartisan approach in which the issues are examined objectively away from the politically charged atmosphere of a full-scale debate in one of the chambers.[39] We note in passing that the equivalent British legislation, the Forfeiture Act 1870, which disqualified persons convicted of treason and felony, has been repealed by the Criminal Law Act 1967 in so far as felonies are concerned. While no disqualification exists for criminal conviction (treason excepted), both Houses of the British Parliament have the right to expel such a person. Nevertheless, we do not find the parliamentary committee procedure attractive as a solution to the difficulties of this aspect of s. 44 (ii).

3.34 Professor Sawer suggests that there seems to be some merit in 'repealing the subsection, leaving such matters to the judgment of the electors in the first place and to the operation of section 38 thereafter.'[40]

Section 38 of the Constitution provides that:

> 38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

Section 20 makes similar provision in the case of absent senators. We see merit in the view put by Professor Sawer and have, upon consideration, reached the conclusion that the second aspect of s.44 (ii) is no longer satisfactory as a means of ensuring that persons convicted of serious offences do not either seek a place in Parliament or, if already a senator or member of the House of Representatives, retain their seat in Parliament. Instead, we, like Professor Sawer, regard this as something which can be left to the judgment of the electors where candidates are concerned and, in the case of sitting members, to the discretionary operation of s. 38 or s. 20. The operation of s. 38 would, of course, have the effect of causing a by-election for the House of Representatives, thereby putting the matter before the electors, presuming the member in question chose to stand again. The operation of s. 20 would give rise to a casual vacancy under s. 15 as far as the Senate is concerned.[41] We are aware that ss. 20 and 38 cannot assist in situations where the only penalty for an offence is a fine, so that a member convicted of a serious offence whose only penalty is a fine could still sit in the Parliament. However,

there is, in our view, no practical alternative but to leave the question of such a member's fitness for Parliament to the decision of the electors at the next election. Having said that, we are nevertheless confident that in serious cases the member concerned would be subject to strong pressures from within his own Party which could well lead to his resignation.

3.35 Finally, and keeping in mind the reservations we expressed above, there is as an ultimate, and extreme, resort the option of expulsion under s. 49. If a member of the House of Representatives is expelled, he has the option of seeking re-election at the by-election which must follow. The situation is more complex in the case of an expelled senator. It is conceivable, but not likely, that his name could be put forward for selection by the State Parliament under s. 15. In any event the expelled senator could nominate for the next election of the Senate. There are, therefore, processes whereby the electors can ultimately make their own judgment, even about members or senators who have been expelled.

3.36 In this context it is worth noting some examples which have occurred in the United States. Recently, on 2 October 1980, the United States House of Representatives took the unusual step of expelling a member (Rep. Michael Myers) who had been convicted of bribery in the FBI's 'Abscam' political corruption investigation.[42] He was defeated in the election held on 4 November 1980. Another member was also convicted in the 'Abscam' probe and subsequently defeated in the election.[43] Three other members, although on indictment awaiting trial on similar charges at the time, were also defeated in the election of 4 November.[44] By contrast, when the House of Representatives in 1967 voted to exclude Adam Clayton Powell from the 90th Congress for numerous offences, including involvement in court cases for income tax evasion and libel, he was re-elected overwhelmingly, even though he did not campaign.[45]

3.37 These examples serve to illustrate our belief that the electorate is the forum in which decisions about the suitability of a person for membership of the Parliament can best be made. Ultimately, it must be the electorate which makes decisions about the quality of representation which it demands in the national Parliament.

3.38 Recommendation: Section 44 (ii) of the Constitution should be amended by omitting the words 'or has been convicted and is under sentence or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer'.

3.39 If our recommendations with respect to the amendment of s. 44 (ii) are accepted, it will read as follows:

> Any person who has been convicted under the law of the Commonwealth, and not subsequently pardoned, of the offence of treason shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Notes and references

1. See J.A. La Nauze, *The Making of the Australian Constitution*, MUP, Melbourne, 1972, p. 53. See discussion later at paras 3.12-3.13.
2. Convention Debates, Sydney, 1891, pp. 665-659.
3. Convention Debates, Melbourne, 1898, p. 2445.
4. Quoted in Erskine May's *Parliamentary Practice*, 15th edn, London, 1950, p. 196.
5. Submission No. 8, p. 1.
6. ibid.
7. R.D. Lumb & K.W. Ryan, *The Constitution of the Commonwealth of Australia Annotated*, 2nd edn, Butterworths, Sydney, 1977, p. 63.
8. Submission No. 8, p. 1.

9. There appears to be no common law offence of treason: *Halsbury's Statutes of England*, 3rd edn, vol. 8, p. 13, note referring to *R* v *Sindercome* (1658) 5 State Tr. 842.
10. See *Halsbury's Laws of England*, 4th edn, vol. 11, para 811 ff.; *Halsbury's Statutes of England*, vol. 8, *passim*.
11. It is not clear whether treason provisions in the Queensland, Tasmania and Western Australia Criminal Codes are good law in light of the corresponding Crimes Act provision (See C. Howard, *Criminal Law*, 3rd edn, Law Book Co., Sydney, 1977 p. 423, footnote 69). In any event, we would restrict the ground to conviction for treason under Commonwealth law.
12. *Halsbury's Laws of England*, 4th edn, vol. 8, para 952.
13. per Morris C.J.: *R* v *Cosgrove* (1948) Tas. SR 99 at 106.
14. Convention Debates, Sydney, 1891, p. 655.
15. ibid.
16. Convention Debates, Sydney, 1897, p. 1020.
17. ibid, p. 1021.
18. Convention Debates, Melbourne, 1898, p. 1931.
19. Convention Debates, Sydney, 1891, pp. 655-659.
20. ibid, p. 659.
21. No. 8, p. 1.
22. ALRC Report No. 15, Commonwealth of Australia, 1980, para. 38 ff.
23. ibid, para. 41.
24. ibid, para. 67; and see further discussion at para 160.
25. ibid, para. 160.
26. ibid, para. 410.
27. cited footnote 22, paras 410-413.
28. ibid, para. 413.
29. ibid.
30. Section 19(4) defines 'concentration' as being, in relation to birds, an identifiable group of more than 20, and, in relation to seals, an identifiable group of more than 10.
31. Submission No. 15, p. 2.
32. ibid, p. 1.
33. The discussion on suspended sentence and conditional discharge is based on: 'Sentencing and Corrections', *First Report of the Criminal Law and Penal Methods Reform Committee of South Australia*, July 1973, chapter 4, pp. 135 ff.
34. 556A (1) Where any person is charged before any court with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed or to any other matter which the court thinks it proper to consider, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—
    (a) dismissing the charge; or
    (b) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

    (1A) A recognizance mentioned in subsection (1) shall be conditioned upon and subject to such terms and conditions as the court shall order.

    (2) Where an order is made under this section the order shall, for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner, and as to the payment of money upon or in connection with such restitution or delivery, and for the purpose of the exercise of any power conferred by section 437 (1) or section 554 (3), have the like effect as a conviction.

    (3) Where under subsection (1) a charge is dismissed or an offender is conditionally discharged, the person charged shall have the same rights as to appeal on the ground that he was not guilty of the offence charged as he would have had if convicted of the offence.
35. Cited footnote 22, paras 414-417.
36. J.R. Odgers, *Australian Senate Practice*, 5th edn, AGPS, Canberra, 1976, p. 261.
37. It should be noted that while the Privileges Committees of both Houses have investigated specific matters relating to the arrest and imprisonment of a Senator and member of the House of Representatives, they themselves have not gone on to make any specific recommendations which touch upon the question of how such arrests and imprisonment might affect the qualification or disqualification of members. See:

Imprisonment of a Senator, October 1979, Parl. Paper No. 273/1979; House of Representatives, Committee of Privileges, *Report Relating to the Commitment to Prison of Mr T. Uren, M.P.*, May 1971, Parl. Paper No. 67/1971.

38. Australia, House of Representatives, *Votes and Proceedings*, 1920-21, pp. 431-3.
39. It is useful here to refer to the Poulson affair in Britain. A Select Committee of the House of Commons was established to inquire into the conduct and activities of a number of members, including former Home Secretary Reginald Maudling, in connection with the business affairs of Mr J.G.L. Poulson to determine whether such conduct or activities amounted to a contempt of the House. Although Mr Maulding's conduct was criticised, he was not found to be in contempt. During debate on the Committee's report, amendments to expel Mr Maulding and another member were overwhelmingly defeated. A useful account is contained in *Keesing's Comtemporary Archives*, October 14, 1977, pp. 28607-28610.
40. Submission No. 8, p. 1.
41. In the case of a casual vacancy in the Senate the electorate is the Parliament of the relevant State acting in accordance with s.15 of the Constitution as representatives of the voters of that State.
42. Myers is the first House member to be expelled since 1861. See the account in *Inside Congress*, Congressional Quarterly Inc., page 2894, October 4, 1980.
43. He is John W. Jenrette Jnr.: *Inside Congress*, page 3336, November 8, 1980.
44. Representatives Richard Kelly, John M. Murphy and Frank Thompson Jnr., ibid.
45. In a subsequent decision in 1969 the U.S. Supreme Court held that the House had acted improperly in excluding Powell. See a full account in *Congress and the Nation*, vol. II, Congressional Quarterly Service, Washington D.C., 1969, pp. 895-900.