Disqualification under S44

A Public Submission to the Australian Parliament Joint Standing Committee on Electoral Matters

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All Members of Parliament must have undivided loyalty to Australia. The Constitution does an excellent job of stipulating this. Any attempt to alter S 44 of the Constitution should be vigorously opposed. The people have demonstrated their reluctance to support previous referenda of this nature. Parts of S 44 however could do with some proposed updating and some streamlining for candidates is suggested.

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1 INTRODUCTION

1.1 Lay Private Submission.

This is a lay private submission by an interested citizen with no formal Constitutional Law qualifications. The author is an experienced Systems Engineer and brings this background to the submission. The submission holds the Australian Constitution as the most fundamental and important instrument of Governance for our nation. We the people own the Constitution and if it is to be changed then only the people can do this. Accordingly the comments offered here respond to the public invitation by the Joint Standing Committee on Electoral Matters (JSCEM) and its Reference from the Prime Minister to investigate and report to the Parliament on the application of the Constitution's disqualification operations of Section 44, and related legislation.

1.2 Undivided Loyalty and Singular Focus of Section 44

This submission strongly supports the existing excellent provision of S44 requiring every candidate and elected parliamentarian to have a singular and exclusive focus on Australia. The disqualification of anyone who has dual or multiple foreign citizenship is a precious and fundamental principle. Any attempt to dilute this singular and primal qualification must be vigorously opposed.

1.3 Structure of the Submission

The submission has seven sequential parts, starting with this brief Introduction, followed by each of the five explicit Terms of Reference (TOR) and then a brief Conclusion. The seven sequential parts are:

1. Introduction
2. Candidate and Member Disqualification
3. Legislation for Improved Certainty and Predictability
4. Unknown Inherited Foreign Citizenship
5. Office of Profit and Pecuniary Interests
6. Other Issues
7. Conclusions

A list of contents is also included to assist information location.

2 Candidate Disqualification by Foreign Citizenship S44 (i)

TOR A. How electoral laws and the administration thereof could be improved to minimise the risk of candidates being found ineligible pursuant to section 44(i) (this could involve, among other matters, a more comprehensive questionnaire prior to nominations, or assistance in swiftly renouncing foreign citizenship).

2.1 Conflict of Interest by Foreign Citizenship

S44 (i) disqualifies any candidate or member if they have any entitlement to Foreign Citizenship. This provision of S44 (i) is highly effective in establishing and maintaining the primacy and exclusivity of Australian Citizenship for all members. The objective so well served is that Australians do not want any conflict of interest, real or perceived, by their representatives in Parliament. It is noted that others support dual and multi citizenship. This submission rejects that view and takes considerable comfort that any such change to the Constitution has virtually no chance of happening.

While the Constitution is fine here, there may be legislative and administrative improvements to make these provisions more effective and more efficient for all Candidates and Australia's broader interests. The following are suggested.

2.2 Risk of Being Found Ineligible

The nomination process is set out in the Australian Electoral Commission's (AEC) Handbook for Candidates. Currently the handbook requires that every candidate self-ensures their compliance with S44, which is a good first step. But as this TOR suggests, a more comprehensive questionnaire should be completed prior to nomination. If this screening and renunciation process is done properly, it should eliminate or reduce to near zero the risk of survival of any unknown or previously undeclared Foreign Citizenship. Hypothetically, for now let it taken that such a good screening process has been devised and is in place. More about that process under the next TOR, but for now let it be a given here that such a scheme is possible and is currently available. If the Candidate completes the form properly there would be zero chance of any residual foreign citizenship. Consequentially all candidates would be safe from disqualification vide S44 (i).

Every candidate would complete their nomination process on-line to the AEC. Any Foreign Citizenship entitlement would be detected and drawn to the candidate's attention, where upon the candidate chooses to consciously and formally reject or cancel any such Foreign Citizenship entitlement, or alternatively the candidate chooses to withdraw their nomination. The process eventually concludes and finally the candidate electronically signs their nomination, which is then accepted and certified as valid by the AEC. How all this is to happen is non-trivial and will be addressed subsequently. The concept is all that matters for now.

2.3 Maximising the Competitive Field

Another objective is that the field of candidates for every Division should represent a good selection of eligible strong contenders. It is likely that some candidates would not be prepared to universally reject any entitlement to Foreign Citizenship, especially if they were to be unsuccessful and not become the member elect. Therefore it may be more appropriate that the universal rejection capability only be formally executed for the winning candidate. In the interim some form of provisional renunciation might apply to all candidates to ensure they all complied with the letter of the constitution. While this is likely to only be an implementation detail, the principle of not prematurely discouraging candidates is important. The Constitutional imperative that a person may not be chosen if they have foreign citizenship remains an inconvenient problem, but for now also assume that some sort of interim renunciation limbo was entered pending election. Such a scheme for this has to be developed in a way will work and be acceptable to the High Court.

It is presumed here that rejection of Foreign Citizenship may be a fair price for guaranteed election to the Parliament, but it is believed it may be too high a price to pay for some unsuccessful candidates, but for whom it would very much be in the public interest for them to still contest the process but be prepared to make the forfeiture as the *quid pro quo* were they to be successful! No election no forfeiture! It is noted recently in both New England and Bennelong that neither candidate hesitated to reject their respective foreign citizenship as was necessary for them to resume their seats.

Ostensibly there is still a problem with S44 (i) because those candidates having foreign citizenship are disqualified. Alternatively, if some kind of provisional renunciation was to be attributed to all candidates through their formal acceptance of the nomination process, then this may be more widely attractive as well as being effective, because it would prevent any candidate being elected without renunciation of all their foreign citizenship entitlements. However, the formal execution of renunciation might be withheld and solely applied to the successful candidates. All the unsuccessful candidate might then have provisional renunciations lapse. The public interest and the intent of S44 (i) would be satisfied by this construct. The Committee might take this onboard and perhaps a reference to the High Court could establish its in-principle acceptability or otherwise.

2.4 Swift Renunciation of Foreign Citizenship

The conceptual, on-line, real-time, nomination session; for now is taken as inter-actively renouncing any detected Foreign Citizenship. To that end some unilateral Australian legislated instrument would unequivocally reject all such foreign citizenship upon the election to office of each successful candidate.

Such an instrument of rejection will be further considered later. However, it would be a unilateral edict under Australian sovereignty. There would need to be consequential and simultaneous diplomatic or administrative notification to the respective foreign sovereign state. Whether such states accepted, rejected or delayed the annulment of any such citizenship should be of little interest. After all what is needed here is an Australian solution under the Australian Constitution for the Australian Parliament on behalf of the Australian People. Perhaps there is also some attendant need for some form of UN notification in the case of defunct foreign states, or those that refuse to recognise the proposed unilateral Australian instrument. Foreign Affairs advice would of course be critical here. But the need exists externally of DFAT. Its operation would indeed be exclusive and internally sovereign to Australia. However, the international adoption of this or some similar approach may be a fortunate corollary.

Of course, the concept of some unilateral rejection of all and any foreign citizenship for every candidate would be meaningless without a specific entitlement being detected. One cannot reject something that does not exist! But specific foreign citizenship entitlements are real and can be renounced, with due notification to the relevant State. Conversely, where a former foreign state that had extended foreign citizenship no longer exists, there can no longer be such foreign citizenship.

2.5 Outcome A. Solution of the Foreign Citizenship Problem of S44 (i)

Conceptually, every candidate would be freed of any foreign citizenship through the nomination detection and swift renunciation process. The nomination process administered by the AEC, or some other agency, would be a comprehensive online interactive questionnaire linked to immigration and citizenship databases. The candidate would be prompted by each discovery and given the option to withdraw or proceed. Some form of interim renunciation would be instituted to satisfy the constitutional obligation on candidates. Finally the execution and universal renunciation would only be triggered for the successful candidate upon their being elected to Parliament. All provisional renunciation for unsuccessful candidates would then lapse.

While the precise detail of such a system is far beyond scope here, it is certainly a routine task for a competent systems engineering study. Implementation would be an extension of the existing process within the AEC. Every candidate on the Ballot paper would be compliant with S44 (i) of the Constitution.

3 Legislation for More Certain and Predictable Operation of S44 (i)

TOR B. Whether the Parliament is able to legislate to make the operation of section 44(i) more certain and predictable (for example, by providing a standard procedure for renunciation of foreign citizenship, or by altering procedures for challenging a parliamentarian's qualifications in the Court of Disputed Returns).

3.1 Parliament's Ability to Legislate for more Operational Certainty

The existing Electoral Act *inter alia* establishes the AEC which in turn produces the Candidate's Handbook and conducts the nomination process. This produces the ballot papers and ultimately conducts and promulgates the outcome of elections. While the AEC is not resourced and must be at pains to avoid any advisory role for individual candidates, the Commission does provide some preliminary screening of candidates and requires them to acknowledge and self assess compliance inter alia with S44 of the Constitution.

It is taken here that this is prima facie confirmation that the Parliament is able to legislate and make operation of S44 (i) more certain and predictable. The drafting of how to achieve this is complicated but such legislation would have to enable a thorough candidate screening process to detect and reject foreign citizenship. Further the legislation would need to enable establishment of an Australian unilateral renunciation instrument of all such detected foreign citizenship. As has been suggested, some universal edict could be issued for every candidate listed on a ballot paper that upon election they categorically renounced all foreign citizenship where that is found to exist. This would ensure every candidate fully complied with S44 (i). These prospects are developed further below.

3.2 Disqualification of Candidates with Foreign Citizenship

The lay expectation here is that the Act could be amended to enable the introduction of an online candidate nomination system. This system could comprehend a foreign citizenship detection capability based on input by the candidate and linkage to the appropriate agencies. Any foreign citizenship detected in the nomination process would, at the discretion of the candidate, be automatically renounced if and when the candidate was successfully elected. The enduring S 44(i) constitutional problem preventing candidates having foreign citizenship is acknowledged here. If necessary all candidates may have to provisionally renounce all their foreign citizenship, however, the desirability that this be restricted to the successful candidate has been discussed. The Committee may consider obtaining learned advice on this.

The process for detecting foreign citizenship is not further detailed here. However it is not *rocket science*! For example political parties are good at it and routinely do it to each other now. Similarly the stud cattle and similar industries have highly developed pedigree management processes and they may have some application here. Furthermore, the Government has many highly developed immigration and citizenship testing skills. These can all be collected and codified into the automated candidate nomination system. This is a routine systems engineering requirements analysis task. The Committee should be confident about the feasibility and cost effectiveness of that approach.

3.3 Unilateral Sovereign Renunciation

The lay view here is that the Parliament could amend the Electoral Act so that, where a candidate so chose, they could renounce any foreign citizenship detected in the nomination process. An Australian Instrument of Renunciation could be issued by the AEC, possibly on behalf of the Governor General or other authority, in respect of each specific entitlement to any foreign state. Further advice is needed as

to whether this should be done through the authority of Citizenship, or Foreign Affairs, or other Ministers or Executives.

The point here is that such renunciation is done voluntarily by the candidate holding any foreign citizenship or entitlement. The authority is under the Australian Parliament as a unilateral declaration and the views or reaction by any foreign state should be irrelevant for purely Australian purposes.

3.4 Challenges of Qualification in the Court of Disputed Returns

This submission cannot suggest any alterations for challenges to Parliamentarian's Qualification in the Court of Disputed Returns, other than to reiterate that if the nomination screening process is properly designed and implemented then there should be none, or very few, referrals of such matters to the Court. Of course it is always possible that some elected member could subsequently be awarded some citizenship or such like by a foreign power. In such circumstances it would be routine to renounce any arising compromising entitlements. The diplomatic implications of such renunciations could be sensitive and this needs to be considered by the Committee.

It may be appropriate for the Parliament to create some titular recognition of such awards in a way that did not disqualify the member vide S 44 (i) while simultaneously maintaining the bilateral relationship of Australia and the State in question. This too is beyond scope here.

Finally to return to "Challenges to the Court of Disputed Returns". If there are any such referrals then this would signal failure and the need for further refinement of the screening process. If the process is effective there would be no such referrals. However, only the High Court can rule on the meaning of the Constitution and speculation about how the High Court may so find is fraught. There is no appeal.

It is therefore unlikely in the lay view here, how some procedural alteration is going to do much for Parliamentarian's challenges in this jurisdiction, but given the proposed changes they should not arise.

3.5 Outcome B. Solutions to Parliamentary Legislation and Renunciation

The Parliament is able to legislate to amend the Electoral Act so that candidate nominations include foreign citizenship screening. Automatic renunciation of any foreign citizenship should be a corollary of this and be built into the nomination system. An Australian unilateral Instrument of Renunciation should be developed in consultation through all diplomatic channels. Its international adoption should simultaneously be fostered.

4 Disqualification by Unknown Inherited Foreign Entitlement.

TOR C. Whether the Parliament should seek to amend section 44(i) (for example, to provide that an Australian citizen born in Australia is not disqualified by reason of a foreign citizenship by descent unless they have acknowledged, accepted or acquiesced in it).

4.1 Elimination of Conflict of Interest by Descent

Logically there is no conflict of interest arising under S44 (i) by any Australian born member who may have inherited foreign citizenship in which they have not acknowledged, accepted or acquiesced. Presumably prior to the time of detection of such entitlement, the member was also unaware of it.

The High Court has recently ruled that such members are disqualified. This is the strict literal meaning of the Constitution and there is no appeal. The only recourse is renunciation of such entitlement and re-nomination for the division at the next opportunity if the former member so wished.

Clearly there is no public interest served by such provision of the Constitution and ideally the Constitution should be changed. However, the prospects of the Australian public supporting such a referendum are very poor.

4.2 Amendment of the Constitution is only by Referendum

Despite its poor prospects, the Committee should still advise the Parliament that such a Constitutional change is needed. There may need to be an exemption clause inserted covering Australian born members inheriting such entitlement and automatic renunciation through their nomination or continued sitting member status. The Parliamentary draftspersons should find this no difficulty.

While a referendum on these grounds alone is not likely to be passed by the people, it in some combination with other more widely appealing proposals may be seen to be in Australia's interests and the omnibus package may be supported.

4.3 Outcome C. Inherited Foreign Citizenship

The risk of unknown inherited foreign citizenship for Australian born Members of Parliament is a real and continuing problem. A more comprehensive screening process at nomination time should eliminate or significantly reduce this from occurring. Constitutional amendment is called for, but is thought here to be unlikely to succeed. The preparatory drafting requirement should be advised to the Parliament for possible inclusion in any appropriate referendum.

5 Office of Profit and Pecuniary Interests S44 (iv) and (v)

TOR D. Whether any action of the kind contemplated above should be taken in relation to any of the other paragraphs of section 44 of the Constitution, in particular sections 44(iv) and 44(v).

5.1 Superannuated Commonwealth Retirees S 44 (iv)

Commonwealth Public Servants (APS) and members of the Australian Defence Force (ADF), who are retired and drawing publically funded pensions, ostensibly do hold an office of Profit under the Crown.

Learned comment suggests that the four explicit exemption categories, to which section 44 (iv) does not apply; do not include APS and ADF pensioners. They have no exemption from Section 44 (iv).

The S 44 (iv) "*Exemption Paragraph*" has four subparts designated a, b, c, d here; it reads:

"But subsection (iv) does not apply to

a. the office of any of the Queen's Ministers of State for the Commonwealth, or of

b. any of the Queen's Ministers for a State, or to

c. the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to

d. the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth."

The literature provides some support for the meaning of the four above subparts to be exemptions for:

a. Ministers of State for the Commonwealth
b. State Ministers
c. former Imperial service people (Queen's navy or army – not Commonwealth's)
d. ADF Reservists or part-time service people.

There is no explicit or categorical exemption from S44 (iv) for Commonwealth funded pensioners.

5.2 Literal Interpretation and Current Practice

This lay submission notes that the view here is at variance with long-standing practice by Australian voters to elect former military officers and former public servants. Similarly the High Court has just recently ruled the election of Major General Jim Molan and before that retired public servant Mr John Stone to be valid. Also further learned comment, circa the 1890s Constitutional Convention, was that Section 44 (iv) would not disqualify former military personnel or public servants from being chosen.

The understanding of this submission is that the specifics of this particular issue have not been considered or ruled on by the High Court. The point here is that the rulings and practice appear to be inconsistent with the literal wording of Section 44(iv). For now this inconsistency persists.

5.3 Pecuniary Interests Section 44 (v)

Section 44 (v) seems reasonable enough. No Candidate or Parliamentarian should hold any direct or indirect pecuniary interest in any agreement with the Public Service. This submission sees no requirement to alter this clause.

5.4 Outcome D. Office of Profit S44 (iv) and Pecuniary Interests S44 (v)

The lay and naive interpretation here is that commonwealth superannuated pensioners hold an Office of Profit under the Crown and as such they are disqualified under Section 44(iv). Clearly this is not in the public interest, nor does it reflect the popular public support and long standing practice. The solution would be to alter the Constitution to include an explicit exemption for such pensioners. Others advocate more radical change, but the prospects of either approach succeeding are not good.

Conversely this submission asserts there is no need to alter Section 44 (v).

6 Any other Issues

TOR E. Any related matters.

This is the catch all provision. To that end some issues are suggested below. It is useful to separate them out here so as not to further de-focus the discussion of the foregoing substantive TOR responses.

6.1 AEC Reform

The AEC is on record that it cannot advise individual candidates. This is understandable particularly given the high peak demand on resources at election times. However, a cultural change within the Commission would be required if the comprehensive screening process was to be effective so as to eliminate all future S44 disqualifications. In the end the onus must always lay with the candidate, but some greater involvement by the electoral authorities appears to be necessary. No criticism of the AEC is made by this submission, but overall the current system is broken and it needs fixing. Essentially

more work is needed at the candidate nomination process so that fewer if any disqualifications end up consuming the Parliament's and High Court's resources.

Development of the automated foreign citizenship renunciation capability will have attendant resource implications too. However, such expenditure would represent good value for the Australian Taxpayer.

6.2 The High Court and Court of Disputed Returns

The High Court alone will determine whether there is standing or not for each referral, however there would appear to be some propensity for many more referrals until an effective screening system is in place. The potential to overwhelm the High Court exist and this needs to be addressed. The Parliament alone may not be able to do this. The High Court is the sole authority on the Constitution and on disputed returns. Consequentially it is the only jurisdiction for such matters. Some such matters may be trivial or quite straightforward just requiring an authoritative ruling. How the workload balance between the augmented AEC and the High Court might be adjusted is unknown here. The Committee may consider further developing this matter.

6.3 Draft Glossaries for Public Submissions

Where the Committee seeks public submissions on matters such as the current three associated references it may be helpful to make a draft Glossary available on the website. Complex language particularly S44 is difficult on which to find consensus, or for which the public can adopt consistent simple meanings. It may help respondents get to a more common first base and it may provide the Committee with a more congruent array of proposals and comments. Most experts would probably not refer to such Glossaries, but other lay people may. This need not be exhaustive. Essentially it's a boiler-plate task for the Secretariat or perhaps a graduate assignment.

6.4 Submission Schedule

It is noted that the Committee has two reporting deadlines to Parliament, firstly on S44 (i) by 23 March 2018 and secondly the other provisions by 30 June 2018. Yet there is only a single combined date for public submissions to the Committee, by Friday 9 February 2018. Given the likely rapid pace of developments in the Parliament and elsewhere surrounding this matter, it may be desirable for the Committee to be updated nearer its 30 June deadline. As has been pointed out by the Secretariat, supplementary submissions are a possibility. The Committee may even request this if it's seen to be desirable.

6.5 Outcome E. Other Issues

The other issues this submission raises are the work-balance between the AEC and the High Court. A more thorough routine input involvement by an augmented AEC could help remove routine referrals to the High Court. Provision of a draft glossary for public submission is suggested. Also an updated supplementary schedule may help the Committee with its two reporting deadlines for this referral.

7 Conclusions

7.1 Disqualification

Section 44 of the Constitution ensures that those who are chosen and elected to Australia's parliament have an undivided loyalty to the people of Australia and no other foreign interest. The primacy of this principle is paramount in this submission. Attempts to compromise and dilute this with permissive dual and multi citizenship must be vigorously opposed.

7.2 Effective Screening and Automatic Renunciation (TOR A.)

The development of a comprehensive candidate screening process would detect all real and potential foreign citizenship. Coupled with an automatic renunciation system, no candidate should be disqualified under Section 44 (i). There are consequential considerations based on interim renunciation by all candidates and only executing this for the successful candidate upon their election to Parliament. This should help attract the widest field of candidates who may otherwise not nominate where the loss of foreign citizenship was too high a price for unsuccessful candidates.

7.3 Parliament Can Legislate to Amend the Electoral Act (TOR B.)

Parliament can amend the Electoral Act to give the AEC the authority and resources for it to conduct thorough screening of all candidates to detect all foreign citizenship issues. Similarly the AEC in concert with other agencies could develop an automatic foreign citizenship renunciation system as part of its candidate enrolment capability. Such a system is also likely to have International application.

7.4 Inherited Foreign Citizenship (TOR C.)

The Constitution should be changed so that Australian born candidates and Members of Parliament would not be disqualified if they were found to have foreign citizenship by descent, provided they had not acknowledged, accepted or acquiesced in it. While as a principle this may be fine, pragmatically getting such a change through a referendum is probably not going to be successful.

7.5 Office of Profit and Pecuniary Interest (TOR D.)

There is an apparent wording problem for Section 44 (iv) and its exemption clauses. There is a difference with currently widely accepted practice and a possible interpretation of the Constitution which does not appear to have been tested in court. Pensioned APS and ADF superannuates are not explicitly exempted from disqualification under S44 (iv). The Constitution should be amended to make this explicit.

Conversely there does not appear to be a problem regarding Section 44 (v). Pecuniary Interest should continue to disqualify any candidate or elected parliamentarian should they arise. No action on Section 44 (v) is required.

7.6 Other Issue (TOR E.)

There are some related issues that the Committee might consider. For both the AEC and the High Court, there are workload and resource implications arising from the suggested changes here and others. The AEC or some other agency would need to take on significantly more direct engagement with candidates to service the comprehensive screening processes and their attendant automatic renunciation workloads.

The Committee might also consider the provision of a boiler-plate or reference glossary for use by the public addressing more technical and arcane language such as is covered by this Reference. This may help a more consistent language to be used across submissions and to more consistently inform the public on some obscure or specialized problem.

The re-scheduling of an additional alternative public submission deadline might better match the Committee's dual submission deadlines of this Reference. This may help the latest breaking rulings or developments to be considered publically in further submissions to the Committee.

7.7 Commendation to the Committee

The Constitution is the one prime enabler of Australia's great democracy. We all own, nurture and maintain it. This opportunity to comment on Section 44 regarding the disqualification of candidates and members is very valuable. Section 44 is probably the most important thing about the Constitution, for it goes to the heart of who becomes our representatives in Parliament. The submission is accordingly commended to the Committee.