

Eligibility for a seat in the Parliament

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First, let us be clear about what the law says about eligibility for a seat in the Parliament:

44. 1 Any person who ... is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

There can be no doubt about the meaning of the words, and the Court follows it to the letter.

It is worth asking, however, whether the Lawmakers who wrote and approved that clause intended it to work out as it has in practice.

First, its purpose was to ensure that parliamentarians did not have divided loyalties. Most of us would agree that this is a good idea, but will §44.1 achieve this end? I suspect that candidates with divided loyalties would be the first to ensure their eligibility for election by renouncing the dual nationality. The idea that such a renunciation would prove a change in loyalties is naive in the extreme.

But it is worse than useless. None of those who have recently been excluded has ever shown evidence of divided loyalties, while a number of people whose loyalty to Australia is unquestioned have been deemed ineligible. The Parliament has been damaged by the Court's application of a law designed to protect it.

Indeed, one might ask whether any parliamentarian has ever

shown evidence of divided loyalties. The nearest approach to it was perhaps Sir Robert Menzies, who on Sept 3 1939 adhered to a decision of the British government:

Fellow Australians, it is my melancholy duty to inform you officially that ... Great Britain has declared war upon [Germany], and that, as a result, Australia is also at war.

Of course, things were very different then: Britain was not a foreign power. But today it is: we did not feel obliged to join in their Falklands War.

More importantly, I suspect that Menzies would not be eligible to sit in our Parliament today, if only because of the bizarre final few words of Clause 44.1. He would be ineligible today because he was ‘*entitled to the rights or privileges of a subject or citizen of a foreign power*’.

Again, what does this rule really mean? To be sure that candidates have no such entitlements, they have to investigate the laws of every country in which they, their parents or their grandparents were born, have lived or have worked.

It would be interesting to check up on all the politicians who have been elected since that clause was written. I would consider it likely that around a third of them would prove to have such entitlements. They did not mention them because they could not see that an unknown and unclaimed entitlement was relevant to the question of their loyalties.

This is still the case, but the issue has been deemed relevant: it means that a woman whose Jewish mother left Hungary to escape from Nazi anti-semitism in WW2 will be ineligible unless she can prove that Hungarian law no longer regards her as having Hungarian entitlements.

The idea that the existence of such entitlements might be indicative of potential pro-Hungarian loyalties is worse than absurd: it is grossly insulting.

Had the possibility of the current interpretation of this clause been pointed out when the clause was being drafted, the wording would unquestionably have been changed.

As it is, we have a bizarre outcome: a law designed to make sure that all Parliamentarians are loyal Australians is not only ineffective; it causes many totally loyal Australians to be excluded. A Court which mindlessly follows the letter of such a law is suspect: theirs is at best a bad legal decision, and at worst an illegal decision.

Indeed, we might ask for law to ensure that judges are eligible for the job. The test would be their capacity to maintain our respect for the law. A judge who delivers a judgement which not only fails to do what the law was supposed to do, but also does major damage to the Parliament that the law was supposed to protect, clearly damages our respect for the Law, and should therefore be ineligible for the post of judge.

If the Court applied common sense, the outcome would probably be what the original lawmakers intended, and it would certainly make sense. This is surely what we want and expect from our Courts. For a start, our current prime minister originally thought this way, and to my mind he did so with good reason.

Given that changing Clause 44 is very tedious, we need a simple way of solving the problem. There is one. The Court can determine that the eligibility of parliamentarians can be confirmed retrospectively if they take appropriate prompt action to renounce the offending rights. The Court can determine what 'appropriate' means, a trivial issue since the process proves nothing either way.

Meanwhile our protection against divided loyalties lies not in the Courts but in the intelligence of the electorate. The views of anyone who stands for Parliament will rapidly become well known. There is no way in which a person with suspect loyalty could survive the electoral process without anyone noticing it, and

if it was noticed that person would not be elected.

I have fair confidence that no current parliamentarians would be found to have divided loyalties. The only possible ones would be those who voted for Australian involvement in US wars in Viet Nam, Iraq, etc., but they could argue that this was because of treaty obligations, not '*obedience to a foreign power*'.

It is appropriate that Section 44 should require that candidates be current Australian citizens. It is perhaps appropriate that they have renounced all prior nationalities and entitlements of which they are aware, and which might influence their loyalties; but the best protection against divided loyalties is the common sense of the electorate and the Parliament. It is a defiance of democracy that a person who has been chosen to represent an electorate should then be removed on the grounds of an eligibility which would never influence their vote or of which they were unaware.