

Summary and recommendations

Chapter 1

1. The Legal and Constitutional Affairs Committee was given a reference to inquire into and report on the operation of subsections 44(i) and (iv) of the constitution, including the exceptions to subsection (iv). The Committee was also asked to inquire into and report on action to address any identified problems including constitutional amendment, legislative change and administrative action.
2. The Committee invited submissions and took evidence on subsections 44(i) and (iv) and the exceptions to subsection 44(iv). In this report the Committee considers the problems posed by each of the subsections and the constitutional and legislative options available to address those problems. It then considers possible executive action that could ameliorate the difficulties caused by those provisions. The Committee concludes that the only effective way to address the problem is by constitutional amendment. If the constitutional amendment is delayed, the Committee suggests that some measures could be taken to alleviate the problems in the interim. However, the Committee considers that constitutional amendment is essential.
3. While the Committee confined its attention to subsections 44(i) and (iv), it notes that other provisions of section 44 also require attention. It recommends that if parliament proceeds with a referendum to alter subsections 44(i) and (iv) the need for amendment to other parts of section 44 should be considered. Recommendation 1 addresses this possibility.

Recommendation 1:

The Committee recommends that if the parliament proceeds with a referendum to amend subsections 44(i) and (iv) of the constitution, consideration should be given to the need for amendments to the other parts of section 44, especially subsection 44(v). [page 9]

Chapter 2 – Subsection 44(i)

4. Subsection 44(i) expresses the principle that members of parliament must have clear and undivided loyalty to Australia and must not be subject to the influence of foreign governments. The language in which the principle is expressed is archaic. The provision was drafted before the concept of Australian citizenship developed and the scope of the subsection is uncertain.
5. The exclusion from federal parliament of persons who have dual or multiple citizenship is problematic. First, there is a question of whether the many Australian

citizens who are dual citizens should be excluded from the political process. Second, the steps necessary to renounce other citizenships are those embodied in the relevant foreign law. They may be cumbersome or uncertain. The process may also be irreversible. Those who renounce a foreign citizenship in order to nominate and then fail to get elected may be considered to have paid a high price for participation in the political process. Third, many Australians may be unaware that they are dual citizens.

6. Despite the operational and philosophical issues arising from subsection 44(i) the Committee recognises that the principle is as fundamental today as it was in the nineteenth century. Indeed there may be more need to protect the Australian parliamentary process from foreign influence today than ever before because of the increasing globalisation of many aspects of modern life. It is difficult to exclude any conflict of loyalty by including the necessary detail in the constitution itself, because language and concepts change over time.
7. The Committee concludes that the community would be better served if the current provision were to be deleted and the constitution were to focus on the primacy of Australian citizenship in the parliamentary system. The Committee also considers that safeguards to prevent divided loyalty or foreign influence should be included in legislation and considers that the constitution should be amended to provide the parliament with power to enact the necessary legislation.
8. Options for legislation (dealing with disqualification in relation to conflicting loyalty or foreign influence) might include restating the current provisions in modern language. If so, there could be statutory 'reasonable steps' for application where there was no practical method of renouncing a foreign citizenship according to the relevant foreign law.
9. Alternatively, the law might permit candidates or members of parliament to keep a foreign citizenship according to the relevant foreign law, but require them to refrain from exercising any rights or privileges arising from that foreign citizenship while a candidate or member.
10. The Committee does not support a particular legislative option, considering that this would be a matter for the whole parliament during debate on the referendum. The legislative proposal should be determined before the people are asked to vote on the recommended constitutional amendment.

Recommendation 2:

The Committee recommends that a referendum be held to make the following changes to the constitution:

- delete subsection 44(i)
 - insert a new provision requiring candidates and members of parliament to be Australian citizens
 - empower parliament to enact legislation determining the grounds for disqualification of members of parliament in relation to foreign allegiance.
- [page 43]

Chapter 3 – Subsection 44(iv)

11. Subsection 44(iv) embodies the principles that the executive and the legislature should be separated and the executive should not be in a position to unduly influence the legislature. The provision also seeks to prevent persons from simultaneously holding two offices which give rise to a conflict of duties.
12. It is said that subsection 44(iv) is unfair and discriminatory because it places a heavier burden on public sector employees than on their private sector counterparts. The reluctance of public sector employees to stand for parliament reduces the potential pool of candidates for the federal parliament. Subsection 44(iv) is particularly unfair to senators-elect because it has been interpreted to mean that a senator-elect cannot hold an office of profit under the Crown during the period before he or she takes his or her seat, possibly many months. Further, the scope of the expression 'office of profit under the Crown' is quite uncertain.
13. The final paragraph of section 44 exempts several categories of public employees from the operation of subsection 44(iv). At the end of the twentieth century most of these exemptions are inappropriate.
14. The Committee emphasises that the principles on which subsection 44(iv) are based are of paramount importance. However, the Committee concludes that, as currently expressed, the provision is both uncertain and unfair and that new arrangements should be made to remove the uncertainty and unfairness.
15. The new arrangements should include different provisions for those in high profile and politically sensitive positions. Those holding judicial offices should be required under the constitution to resign before nominating for election to the Senate or House of Representatives. Other persons in sensitive positions should be deemed to have relinquished their office immediately before nominating as a candidate. Those in less sensitive positions could satisfy the public policy underlying subsection

44(iv) if they were deemed to have resigned on election to the Senate or House of Representatives.

16. It would not be possible to encompass the degree of detail necessary to achieve this outcome in the constitution. The constitution should be amended to delete subsection 44(iv) and replace it with new provisions including one to empower the parliament to enact legislation dealing with office of profit.

Recommendation 3:

The Committee recommends that subsection 44(iv) be deleted and new provisions be inserted in the constitution.

One provision should require a person who holds a judicial office under the Crown in right of the Commonwealth or a state or a territory to resign from the office before he or she nominates for election to the federal parliament.

Under the second provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office nominated for election to the Senate or the House of Representatives.

Under the third provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office were elected to the Senate or the House of Representatives. [page 93]

Recommendation 4:

The Committee recommends that if a senator or a member of the House of Representatives accepts any of the offices covered by the new provisions he or she should be disqualified from membership of the parliament. [page 93]

17. The Committee considered other problems associated with subsection 44(iv) and its exceptions and makes recommendations to address them.

Recommendation 5:

The Committee recommends that the number of members of parliament who hold executive office (ministers, assistant ministers and parliamentary secretaries) should be limited, under the constitution, to a maximum of 20 per cent of the total membership of the parliament. [page 99]

Recommendation 6:

The Committee recommends that:

- the exemption that covers ministers of state for a state should be deleted
- the exemption that currently exists for members of the imperial armed services should be deleted. [page 100]

Recommendation 7:

If the constitutional amendment to delete subsection 44(iv) does not proceed the Committee recommends that the Attorney-General write to those states where there is a concern that the legislation guarantees reinstatement and request that state parliaments take such action as is necessary to ensure that the relevant legislation does not infringe subsection 44(iv). [page 105]

Chapter 4 – Executive action

18. The Committee considers that there is limited scope for action that could be taken by various Commonwealth government agencies to address the problems relating to subsection 44(iv). However, the Committee makes some recommendations in relation to actions that the Australian Electoral Commission, the Department of Immigration and Multicultural Affairs and the Department of Foreign Affairs and Trade could take to address those problems.

Recommendation 8:

The Committee recommends that the AEC:

- publish a booklet, noting possible problem areas that should cause a potential candidate to consider seeking further advice
- disseminate other relevant information, for example, extracts of state and territory laws governing the resignation and re-appointment of public sector workers, and papers prepared by the Parliamentary Library, on subsections 44(i) and 44(iv) of the constitution, to interested persons including potential candidates. [page 113]

Recommendation 9:

The Committee recommends that the Department of Foreign Affairs and Trade establish and maintain a data base on the renunciation of citizenship procedures for the ten countries from which most immigrants originate and that information be provided by the Australian Electoral Commission to intending candidates on the basis of this data base. [page 115]

Recommendation 10:

The Committee recommends that when the Department of Immigration and Multicultural Affairs provides information to persons who are taking up Australian citizenship, it draws attention to the need to comply with subsection 44(i) in the event that the person wishes to stand for election to the Commonwealth parliament. [page 116]