

Tabled 4 December 1997

GOVERNMENT RESPONSE

TO

**THE REPORT OF THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS,**

'ASPECTS OF SECTION 44 OF THE CONSTITUTION'

**GOVERNMENT RESPONSE TO
THE REPORT OF THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS,
'ASPECTS OF SECTION 44 OF THE CONSTITUTION'**

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).

Response

Subject to the qualifications outlined below, the government would support amendments of subsections 44(i) and (iv) of the Constitution to overcome the shortcomings identified by the Committee. While the government also supports the recommended administrative action, it accepts that constitutional and legislative action is the only realistic way in which to overcome these shortcomings. Given adequate support for a suitable proposal, the government would be disposed to put the constitutional issue to a referendum at an appropriate time.

However, the government agrees that a proposal should not be formulated without first considering whether it would be appropriate also to amend other parts of section 44, or any other relevant constitutional provision. The government notes that amendment of the other parts of section 44 has been the subject of detailed consideration by various bodies which have recommended amendment.

The government must give further consideration to a number of substantive issues before deciding on the final form of any proposal. These issues include the form of any statutory component of a proposal that might be enacted as an adjunct to a constitutional amendment. Certain of the Committee's recommendations contemplate the Parliament being given power to legislate to prescribe in more detail the circumstances in which persons may be disqualified from being chosen or sitting as a member of the Parliament. The government also recognises the fundamental importance of the purpose underlying subsections 44(i) and (iv), which is to protect the parliamentary system by reducing the risk of conflicts of interest and divided loyalty.

The Attorney-General will give further consideration to these issues with a view to developing specific proposals.

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.*

Response

Subject to the general provisos already outlined, the government would support the deletion of subsection 44(i) of the Constitution and the substitution of a new provision establishing failure on the part of a parliamentarian or candidate to retain Australian citizenship as a ground of disqualification.

The government notes the Committee's conclusion that the constitutional amendment should also provide for a legislative regime to protect against 'divided loyalty'; either by requiring candidates to give an undertaking that they will not take advantage of any specified form of foreign association, or by requiring dual citizens to take specified steps to renounce foreign citizenship. On either approach, non-compliance would constitute a ground of disqualification.

The government can see arguments for both approaches. The first recognises the fact of citizenship as the determining factor in eligibility for election while retaining a sanction against perceived conflicts of interest. The second would require a public demonstration of commitment to the Commonwealth Parliament and polity by means of a formalised renunciation of foreign citizenship.

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.

Response

Subject to the general provisos already outlined, the government would support the deletion of subsection 44(iv) of the Constitution and the substitution of new provisions broadly consistent with those recommended by the Committee.

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.

Response

Subject to the general provisos already outlined, the government would support the deletion of subsection 44(iv) of the Constitution and the substitution of new provisions broadly consistent with those recommended by the Committee.

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.

Response

The government is not convinced that a change of the kind described in recommendation 5 is warranted. The Committee has not made a compelling case for change, even in the event that section 44 of the Constitution is amended along the lines described in recommendations 2 - 4.

Nevertheless, the government will consider the matter as part of its further deliberations on the question of amendment of section 44 of the Constitution. In particular, consideration will be given to whether section 65 of the Constitution, which already provides for a limit on ministers of state, should be amended to allow the Parliament a role in limiting the number of parliamentarians who may hold other kinds of executive office.

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.*

Response

Subject to the general provisos already outlined, the government would support the deletion of the 'exemptions' identified by the Committee.

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).

Response

The government recognises that it cannot require that State parliaments adopt particular 'reinstatement' provisions. However, subject to that qualification, it adopts the recommendation.

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.*

Response

The government adopts the recommendation. The Australian Electoral Commission has already commenced the preparation of a special publication which will alert potential candidates for the next federal election to the possible eligibility problems under section 44 of the Constitution. The publication will highlight those circumstances in which potential candidates should consider seeking their own legal advice before nomination.

Recommendation 9

The Committee recommends that the Department of Foreign Affairs and Trade establish and maintain a database 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 the database.

Response

Subject to one qualification, the government adopts the recommendation. The database will be established and maintained by the Department of Immigration and Multicultural Affairs. Initial work has already begun in that Department on identifying renunciation procedures in

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various countries as part of its continuing role in monitoring foreign citizenship developments.

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.

Response

The government adopts the recommendation.