Chapter 2 – Subsection 44(i)

Subsection 44(i) expresses the principle that members of parliament must have a 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. It was drafted before the concept of Australian citizenship developed and the scope of the subsection is uncertain.

The exclusion from federal politics of persons who have dual or multiple citizenship is problematic. First, there is a question whether the many Australian citizens who are dual citizens should be excluded from the political process. Second, the steps necessary to renounce other citizenships may be cumbersome or uncertain. Third, many Australians may be unaware that they are dual citizens.

The principle is as fundamental today as it was in the nineteenth century. The Committee concludes that the community would be better served if the current provision were to be deleted and the constitution recognised 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.

Introduction

2.1 Subsection 44(i) provides:

> Any person who –
>
> (i) 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 a 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.

2.2 Subsection 44(i) is based on the principle that members of parliament must have a clear and undivided loyalty to the Australian

community.[6] It attempts to avoid both actual and perceived conflicts of interest that may flow from any allegiance or loyalty owed to another nation-state.[7] Its terms embody particular political considerations that prevailed at the end of the nineteenth century. At that time, when the Australian constitution was drawn up, there was no concept of Australian citizenship. Australian residents were divided into British subjects and aliens.[8]

2.3 Despite the fact that subsection 44(i) was drafted in the particular social, political and geopolitical context of the late nineteenth century, the policy on which the provisions are based remains valid. The Liberal Party of Australia submitted:

> The intention of section 44(i) is very clear, it exists to ensure that members of the Parliament do not have dual allegiance and cannot be subject to any influence from foreign governments.[9]

2.4 Associate Professor Sharman expressed the same point in different terms. The provision:

> is aimed at ensuring that members of Parliament have a clear and undivided loyalty to the political community of Australia. [10]

2.5 Virtually all those who made submissions to the Committee agreed that the principle underlying subsection 44(i) is vitally important to the integrity of the political system and should be maintained whether in constitutional or legislative form.

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6 Associate Professor Campbell Sharman, *Submissions,* p. S79.

7 Associate Professor Gerard Carney, *Submissions,* p. S147.

8 Dr James Jupp, *Submissions*, p. S3.

9 Liberal Party of Australia, Federal Secretariat, *Submissions*, p. S133.

10 Associate Professor Campbell Sharman, *Submissions*, p. S79.

Operation of subsection 44(i)

2.6 To date no member of parliament has been ruled by the High Court to be ineligible to stand for election or to sit in the parliament because he or she was disqualified under subsection 44(i). In *Sykes v Cleary* the Court held, *obiter dicta*, that the Liberal Party and Australian Labor Party candidates, Mr Delacretaz and Mr Kardamitsis, were not eligible to be chosen under subsection 44(i). However, the decision was based on Mr Cleary's disqualification, not the disqualifications of Mr Delacretaz and Mr Kardamitsis. The challenge to Miss Jackie Kelly's qualification was based in part on the issue of dual nationality, but that matter was not pursued when the case came before the Court.[11]

Increased likelihood of litigation

2.7 It is possible that there will be an increasing number of challenges under the provision. Professor Tony Blackshield drew attention to threats made against a number of members of parliament in the 1980s on the basis that they were disqualified under subsection 44(i). After one election 35 members of parliament, and after another election 57 members, were alleged to be disqualified. The then Prime Minister, Hon RJL Hawke was one of those said to be disqualified on the grounds that he had been made an honorary citizen of Israel.[12]

2.8 Dr James Jupp, Director of the Centre for Immigration and Multicultural Studies, Australian National University, submitted:

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11 AEC, *Submissions*, p. S39.

12 Professor A R Blackshield, *Transcript*, p. 271/6.

> The persistence of groups and individuals who resent "foreigners" in Australian politics makes it probable that various candidates will be challenged in the future.[13]

2.9 Professor Colin A Hughes underscored the increased likelihood of litigation in relation to subsections 44(i) and (iv). He told the Committee that the proliferation of parties and the increase in the number of independent candidates has greatly increased the possibility of litigation under these provisions. For instance, the original petition against Senator Wood came from Mrs Nile from a minor party. As well, the High Court decision in *Sykes v Cleary*, which amplified the law concerning section 44 of the constitution, resulted from an action brought by Mr Sykes, an independent candidate in a by-election for the seat of Wills.[14]

2.10 The Department of Immigration and Multicultural Affairs foreshadowed a likely increase in the number of problem cases given the growing number of Australians with dual nationality (up to five million). The Department expects that this number could increase.[15]

Issues raised by subsection 44(i)

2.11 As noted above there is a consensus that the principles upon which subsection 44(i) is based – the need to ensure that the primary loyalty of a member of the Australian parliament is to Australia and to prevent subversion by foreign governments – are very important and should be preserved. Nonetheless, the Committee received evidence

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13 Dr James Jupp, *Submissions*, p. S4.

14 Professor Colin A Hughes, *Transcript*, p. 161.

15 Department of Immigration and Multicultural Affairs, *Submissions*, p. S143.

that subsection 44(i) raises diverse issues which need to be addressed. The issues drawn to the Committee's attention include the following:

- The scope of subsection 44(i) is unclear. What is the meaning of 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power'? What is the meaning of 'is entitled to the rights or privileges of a subject or a citizen of a foreign power'? What is the distinction between a subject and a citizen?
- The extent of dual nationality among Australian citizens.
- What are the 'reasonable steps' that a dual citizen must take to surrender a foreign citizenship?

Issue 1: scope of subsection 44(i)

2.12 A critical issue arising from subsection 44(i) relates to its scope. It is clear that it disqualifies dual citizens unless the foreign citizenship derives from a country that does not allow renunciation. In those cases dual citizens who have not taken 'reasonable steps' to renounce their foreign citizenship will be disqualified.[16] Subsection 44(i) disqualifies a person who is 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power'. Similarly, a person who is 'entitled to the rights and privileges of a subject or a citizen of a foreign power' is disqualified. These expressions are quite obscure[17] and their scope is

16 *Sykes v Cleary* (1992) 176 CLR 77.

17 In drafting the Australian constitutional provisions dealing with the parliament, the framers relied on the *British North America Act 1867* which created a federal union in Canada. See S. O'Brien, *Dual Citizenship, Foreign Allegiance and s.44(i) of the Australian Constitution,* Background Paper No. 29, Department of

unknown. The question also arises: is there a difference between a subject and a citizen?

Meaning of 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power'

2.13 The meaning of the expression 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power' is unsettled. The High Court did not address these aspects of subsection 44(i) in *Sykes v Cleary*. Although issues concerning 'allegiance' were raised in *Nile v Wood* where it was claimed that Mr Wood was not eligible to be chosen because he was in breach of subsection 44(i), the Court rejected the assertion. Their Honours said:

> [The petition] does not, in terms, assert allegiance, obedience or adherence to a foreign power. And the facts it sets out in order to establish the conclusion that the first respondent was under any acknowledgment of allegiance, obedience or adherence to a foreign power are clearly insufficient for the purpose. It does not even identify a foreign power. Furthermore it would seem that s. 44(i) relates only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgment.[18]

2.14 In evidence to the Committee, Mr Henry Burmester stated that concepts like allegiance, obedience and adherence to a foreign power

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the Parliamentary Library, 1992. O'Brien notes that in the 1891 draft of the Australian constitution the equivalent provision to the present subsection 44(i) was in the same form as the 1840 Canadian legislation (the *Union Act*) as it disqualified any person 'who has taken an oath or made a declaration or acknowledgment...'. A positive act was required. That wording was agreed to at the 1897 Convention in Adelaide. However, some time after the 1897 session the words were changed to 'is under an acknowledgment of allegiance, obedience, or adherence...'. The words 'oath' and 'declaration' were removed, making the phrase less specific.

18 *Nile v Wood* (1987) 167 CLR 133 at 140.

are '... obviously words of some uncertainty and could give rise to difficulties of interpretation.'[19] In seeking to give meaning to the expression Mr Burmester said that *Sykes v Cleary* shows that the High Court would at least try to read the words in the way that required some active conduct, rather than something that occurred formally without any action by the person. He considered that it is hard to be more precise.[20] Serving in foreign armed forces could be a direct form allegiance to a foreign power. However, acting as an honorary consul for another country may or may not infringe subsection 44(i).[21] Whether a person owes allegiance or obedience must be considered on a case by case basis.[22]

Meaning of 'entitled to the rights and privileges of a subject or a citizen of a foreign power'

2.15 Ms Kim Rubenstein, lecturer in law, Melbourne University, highlighted the uncertainty associated with the expression 'entitled to the rights and privileges of a subject or a citizen of a foreign power'. She stated that:

> ...notions of rights and privileges associated with citizenship are extremely unclear....in some countries [it] could be the right to vote or the right to hold a passport or it might involve certain social security rights or entry or migration rights.[23]

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19 Mr Henry Burmester, Attorney General's Department, *Transcript*, p. 66

20 ibid., p. 71.

21 ibid., pp. 71-72.

22 Mr George Williams, *Transcript*, p. 26.

23 Ms Kim Rubenstein, *Transcript*, p. 97-8.

2.16 Such rights vary from one country to another and can only be established by examining the laws of each country involved.[24] This increases the complexity of ascertaining whether a person is disqualified under subsection 44(i).

2.17 Mr Bob Charles MP drew the Committee's attention to the problems caused by this expression for those with entitlements under the law of a foreign power:

> In the modern context there are pension and social security systems which accrue rights to individuals as citizens of one nation which remain theirs absolutely notwithstanding that they have left their country of origin, sworn allegiance to Australia and renounced any prior citizenship or allegiance. There are also situations...where some countries offer individuals the right to regain their citizenship, at some time in the future, notwithstanding that it has been renounced and that they have become citizens of another country.[25]

2.18 Mr Charles demonstrated the difficulties by reference to his own position:

> ...it is virtually impossible to relieve an individual who is born overseas of all of their potential residual rights in the country of their birth, or a prior country of occupation. I cite for the record the fact that because I grew up in the United States, where there is a different kind of social security system from what we have here, at age 13, when I took my first job, I applied for and gained a social security number, which meant that I paid taxes to the American government for potential social security benefits and continued to pay those for many years. That amount has accrued to my account.
>
> ...
>
> ... even though I am an Australian citizen I have an absolute right to that benefit. It would be unconscionable for you to say to me that I could no longer be a member of this parliament because I

24 ibid., p. 98.

25 Mr Bob Charles MP, *Submissions*, p. S6.

> have a right to a social security benefit for which I worked in another country at another time.... [T]he larger part of that argument is that these inconsequential rights and entitlements certainly should not disqualify one from office. [26]

2.19 Professor Blackshield supported the view that the words 'entitled to the rights or privileges' raise particular problems. As noted above, during the 1980s, the then Prime Minister, the Hon RJL Hawke was threatened with a challenge under subsection 44(i) because he had been made an honorary citizen of Israel. Professor Blackshield commented that in fact there is an argument that the conferral of honorary citizenship had entitled the Hon RJL Hawke to the rights and privileges of a citizen of the state of Israel and that he was in fact disqualified.[27] Significantly, no legal challenge was issued.

2.20 Dr Jupp argued that the expression raises doubts in relation to significant numbers of Australian citizens who have come from Britain or its colonies, or whose parents came from Britain or its colonies. In 1991, there were 2,524,283 Australian residents either born in the UK or with at least 1 parent born there who were eligible for a passport as 'Citizens of the UK and Colonies'. As Dr Jupp observed, in theory at least, anyone who holds a UK passport is 'entitled to the rights and privileges of a subject or citizen of a foreign power.'[28] This represents a very large group of persons who could be considered ineligible to stand for parliament under subsection 44(i).

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26 Mr Bob Charles MP, *Transcript*, p. 81.

27 Professor A R Blackshield , *Transcript*, p. 271/6.

28 Dr James Jupp, *Submissions*, p. S3.

The distinction between a subject and a citizen

2.21 The concept of 'subject' appears to be archaic. It appears that it was intended to have the equivalent meaning of 'citizen' – the distinction being that citizenship seems to have been the expression used in republican forms of government. According to the Encyclopaedia of the Laws of England:

> A subject is one who, from his birth or oath, owes lawful obedience or allegiance to his liege lord or sovereign. "Citizen" is the term usually employed, under a republican form of government, as the equivalent of "subject" in monarchies of feudal origin.[29]

2.22 Quick and Garran wrote:

> In view of the historical associations and the peculiar significance of the terms "citizens" and "subjects", one being used to express the membership of a republican community, and the other that of a community acknowledging an allegiance to a personal sovereign, it was obvious that there might have been an impropriety in discarding the time-honoured word "subject" and in adopting a nomenclature unobjectionable in itself but associated with a different system of political government.[30]

Issue 2: extent of dual nationality among Australian citizens

2.23 A significant number of Australian citizens are also dual citizens. Estimates vary, but there are probably three to four million, or possibly up to five million, dual (or multiple) citizens in Australia.[31] The Committee

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29 Cited in J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth,* 1901, reprinted by Legal Books, Sydney, 1995, p.144.

30 ibid., p. 957.

31 Dr James Jupp, *Transcript*, p. 231. The Department of Immigration and Multicultural Affairs estimates that there could be as many as 5 million dual or

notes that these people may or may not be aware that they are dual citizens. Those Australians are ineligible to be chosen or to sit in the parliament under subsection 44(i).

How foreign citizenship may be acquired

2.24 Mr Mark Sullivan, Department of Immigration and Multicultural Affairs, explained that one of the difficulties in working out more precisely the number of dual citizens is that it is hard to know how many Australian born citizens are eligible to take up the nationality of their father or parents.[32]

2.25 An Australian citizen may acquire another citizenship in several ways.

2.26 First, since Australian law does not require a person to renounce any other citizenship on assuming Australian citizenship, a migrant who acquires Australian citizenship is a dual citizen if the citizenship laws of the other country allow the person to retain that prior citizenship.

2.27 Second, an Australian born person could acquire Australian citizenship by birth and a foreign citizenship by virtue of a parent's non-Australian citizenship. For example, the child of an Australian father and an Irish citizen mother is an Australian citizen by birth and Irish citizen by descent.

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multiple citizens in Australia - Department of Immigration and Multicultural Affairs, *Submissions*, p. S141 and *Transcript*, pp. 215-217.

32 Mr Mark Sullivan, Department of Immigration and Multicultural Affairs, *Transcript*, pp. 216-217.

2.28 Third, a person who is born overseas could acquire Australian citizenship by descent and another citizenship by reason of being born overseas. Thus a person born in New Zealand to an Australian citizen parent acquires New Zealand citizenship and is generally eligible to register as an Australian citizen by descent.

2.29 Fourth, an adult Australian who acquires a foreign citizenship automatically by operation of the laws of another country will not lose his or her Australian citizenship. This may happen with the acquisition of another citizenship through marriage.

2.30 Finally, an Australian citizen who loses his or her Australian citizenship by reason of acquiring another citizenship may be able to resume the Australian citizenship. The person will have dual citizenship if the other country allows the person to retain that citizenship.[33]

2.31 The Committee received direct evidence showing that dual citizenship may be easily acquired. One witness with dual citizenship (Australia and Britain) also has an entitlement to Irish citizenship.[34] Another submission described the circumstances of a person with multiple citizenship. The person concerned, an Australian citizen who has lived in Australia for 32 years, since the age of four, acquired one citizenship by birth (United Kingdom) and another by descent (parents came from the Republic of Ireland).[35]

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33 Department of Immigration and Multicultural Affairs, *Submissions*, pp. S141-142.

34 Dr James Jupp *Transcript*, p. 231. This is because a person has a grandparent born in Ireland is eligible to apply for Irish citizenship. If a person is born in Ireland or has a parent born in Ireland that person is automatically a citizen of Ireland.

35 Fintan O'Laighin, *Submissions*, p. S72.

2.32 As Dr Jupp pointed out, under the principle of *jus sanguinis*, some countries extend citizenship to second, third or even more distant descendants. Examples include Greece (286,941 first and second generation Greeks in Australia), Germany (249,596), Ireland (146,810) and Israel (for all Jews).[36]

Many Australian citizens unaware that they are dual citizens

2.33 One complication caused by the ways dual citizenship can be acquired is that there are probably many Australian born citizens who are not aware that they are, or are eligible to be, dual nationals.[37] Mr Sullivan speculated that some time in the future a parliamentarian could declare that he or she is unaware that he or she is a dual citizen and therefore does not know that there is any other citizenship to renounce.[38]

2.34 The issue of whether people are aware that they are dual citizens is possibly particularly acute for persons from Britain or persons whose parents were born in Britain or in British colonies or former British colonies. Since British citizenship is not, under British law, surrendered on taking up the citizenship of another country, virtually all UK born Australian citizens have dual citizenship.[39] British citizenship may extend to the Australian born children of British citizens or the Australian born children of persons born in British colonies or former British colonies. However, as the Attorney-General's Department noted, ignorance of

36 Dr James Jupp, *Submissions*, p. S4.

37 Mr Mark Sullivan, Department of Immigration and Multicultural Affairs, *Transcript*, p. 217.

38 ibid., p. 226.

39 Dr James Jupp, *Submissions*, p. S3.

citizenship status will not discharge a person from the need to comply with subsection 44(i):

> ... it is clear that the provision may operate to disqualify a person where that person has no knowledge of, or fails to take adequate steps to renounce, a foreign association which constitutes a ground of disqualification under subsection 44(i).[40]

Issue 3: Renouncing dual citizenship - what are 'reasonable steps'?

2.35 Prior to *Sykes v Cleary* there was a widespread concern that some dual citizens may never be able to stand for the Commonwealth parliament because under the law of the other country, they could not renounce that other citizenship or satisfy the foreign state's renunciation requirements. However, in *Sykes v Cleary* the High Court went some distance to resolving the problem. It held that a person who, under the law of the foreign country, cannot renounce his or her citizenship, can nevertheless comply with subsection 44(i) if he or she takes 'reasonable steps' to do so.[41]

2.36 However, what constitutes 'reasonable steps' for the purposes of subsection 44(i) is far from clear. The High Court itself said:

> What amounts to the taking of reasonable steps to renounce foreign nationality must depend upon the circumstances of the particular case. What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connection between the individual and the foreign State of which he or she is alleged to be a subject or citizen.[42]

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40 Attorney-General's Department, *Submissions*, p. S160.

41 Mr Geoffrey Lindell, *Transcript*, p. 106.

42 *Sykes v Cleary* (1992) 176 CLR 77 at 108, cited in Mr George Williams, *Submissions*, p. S9.

2.37 The mode of renunciation will always depend on the country to which the person's other citizenship belongs.[43] As the Hon Elizabeth Evatt observed a candidate may take steps to renounce but would not know in advance whether the High Court would consider those steps to be sufficient.[44]

2.38 It is arguable that the law imposes something of an 'inverse burden'. If a country provides procedures to enable citizens to renounce that country's citizenship, a person wanting to renounce must comply with that procedure. By contrast, if a country gives no guidance as to the steps to be taken to renounce its citizenship, it may be that a person need only write to the country renouncing his or her citizenship of that country.[45] However, without further guidance from the High Court it is difficult to be certain what steps a person would be required to take in circumstances where there is no procedure for renunciation.

2.39 Mr George Williams, senior lecturer in constitutional law, Australian National University, put the view that:

> In many of these cases it will be a fine decision as to whether it is oppressive or not, and the only way of testing that would be via a High Court challenge. If the only way you can gain certainty under the constitution is by taking it to the High Court, that is a strong case for redrafting, particularly where we are dealing with such an important democratic provision.[46]

2.40 In summary, subsection 44(i) represents a significant problem for the effective operation of the electoral process, and ultimately, for the

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43 Ms Kim Rubenstein, *Transcript*, pp. 99-100.

44 The Hon Elizabeth Evatt, *Transcript*, p. 172.

45 Ms Kim Rubenstein, *Transcript*, p. 100.

46 Mr George Williams, *Transcript*, p 26.

operation of the parliamentary system and the wider political system. A large number of Australians is affected by it. Many of those are quite probably unaware that they are disqualified from standing for, or sitting in, parliament by the provision. Second, the steps that are necessary for the purpose of divesting foreign citizenship are unclear in many cases and whether or not any steps taken are effective can only be finally determined by the High Court.

Approaches to subsection 44(i): the 'no change' case

2.41 Despite the problems outlined above the Committee heard support for the view that subsection 44(i) should be retained in its present form.[47] For example Mr Dean Smith, Liberal Party of Australia, put the view that the intention of subsection 44(i) is clear and the existing section is quite appropriate.[48] The Liberal Party submitted that the (coalition) shadow cabinet opposed any change to subsection 44(i) in 1993 when it considered the issue of a referendum on the subject. In the Liberal Party's view, the High Court in *Sykes v Cleary* eliminated fears that a literal interpretation of the provision may result in some Australian citizens being permanently denied the right to stand for election to the federal parliament.[49]

47 See for example Associate Professor Gerard Carney, *Submissions*, p. S148, J. Bryant, *Submissions*, p. S83, F Regan, *Submissions*, p. S88, Associate Professor Campbell Sharman, *Submissions*, p. S79.

48 Mr Dean Smith, Liberal Party of Australia, Federal Secretariat, *Transcript* p. 3.

49 Liberal Party of Australia, Federal Secretariat, *Submissions*, pp. S133,134.

Committee's conclusion on the 'no change' case

2.42 The Committee accepts that in *Sykes v Cleary* the High Court partly relieved the problems presented by subsection 44(i) by rejecting a literal interpretation of the provision and allowing persons with a foreign citizenship from countries that do not permit renunciation to overcome the disqualification by taking 'reasonable steps' to do so. [see paragraph 2.35 above].

2.43 However, the Committee remains concerned that this is only part of the difficulty inherent in subsection 44(i). First, as is noted above, a large number of Australian born citizens probably do not know that they are dual citizens. Such persons could stand for parliament unaware that they need to take steps to comply with subsection 44(i). Second, the prohibition on dual citizenship is not the only component of the provision. Subsection 44(i) also prevents a person from standing for or sitting in the parliament if the person '[i]s under an acknowledgment of allegiance, obedience, or adherence to a foreign power' or is 'entitled to the rights or privileges of a subject or a citizen or a foreign power'. As discussed above, the meaning of these expressions is uncertain. Finally, what constitutes 'reasonable steps' remains uncertain.

2.44 For these reasons the Committee is unable to support the "no change" case.

Approaches to subsection 44(i): Constitutional amendment options

2.45 The Committee received other evidence supporting constitutional change to eliminate the problems created by

subsection 44(i). Some recommendations for constitutional amendment were accompanied by suggestions for legislative amendment.

2.46 Options for constitutional amendment include:

- enable Australians holding dual citizenship to 'renounce'[50] their foreign citizenship under Australian law rather than in accordance with the law of the other country as is presently required
- replace subsection 44(i) with a simple provision leaving dual citizenship as a disqualification but removing references to 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power' and 'entitled to the rights or privileges of a subject or a citizen of a foreign power'
- delete subsection 44(i) and insert a constitutional requirement that candidates and members of parliament be Australian citizens - in effect allowing dual citizens to stand for and sit in the federal parliament.[51] If this approach were to be adopted the parliament would need to enact legislation to prevent divided loyalty in members of parliament.

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50 The use of the word "renounce" in this context does not imply that renunciation under Australian law would be effective from the perspective of the relevant foreign power. See paragraph 2.52.

51 The Joint Standing Committee on Electoral Matters, in its *Report of the inquiry into all aspects of the 1996 federal election*, June 1997, made a recommendation to this effect. Recommendation 39 stated: 'at an appropriate time, such as in conjunction with the next Federal election, a referendum be held on...deleting section 44(i) on 'foreign allegiance' and otherwise amending the Constitution to make Australian citizenship a necessary qualification for membership of the Parliament.

Option 1: constitutional amendment to allow renunciation under Australian law

2.47 The Committee heard proposals for constitutional amendment to allow dual citizens to renounce their foreign citizenship under Australian law. This would overcome difficulties associated with renouncing foreign citizenship under foreign law. It would also eliminate the uncertainty that arises where a person who cannot renounce the foreign citizenship under foreign law must take 'reasonable steps' to divest himself or herself of the unwanted citizenship.

2.48 Mr Bob Charles MP argued that there should be a mechanism to enable an Australian citizen to renounce a prior citizenship. He supported a referendum that would, in effect, enable an Australian citizen to renounce his or her foreign citizenship by writing to the appropriate foreign power and renouncing all allegiance to that power, including citizenship.[52] Mr George Williams agreed that this would be an appropriate solution.[53] A similar view was put forward by others.[54]

2.49 The Hon Elizabeth Evatt argued that renunciation at the time of naturalisation as an Australian citizen should be sufficient. She stated:

> ... the matter could be adequately covered from the point of view of Australian interests if when a person took up Australian

52 Mr Bob Charles MP, *Submissions*, p. S5.

53 Mr George Williams, *Submissions*, p. S9 and *Transcript*, p. 25. Mr Williams also proposed an alternative, namely, constitutional amendment so that it would be enough, under the Australian constitution, for a person to be naturalised as an Australian – *Submissions*, p. S9.

54 Mr Coates, *Submissions*, p. S90.

> citizenship he or she at that time by some declaration known to our law renounced the citizenship of the other country.[55]

2.50 This approach has the merit of being relatively simple. It places on an equal footing all Australian citizens who hold another citizenship that they wish to renounce to overcome the effect of subsection 44(i). At present dual citizens bear different burdens in renouncing a prior citizenship, depending on the renunciation procedures of the other country.

2.51 On the other hand, the fact remains that unless such a step were effective in renouncing foreign citizenship, a person in this situation would *in fact* retain the other citizenship. As the Constitutional Commission noted (and the High Court, in *Sykes v Cleary*, reiterated), it is an internationally accepted principle that each country has the right to decide the conditions under which nationality is gained or surrendered.[56] The Committee is therefore doubtful that this is a satisfactory approach. Its effect would really be identical to an amendment that required only that a person hold Australian citizenship [see option 3 paragraphs 2.59 to 2.65]. Both such provisions would, in practice, allow a person to retain the foreign citizenship. If that is the approach to be taken, it would be preferable to take the more direct route of permitting people to retain dual (or multiple) citizenship and take additional steps to ensure that the person's connection with the other country did not cause damage to Australia.

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55 The Hon Elizabeth Evatt, *Transcript*, p. 172.

56 Constitutional Commission, *Report*, Vol. 1, 1988, p. 288.

Committee's conclusions on option 1

2.52 For the reasons discussed in paragraph 2.51, the Committee does not favour amending the constitution to allow dual citizens to renounce their foreign citizenship under Australian law rather than in accordance with the law of the foreign country as is the case at present.

Option 2: retain constitutional prohibition on dual citizenship but delete other limbs of 44(iv)

2.53 One option the Committee considered was to retain the prohibition on dual citizens but delete the other rather obscure references in subsection 44(iv) to:

- allegiance, obedience and adherence; and
- entitlement to the rights and privileges of a subject or a citizen of a foreign power.

2.54 As noted earlier in this chapter, the meaning of allegiance, obedience and adherence is uncertain. In addition, the reach of the phrase dealing with rights and privileges of a subject or citizen is unknown and its operation could potentially cause great injustice.[57]

2.55 This option would eliminate some of the problems to which subsection 44(iv) gives rise by deleting the words that cause uncertainty. It would also leave untouched what is probably the most sensitive aspect of subsection 44(i) – the prohibition on dual citizens standing for or sitting in parliament.

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57 See evidence on Mr Bob Charles MP, *Transcript*, p.81.

2.56 However, if this solution were to be adopted many other intractable problems associated with subsection 44(i) – outlined in paragraphs 2.23–2.40 – would remain within the rigid confines of the constitution. This approach would not assist those who are unaware that they are dual citizens. Nor does it assist persons who wish to surrender their foreign citizenship but are not permitted to do so under the law of the foreign country. They would still be required to take 'reasonable steps'. Yet it is unclear what precise actions must be taken to satisfy this requirement. In many cases, what constitutes 'reasonable steps' can only be finally determined by the High Court. Nor does this approach solve the problem that it may take some time to relinquish foreign citizenship – often longer than the period between the announcement of an election and the close of nominations.

Committee's conclusions on option 2

2.57 While this option has some attractions the Committee considers that it does not solve enough of the problems and is not worth pursuing.

Option 3: delete subsection 44(i); substitute requirement that candidates and MPs be Australian citizens

2.58 The Committee received a great deal of evidence in support of a constitutional amendment to delete subsection 44(i) entirely and insert in the constitution a provision to require only that candidates and members of parliament be Australian citizens. In addition, the evidence proposed that parliament should make laws to deal with the mischief that subsection 44(i) was designed to prevent. The effect of this would be to allow dual citizens to sit in the parliament (unless the parliament enacted legislation to prohibit dual citizens from standing for or sitting in

parliament) [see paragraphs 2.104–2.106] and to empower parliament to make laws necessary to deal with divided loyalty.[58]

2.59 The Attorney-General's Department supported the deletion of subsection 44(i) and the substitution of a new provision establishing failure on the part of a parliamentarian to retain Australian citizenship as the disqualifying event.[59] Mr Geoffrey Lindell, reader in law, Melbourne University, agreed with this approach which would disqualify a person immediately he or she lost his or her Australian citizenship. He agreed that if the retention of Australian citizenship is to be a qualification for membership of parliament (or failure to retain Australian citizenship, a disqualification), an express constitutional provision should be made for it. Mr Lindell observed that there is currently a requirement in the Commonwealth Electoral Act to be an Australian citizen to stand for parliament but that a close reading of sections 44 and 45 of the constitution leaves open the possibility that a member of parliament who loses his or her citizenship may not thereby be disqualified.[60]

2.60 Professor Hughes is a proponent of this kind of approach. In his view subsection 44(i) is so defective that the sensible thing is to delete it entirely. The problems with which it deals are so complicated that it is unlikely that a satisfactory formula appropriate for putting in a document

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58 Interestingly, this kind of approach was suggested in the course of the constitutional convention debates in the nineteenth century. Delegate Glynn from South Australia urged delegates to allow the parliament to decide who should be disqualified from parliament – Ms Kim Rubenstein, *Submissions* p. S100, *Transcript* p 96.

59 Attorney-General's Department, *Submissions*, p. S158.

60 Mr Geoffrey Lindell, *Transcript*, p. 107. The requirement to be an Australian citizen is in the Commonwealth Electoral Act.

like the constitution can readily be found, according to Professor Hughes.[61]

2.61 Professor Hughes argued that it is better to establish a new legislative scheme to deal with the dangers that are currently dealt with in archaic language devised in circumstances that prevailed a century ago.[62]

2.62 Professor Hughes also made the point that the holding of a foreign citizenship is not the only, nor even necessarily the most subversive, way that a parliamentarian can experience split allegiance. He pointed to the possibility of foreign commercial interests whose influence, 'improper at best, dangerous at worst, is expressed not through formal or legal allegiance but by the power of money in the competitive political process'.[63] Professor Hughes submitted that recent events in the United States have highlighted the danger of donations from foreign business and political interests.[64]

2.63 Professor Tony Blackshield stated a preference for granting the parliament power to make laws on the disqualifications of members of parliament generally. Professor Blackshield cited evidence given by the late Professor Geoffrey Sawer to the Senate Standing Committee on Constitutional and Legal Affairs in 1981. In the course of that inquiry Professor Sawer argued:

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61 Professor Colin A Hughes, *Transcript*, p. 161.

62 ibid.

63 Professor Colin A Hughes, *Submissions*, p. S94.

64 ibid.

> The subject of qualifications and disqualifications of senators and members is in general not suited for inclusion in the rigid parts of the constitution. It is necessarily intricate and technical, and has to operate in relation to a body of public and private law (for example, statutory governmental corporations and commercial private corporations) and to social conditions which are in constant flux. If general in form, such provisions give rise to numerous problems of interpretation, and if precise they rapidly become out of date and irrelevant.[65]

2.64 Similarly Ms Peta Dawson of the Australian Electoral Commission (AEC) contended:

> ...the values and the attitudes about what ... is appropriate for parliamentarians is likely to change over time ... [I]t might be better to leave those issues open for...the parliament ... to decide through statute...[66]

Attitudes towards permitting dual citizens to be candidates or members

2.65 As noted earlier, there was some support for the view that there should be no change to subsection 44(i). Proponents of that approach generally opposed the idea that dual citizens should be permitted to sit in the Australian parliament [see paragraph 2.41].

2.66 The Committee received other evidence which suggested that a constitutional amendment with the effect of allowing dual citizens to stand for and sit in the parliament is the best solution to the problems associated with subsection 44(i), although political factors could militate against the success of that approach. For instance, Dr Jupp argued that a solution of this kind would solve all the problems and overcome all the anomalies.[67] Mr Gary Gray, national secretary, Australian Labor Party,

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65 Cited by Professor A R Blackshield , *Transcript*, p. 259.

66 Ms Peta Dawson, AEC, *Transcript*, p. 64.

67 Dr James Jupp, *Submissions*, p. S4 and *Transcript* p. 233.

raised the issue of allowing dual citizens to stand for and sit in parliament for further consideration in the future.[68]

2.67 The Department of Immigration and Multicultural Affairs (DIMA) was not enthusiastic about the proposal for a constitutional amendment to allow dual citizens to sit in and stand for parliament. Its concern seemed to be directed towards the implications of a strong negative referendum outcome for the wider debate concerning dual nationality:

> ...depending on how the debate accompanying such a referendum was handled, a strong negative vote could result in confusion about whether the general Australian public should be entitled to hold dual citizenship. Alternatively, a referendum which abolished the requirement for a single citizenship for Commonwealth Parliamentarians could raise expectations about the removal of the current restrictions on Australian citizens acquiring dual nationality.[69]

2.68 Associate Professor Carney leaned towards retaining the existing provision in order 'to protect the integrity of the institution of parliament and its members by avoiding difficulties arising from split allegiance', although he recognised that injustices may arise from time to time.[70] He considered that there may be a negative community reaction if a prime minister were also a citizen of another country. Such a situation could provide the basis for various criticisms of the prime minister. Moreover, Associate Professor Carney observed that the prime minister could be placed in an 'intolerable' position if difficulties developed between Australia and the other country of which the prime

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68 Mr Gary Gray, Australian Labor Party, *Transcript*, p. 206. The Committee notes that the ALP Platform proposes that dual citizens be allowed to sit in the parliament.

69 Department of Immigration and Multicultural Affairs, *Submissions*, p. S148.

70 Associate Professor Gerard Carney, *Transcript*, p.154.

minister was a citizen. He believed that similar arguments can be made in respect of ministers.[71]

Overview of the case for deleting subsection 44(i) and substituting a requirement that candidates and MPs be Australian citizens

2.69 The case for deleting subsection 44(i) and including in the constitution a simple requirement for Australian citizenship is twofold. First, this option would cure the problems outlined in paragraphs 2.12-2.40. Second, the conflict of loyalty which 44(i) purports to prevent, could be addressed by a more certain, flexible and equitable legislative solution.

2.70 In considering this case, the Committee understands that there is an international trend towards the acceptance of dual citizenship generally and it notes that a number of countries appear to allow dual citizens to sit in the legislature.[72]

2.71 As the Committee noted earlier in this chapter, no member of parliament has been disqualified from being chosen or from sitting in the parliament because of a contravention of subsection 44(i).[73] However, it has been suggested to the Committee that at least some former parliamentarians were almost certainly ineligible to sit and that others

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71 ibid., p.156.

72 Ms Kim Rubenstein, *Submission No 30; 11 May 1997 p 1* (Canadian House of Commons, United States Senate and House of Representatives, and Britain. In New Zealand, a seat becomes vacant if a person takes an oath of allegiance to a foreign power).

73 It should be noted that concepts of citizenship have changed significantly since subsection 44(i) was drafted. For instance, there was no concept of Australian citizenship at the beginning of the twentieth century. Moreover, British subjects would not have been considered to be 'citizens of a foreign power'.

were threatened with challenges under subsection 44(i).[74] [see paragraph 2.7 above].

2.72 The Committee considers that the potential exists for challenges to the eligibility of a significant number of parliamentarians especially in view of the fact that a large number of Australian citizens possess dual citizenship. This represents a risk to the integrity and stability of the parliamentary system and to the government of the nation. For example, it is not difficult to envisage a situation where, following an election, the balance between the major political parties, or coalitions of parties, in the House of Representatives was fairly even and where challenges to five or six elected representatives could throw into doubt the outcome of the whole election. It could make government virtually impossible since neither political grouping could take office confident of majority support. In those circumstances, it could take months for High Court challenges to be resolved and for by-elections to occur. The Committee agrees with Sir Maurice Byers that:

> Certainty in the conduct of the affairs of the Parliament is essential to the well-being of the nation. Its composition, following an election, should be capable of challenge only upon the most compelling and clearly stated grounds.[75]

2.73 In evidence, Sir Maurice argued:

> ... it is ... of paramount importance that the procedures of an election be stable and recognised so that the membership of the parliament is not susceptible to unnecessary challenge. It is ... very important that the legislators who pass the laws are entitled to their seats. Hence, the provisions dealing with disqualification

74 Mr Philip Cleary, *Transcript*, p. 124.

75 Sir Maurice Byers, *Submissions*, p. S62.

> and qualifications should be as clear as it is possible to make them.[76]

Overview of the case against deleting subsection 44(i) and substituting a requirement that candidates and MPs be Australian citizens

2.74 The case against deleting subsection 44(i) and providing for a simple citizenship requirement (with automatic disqualification if the candidate or member lost his or her Australian citizenship) rests on two bases. First, the necessary electoral support for such a change may be difficult to gain. Second, the proposal to permit persons with foreign citizenship to sit in the Australian parliament may be seen as weakening the standards of commitment to Australia that are currently required from members of parliament.

2.75 The Committee notes that if a referendum to make such an amendment does not win the support of the main political parties it would face certain defeat. It would not be reasonable to hold a referendum unless the probable legislative change were publicised at the same time. A change permitting dual citizens to sit in the parliament might be problematic. The Federal Secretariat of the Liberal Party of Australia submitted that it opposes such a change.[77] The Labor Party considered that this approach is one that may be contemplated some time in the future.[78] For the parliament to pass a referendum bill and for the referendum itself to be successful, those parties would need to support the proposal.

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76 Sir Maurice Byers, *Transcript*, p. 139.

77 Liberal Party of Australia, Federal Secretariat, *Submissions*, S134.

78 Mr Gary Gray, Australian Labor Party, *Transcript*, p. 206.

2.76 The Committee acknowledges that the issue of permitting persons with a foreign citizenship to sit in the parliament may cause community concern. Some members of the Committee consider that it would be unacceptable for a minister, and in particular, the prime minister, to hold a foreign citizenship. Even if there were no real conflict of interest, there could be a perception of divided allegiance. Other members considered that the political pressure for ministers to surrender any foreign citizenship would force ministers to do so. Paragraphs 2.66 to 2.69 above are also relevant to the case against the proposed amendment.

Conclusions on deleting subsection 44(i) and substituting a requirement that candidates and members be Australian citizens

2.77 The Committee acknowledges the problems outlined above, particularly, the difficulty of achieving the proposed change. Nonetheless most members of the Committee consider that the policy arguments in favour of the proposal are persuasive. One of the most important objectives to be pursued is the achievement of certainty in the electoral process. The most satisfactory method of delivering electoral certainty would be to delete subsection 44(i) and to insert a simple provision requiring that to be eligible to be chosen and to sit as a senator or a member of the House of Representatives, a person must be an Australian citizen.

2.78 The Committee agrees with the Attorney-General's Department and Mr Lindell that parliamentarians should, under the constitution, be required to retain Australian citizenship. The Committee accepts that there is a reluctance to excite the emotional and controversial debates

that would surround a constitutional referendum to amend subsection 44(i). Nevertheless, it considers that the parliament has a duty to lead such debates.

2.79 The Committee concludes that the constitution should be amended to require that Australian citizenship be a qualification for those who wish to stand for or sit in the federal parliament and that loss of Australian citizenship should disqualify candidates or members of the federal parliament.

2.80 The Committee also concludes that the parliament should be empowered to make laws for the disqualification of members of parliament in relation to foreign allegiance. It is vital that the agreement of both parties be achieved before the referendum is put before the people.

2.81 The Committee's reasons for its conclusions are as follows:

- the language of subsection 44(i) is archaic and reflects the social, political and geopolitical concerns of the late nineteenth century and not the concerns of the late twentieth\early twenty-first century
- values and attitudes change over time and it is important that safeguards against divided loyalty be included in legislation that is capable of amendment
- any provisions concerning qualifications and disqualifications are complex, detailed and technical and are not suitable for inclusion in a part of the constitution that is extremely difficult to change

- the holding of a foreign citizenship is not the only or even the most subversive way a member of parliament can experience divided loyalty – if the protection against divided loyalty is included in legislation it can be amended to take account of new dangers as they emerge.

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 of disqualification of members of parliament in relation to foreign allegiance.

Protection against divided loyalty

2.82 If recommendation 2 is accepted, it is essential that proper protection against divided loyalty be achieved by legislative means.

2.83 Four proposals were considered by the Committee:

- require persons to renounce any foreign citizenship before Australian citizenship is granted
- ensure voters receive sufficient information to enable them to judge whether a person is suitable to be a member of parliament
- legislative requirement prohibiting candidates from taking advantage of any foreign citizenship
- legislative requirement that persons renounce dual citizenship in much same way as subsection 44(i) requires renunciation at present.

Amend Citizenship Act to require renunciation on taking Australian citizenship

2.84 If subsection 44(i) is deleted as suggested and candidates and members of parliament are required under the constitution to be Australian citizens, problems of divided loyalty could be addressed by amending the Citizenship Act to deny citizenship to persons who have not renounced (or taken 'reasonable steps' to renounce) prior citizenship. Arguably, it is preferable to delay a grant of Australian citizenship rather than jeopardise the operation of the parliamentary system.[79]

2.85 This approach would effectively deny dual or multiple citizenship to all citizens who acquire Australian citizenship through naturalisation. Dual citizenship would not then raise problems for those persons at the time of nomination of candidates.

2.86 Mr Lindell observed that this approach would be appropriate if the Committee considered that the same standard should apply to all Australian citizens and that there is no difference between an ordinary citizen and one who seeks federal political office and who wishes to represent other members of the community in the parliamentary forum.[80]

2.87 The Department of Immigration and Multicultural Affairs opposed this approach arguing that a higher standard of integrity and loyalty is to be expected of elected representatives.[81]

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79 Sir Maurice Byers, *Submissions*, p. S63.

80 Mr Geoffrey Lindell, *Transcript*, p 107.

81 Department of Immigration and Multicultural Affairs, *Submissions*, p. S142.

2.88 The Department of Immigration and Multicultural Affairs further argued that it is not viable to deny citizenship to persons retaining another citizenship since it conflicts with Australia's policies of cultural diversity. It would also run counter to the international trend towards permitting dual citizenship. The Department noted that if dual citizenship were to be prohibited prospectively the problems associated with subsection 44(i) would remain for at least a generation.[82]

2.89 A further argument against the proposal is that, as noted earlier, a substantial number of Australian born citizens either hold citizenship of a foreign country or are entitled to claim it. Such persons would never be required to renounce their foreign citizenship under the Citizenship Act because they already hold Australian citizenship.

2.90 The Department of Immigration and Multicultural Affairs also argued that migrants considering whether to take Australian citizenship may be discouraged from doing so if they were required under Australian law to renounce the other citizenship.[83] Mr Sullivan stated that the Department has anecdotal evidence to support this assertion. It has also noticed a surge of Americans now applying for Australian citizenship because they will not lose their American citizenship by so doing.[84]

2.91 Nor would this approach be sufficient to overcome the problems of divided loyalty raised by Professor Hughes [see paragraph 2.62].

2.92 The Committee does not support this option.

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82 ibid., p. S143.

83 ibid., p. S145.

Ensure voters receive sufficient information

2.93 The Attorney-General's Department canvassed the possibility that it could be left to the electorate to make judgements on the appropriateness of any foreign association. Mr Henry Burmester suggested that candidates could be required to indicate at nomination if they hold dual or multiple citizenships and the electorate could take such information into account in making a choice between candidates.[85] If this approach were to be adopted, administrative arrangements would need to ensure that this information would be put on the public record. Sir Maurice Byers agreed that this would be a satisfactory approach.[86]

2.94 Ms Rubenstein supported this approach. She submitted that whether or not a person formally renounces citizenship of his or her country of origin he or she will always have some sentiment to that country. This has been accepted and promoted in multi-cultural policy and should be reflected in the make up of the parliament. She pointed out that a connection with another country does not necessarily undermine a person's commitment to the Australian community. She said that the only circumstances in which concerns about dual citizenship are valid is in time of war with another country. She argued that this concern could be met by inserting a contingent provision in the Citizenship Act so that an Australian who is also a citizen of an enemy

84 Mr Mark Sullivan, Department of Immigration and Multicultural Affairs, *Transcript*, pp. 229-230.

85 Mr Henry Burmester, Attorney-General's Department, *Transcript*, p. 69.

86 Sir Maurice Byers, *Transcript*, p.140.

country must renounce that citizenship in order to retain Australian citizenship.[87]

2.95 Ms Rubenstein submitted that dual citizenship is an integral part of modern Australian democratic society and should be represented in our constitutional framework by removing the constitutional disqualification that presently applies to dual citizens.

2.96 In the Committee's view this approach would not offer sufficient safeguards against divided loyalty. Stronger measures than simple disclosure are required for this purpose.

Legislative requirement that candidates and parliamentarians be prohibited from taking advantage of foreign citizenship

2.97 The Attorney-General's Department suggested that measures could be taken to ensure that members of parliament do not have a divided loyalty that would make them subject to influence from foreign governments. The Department proposed amendment of the Commonwealth Electoral Act to require that candidates undertake not to take advantage of any foreign citizenship. Candidates could be required to give an undertaking that they will not engage in certain activities that could be construed as giving allegiance to another country. The Department suggested that, in order to give force to this requirement it would be possible to create offences under the Electoral Act 'in relation to action inconsistent with the declaration'.[88]

87 Ms Kim Rubenstein, *Submissions*, pp. S99–100.

88 Attorney-General's Department, *Submissions*, p. S164.

2.98 Professor Hughes also suggested certain safeguards that could be adopted to ensure that members of parliament did not take advantage of any foreign citizenship. Professor Hughes also proposed that all candidates could be required:

> ...to record date and place of birth in Australia on their nomination form and if this cannot be done, then to provide documentary proof of naturalisation at the time of nomination ... It would not be unreasonable to require candidates who aspire to be Members of the Parliament to meet such a requirement.[89]

2.99 The provision, he argued, should be in the Electoral Act and should be accompanied by a penalty that the making of a false statement disqualifies the person from continuing to sit and from being returned for the life of the current House of Representatives. In addition to preventing an offending member of the House of Representatives from being re-elected at a by-election, it would also prevent a senator who committed an offence from being returned under section 15 of the constitution to the seat that the offending senator has just been forced to vacate.[90]

2.100 Some Committee members saw considerable merit in this proposal to allow dual citizens to stand for and sit in the federal parliament and to impose strict legislative prohibitions on the exercise of any rights under the law of a foreign power and on the use of a member's position to advance the interests of a foreign power to the detriment of the Australian national interest.

2.101 Those Committee members who support this approach note that it recognises that Australia is a multi-cultural society but ensures that

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89 Professor Colin A Hughes, *Submissions*, p. S94.

90 Professor Colin A Hughes, *Submissions*, p. S94.

those who stand for office in the federal parliament do not engage in conduct that could be construed as demonstrating loyalty to a country other than Australia. In addition, this proposal eliminates the perceived inequity that candidates who have little chance of being elected, are nevertheless required to renounce any foreign citizenship in order to nominate.

Legislative requirement that candidates renounce dual citizenship before standing for parliament

2.102 Some Committee members support deleting subsection 44(i) and substituting Australian citizenship as a constitutional qualification for membership of parliament but wish to preserve in legislative form the prohibition on dual citizens standing for, or sitting in, the parliament.

2.103 The legislation would require dual citizens to renounce the foreign citizenship in accordance with the law of the foreign power. Where a foreign power prohibits the renunciation of its citizenship the legislation could provide that a person wishing to renounce that citizenship could take specified steps to affirm his or her desire to renounce that citizenship and to assert allegiance to Australia. Since such persons would *in fact*, under the law of the foreign power, retain the foreign citizenship, the legislation could also provide for the disqualification of persons in that situation who exercise any rights they may have under the laws of the foreign power.

2.104 In effect this approach would put in statutory form some requirements that are currently set out in subsection 44(i). It retains the most important element of subsection 44(i) while eliminating two areas of uncertainty namely, the references to allegiance, obedience and adherence; and entitlement to the rights and privileges of a subject or a

citizen of a foreign power. Under this approach the prohibition on dual citizenship would be in statutory form. If, at some time in the future there was community demand to permit dual citizens to stand for election and sit in parliament, it would be much easier to effect the necessary changes.

2.105 Some Committee members consider that this proposal would be the most appropriate legislative response to prevent divided loyalty if subsection 44(i) is deleted. Those members hold the view that, at this time, the community would be reluctant to support constitutional change of the kind recommended in recommendation 2 if there were any perceived weakening of the protection against split allegiance.

2.106 While this approach really does not represent a relaxation of the existing provision, it does, as already noted, allow for legislative change if, in the future, perceived community values are modified.

Committee's conclusions on protection against divided loyalty

2.107 The Committee believes that if recommendation 2 is accepted, draft legislation should be prepared to demonstrate the kind of protections against divided loyalty that are proposed to replace subsection 44(i). The Committee considers that of the four legislative proposals to prevent conflicting allegiance, the latter two are appropriate, but makes no recommendation on which of the two should be promoted.

2.108 Under the first approach, dual citizens would be permitted to stand for and sit in the parliament. They would be required to make a public disclosure of any foreign citizenship at the time of nomination and would be penalised by disqualification if they breached any of the prohibitions that aim to prevent divided loyalty. Under the second

approach, the legislative regime would, at least for the time being, be quite similar to the regime that exists under subsection 44(i).

2.109 The Committee emphasises that the legislative regime that is proposed to be adopted to prevent divided loyalty should be prepared and publicised at the same time that the referendum proposal is announced.

Options for legislative action without constitutional amendment

2.110 The evidence received by the Committee was, for the most part, emphatic that there is little scope for legislative solutions to the problems posed by subsection 44(i) unless the legislation is accompanied by constitutional change.

2.111 The Liberal Party suggested inserting in legislation a series of steps which may be construed as constituting 'reasonable steps' in accordance with the test set down in *Sykes v Cleary*. This proposition is worth considering.

2.112 The Liberal Party recognised that it would be difficult for legal counsel, political parties, the AEC and other associated parties to compile an exhaustive list, but it considered there should be an attempt to clarify the matter as much as possible.

2.113 The Committee recognises that such a list might help intending candidates but the decision regarding 'reasonable steps' would be, in the end, a matter for the High Court's interpretation. The list would not deliver certainty.

Conclusion and recommendations

2.114 While the Committee has drawn conclusions and made recommendations which would help avoid future problems arising from subsection 44(i) as it now stands, it is important to emphasise that the principle underlying subsection 44(i) remains valid. It is essential that members of parliament owe allegiance and loyalty only to the parliament and the people of Australia.