

Chapter 1 – Introduction

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.

The Committee invited submissions and took evidence on subsections 44(i) and (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.

Terms of reference

1.1 Section 44 of the constitution provides:

44. 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: or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii) Is an undischarged bankrupt or insolvent: or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth

otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

1.2 On 16 December 1996 the Attorney-General, the Hon. Daryl Williams AM QC MP referred the following matters to the Committee for inquiry and report:

- the operation of subsections 44(i) and 44(iv) of the constitution (including the exception to subsection 44(iv) set out in the last paragraph of section 44).
- action (including constitutional amendment, legislative or executive action) to address any identified problems relating to the operation of subsections 44(i) and 44(iv).

The Committee's inquiry

1.3 The inquiry was advertised in *The Australian* and the *Canberra Times* on 25 January 1997. The advertised deadline for submissions was 7 March 1997 although the Committee received submissions after that date.

1.4 The Committee received 36 submissions. The names of those who made submissions are listed in Appendix A. The Committee held a

number of public hearings. Hearings were held in Canberra on 25 March 1997, 26 March 1997, 12 May 1997 and 15 May 1997; in Melbourne on 10 April 1997, in Sydney on 17 April 1997 and in Perth on 18 April 1997. Those persons and organisations who gave evidence before the Committee are listed in Appendix B

Reasons for the inquiry

1.5 Section 44 sets out the circumstances that disqualify persons from standing for election to, or sitting in, the Commonwealth parliament. Subsection (i) disqualifies dual citizens and persons who owe duties to, or are entitled to the rights and privileges of, the citizens of foreign countries. It is now clear that persons who hold dual citizenship are disqualified. However, the meaning of the remaining limbs of subsection (i) is uncertain.

1.6 Subsection (iv) disqualifies those who hold any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of Commonwealth revenues. The last paragraph of section 44 provides that subsection (iv) does not apply to certain classes of office holders including ministers of state.

1.7 In referring the inquiry to the Committee the Attorney-General noted that the operation and implications of these provisions have become more apparent as a result of the High Court decision in *Sykes v Cleary*¹ and the more recent cases concerning Miss Jackie Kelly and Ms Jeannie Ferris.

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

Sykes v Cleary: subsection 44(iv)

1.8 *Sykes v Cleary* focussed attention on the magnitude of the potential impact of the section. While legal experts considered that the decision was quite foreseeable, to some people the consequences appeared harsh.

1.9 As is now well known, Mr Cleary won the seat of Wills at a by-election following the resignation of the Hon. R.J.L. Hawke. The High Court subsequently held that Mr Cleary was not qualified to be chosen as a member of the House of Representatives because at the time of nomination he held an office of the profit under the Crown – he was a secondary school teacher on leave without pay from the Education Department of Victoria. Mr Cleary lodged his nomination on 20 March 1992, resigned from the education department on 16 April 1992 and was declared elected to the House of Representatives on 23 April 1992. However, the High Court held that to comply with subsection 44(iv) Mr Cleary should have resigned before nomination.

Sykes v Cleary: subsection 44(i)

1.10 Although not strictly required to do so, the High Court in *Sykes v Cleary*, also gave some guidance on subsection 44(i). The decision highlighted the potential unfairness of subsection 44(i) for the individuals involved.

1.11 Both Mr Delacretaz (born in Switzerland) and Mr Kardamitsis (born in Greece) migrated to Australia many years ago and became Australian citizens. As part of the naturalisation ceremony each renounced all allegiance to any sovereign or state of whom or of which he was a subject or citizen. Despite the fact that both men considered

that they were Australians with no allegiance to any foreign power, the Court found that both were disqualified under subsection 44(i).

1.12 The Court applied the principles of international law, under which citizenship is a matter for individual countries who confer the citizenship. Because Mr Delacretaz had not applied to the government of Switzerland to terminate his Swiss citizenship, his renunciation of allegiance to Switzerland during his naturalisation ceremony had no effect on his status as a Swiss citizen. Similarly, Mr Kardamitsis remained a Greek citizen under Greek law because he failed to seek the approval of the relevant Greek Minister for the discharge of his Greek nationality.

1.13 Each individual considered himself to be an Australian citizen and each held only an Australian passport. Both had renounced any allegiance to their birth countries during the naturalisation ceremonies and were active participants in Australian public life. Their ignorance of the need to take additional steps to comply with subsection 44(i) or the mechanism for doing so was not considered relevant to the situation.

The Kelly case

1.14 Following the 1996 federal election Miss Jackie Kelly, the successful candidate in the seat of Lindsay was challenged by the Hon. Ross Free, the former member. He alleged that Miss Kelly, as a citizen of New Zealand held a foreign citizenship, and was ineligible to be chosen under subsection 44(i). In addition, he alleged that as an officer of the Royal Australian Air Force she held an office of profit under the Crown. On 11 September the Court held that Miss Kelly was not capable of being chosen at the time of the election and therefore the election for

the seat of Lindsay was void.² A by-election was held and she was again the successful candidate.

The Ferris case

1.15 The third recent case concerned Ms Jeannie Ferris.³ Ms Ferris stood for and won a Senate seat in the March 1996 election. She was employed by the Prime Minister's parliamentary secretary, Senator Minchin, after the date of nomination and before the writ for her election had been returned. It was argued that because she held the office of profit under the Crown before the process of choosing senators was completed, and therefore before she was actually declared elected, she contravened subsection 44(iv). Consequently she was incapable of being chosen as a senator. Her case was not brought before the Court - she resigned before a challenge was initiated. The South Australian parliament then appointed her to the casual vacancy that is purported to have arisen as a result of her resignation.

Previous inquiries

1.16 Section 44 of the constitution has been the subject of several inquiries in the past 16 years. The Senate Standing Committee on Constitutional and Legal Affairs considered the matter in its inquiry into

2 *Free v Kelly* (1996) 185 CLR 296, cited in Australian Electoral Commission submission, *Submissions*, p. S39.

3 The text refers to 'Ms Ferris' rather than to 'Senator elect Ferris' because she was employed by Senator Nick Minchin before the writs were certified for return and therefore before she became, formally, a 'senator elect'.

the qualifications of members of parliament in 1981.⁴ The issues were revisited by the Australian Constitutional Convention at its 1983 session and by the Constitutional Commission which reported in 1988.⁵

1.17 Each of these inquiries has recommended constitutional amendment of section 44 in order to remedy the perceived problems inherent in it.

Scope of this report

1.18 As noted earlier the terms of reference for this inquiry were limited to subsections 44(i) and (iv). These are provisions that have caused difficulties in recent times.

1.19 This report is divided into four chapters. Chapter Two deals with subsection 44(i) of the constitution while subsection 44(iv) is discussed in Chapter Three. Each of these chapters deals first with the problems to which the provisions give rise and then to the solutions proposed to the Committee. Recommendations are included in each chapter. The Committee was also asked to consider possible executive action that may help to overcome the problems generated by subsections 44(i) and (iv). Executive action is dealt with in Chapter Four because generally, similar considerations apply in relation to each subsection.

1.20 In preparing this report the Committee is keenly conscious of the need to preserve the principles on which subsections 44(i) and (iv) are

4 Senate Standing Committee on Constitutional Affairs, *Report, The Constitutional Qualifications of Members of Parliament*, AGPS, 1981.

5 Constitutional Commission, *Final report*, 1988.

based. On the other hand, it is also particularly concerned that there is every possibility of increased litigation under subsections 44(i) and (iv) and unless some action is taken to remedy the uncertainty created by these constitutional provisions there is a real danger of instability in the political system. The Committee notes that there have been three incidents resulting in disqualification or resignation in the last five years.

1.21 The Committee heard evidence that the other provisions of section 44 also require attention. In particular, some witnesses expressed concern that, as the government contracts with bodies corporate and individuals to provide services previously supplied by the government, subsection 44(v) has the potential to cause serious problems.⁶ Although the Committee's terms of reference did not include an examination of subsection 44(v) the Committee considers that it too, should be dealt with before candidates and members are unwittingly disqualified as a consequence of its operation.

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).

1.22 In making its recommendations the Committee has been influenced by the need to strike an appropriate balance between, on the one hand, safeguarding the integrity of the parliamentary system, and on

⁶ See, for example, Mr George Williams, *Transcript*, p. 34 and p. 44.

the other, ensuring the stability of that system. The Committee is also acutely aware of the need to uphold democratic principles by ensuring that the electoral system is open and fair to as many intending candidates as possible.