

Foreword

The purpose of subsections 44(i) and (iv) of the constitution is to protect Australia's parliamentary system by disqualifying candidates and members of parliament who are at risk, or might appear to be at risk, of allowing conflicts of loyalty to affect their performance as members.

For most of the ninety-six years of the Commonwealth these constitutional provisions dealing with disqualification of candidates and members of parliament have acted as silent guardians of our democracy. However, in recent years problems have arisen in relation to section 44 which have been the occasion for the reference of the two subsections to the Committee.

Subsection 44(i) provides for the disqualification of persons with a foreign citizenship or who have various other attachments to a foreign power. Subsection 44(iv) disqualifies those who hold any office of profit under the Crown, or any pension payable during the pleasure of the Crown. The last paragraph of section 44, which is also referred to the Committee, excludes certain classes of office holders, including ministers of state, from the disqualification in 44(iv).

Both subsections carry the difficulty of being expressed in archaic language. The meaning and scope of the provisions are unclear and their effects discriminate unfairly against some potential candidates. In the Committee's view there is a clear need to address the problems inherent in the provisions.

The Committee was asked to report on the operation of the two subsections and to consider constitutional amendment and legislative or executive action as means of addressing any problems identified.

In approaching its task the Committee had regard to the work of previous studies of section 44 including the Senate Legal and Constitutional Affairs Committee report of 1981, the Australian Constitutional Convention (1983 session) and the Constitutional Commission which reported in 1988. These reports predate the significant case law on section 44, particularly *Sykes v Cleary* (1992) and *Free v Kelly* (1996).

The Committee consulted with Commonwealth agencies, political parties, academics and the wider public in an attempt to assess current community attitudes to issues such as dual citizenship and the

application of the concept of office of profit to changing public sector employment trends.

As the collection of evidence drew to a close it became evident that there was but limited scope for addressing the problems by means of legislative and/or executive action. The Committee considers that constitutional amendment is necessary to address the problems raised by the subsections. The Committee is well aware that amendments have little chance of succeeding at referendum unless there is bipartisan support for the proposals outlined in its report. We trust that such support will be forthcoming.

The conduct of the inquiry and consideration of our report demonstrated the best features of the parliamentary committee system – including the ability to approach a problem on its own merits and to seek the best solutions. My thanks go to all members of the Committee for their support and enthusiasm for the task. Thanks also to Ms Kathryn Cole, the inquiry secretary, and other members of the secretariat for their contribution to the inquiry.

I commend the report to all members of the parliament.

Kevin Andrews, MP

Chairman

Terms of reference

The Committee shall inquire into and report on:

- 1. 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)**
- 2. action (including constitutional amendment, legislative or executive action) to address any identified problems relating to the operation of subsections 44(i) and 44(iv).**

Note: The full text of section 44 is reproduced at page x.

Standing Committee on Legal and Constitutional Affairs

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Mr Anthony Smith MP
Dr Andrew Southcott MP

Committee Secretariat

Inquiry Secretary: Ms Kathryn Cole
Committee Secretary: Ms Judy Middlebrook
Executive Assistants: Ms Penne Humphries
Ms Laura Gillies
Ms Jan Wootton

House of Representatives
Parliament House
CANBERRA ACT 2600
Telephone: (06) 277 2358

Abbreviations

AEC	Australian Electoral Commission
DIMA	Department of Immigration and Multicultural Affairs
DFAT	Department of Foreign Affairs and Trade
DPC Act	Defence (Parliamentary Candidates) Act 1969

Section 44 of the constitution

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.

