

Electoral Backgrounder

CONSTITUTIONAL DISQUALIFICATIONS AND INTENDING CANDIDATES

April 2010

Introduction

1. *Electoral Backgrounders* are published by the Australian Electoral Commission (AEC) to provide a basic introduction to electoral law, policy and procedures for the information and guidance of all interested parties.
 2. The AEC administers the conduct of federal elections under the provisions of the *Commonwealth Electoral Act 1918* (the Act). The Act is available on the Attorney-General's Commonwealth Law website at www.comlaw.gov.au. Unless otherwise specified, all references to sections are to sections of the Act. Also please note, the words 'voter' and 'elector' are used interchangeably throughout this publication.
 3. The purpose of this *Backgrounder* is to assist intending candidates for election to the Parliament of Australia to understand their obligation to ensure that they are legally qualified to nominate and, in particular, that they are not disqualified by ss. 43, 44(i) or 44(iv) of the Constitution.
 4. The view of the operation of the law presented here is consistent with advice provided to the AEC by its legal advisers, but in the final analysis it is for the courts to decide upon the interpretation of the law in any particular case. Readers should not rely on the information in this document as a statement of how the law will apply in any particular case.
- Accordingly, if you are in doubt about the interpretation of the law in particular circumstances you should seek your own independent legal advice.
5. The information in this *Backgrounder* is set out under the following headings
 - Candidate nomination
 - False or misleading statements
 - Constitutional qualifications and disqualifications
 - Section 44 of the Constitution - disqualification
 - Section 44(i) of the Constitution
 - Australian Defence Force
 - Information for dual or plural citizens
 - Section 44(iv) of the Constitution
 - Public servants
 - Recent disqualifications under s. 44
 - Legal advice on s. 44
 6. In 1997, the House of Representatives Standing Committee on Legal and Constitutional Affairs inquired into the operation of the candidate disqualifications in ss. 44(i) and 44(iv) of the Constitution. One of the Committee's recommendations was that the AEC publish a booklet to assist intending candidates to recognise whether they need further legal advice.

Please note this update replaces *Electoral Backgrounder No 19* published October 2007.

Electoral Backgrounders are published for the general information of AEC staff and people interested in electoral issues. *Electoral Backgrounders* present and analyse the issues on various topics, but do not promote a particular position or represent legal advice, and should not be relied upon as such. Anyone requiring legal advice should consult their own legal advisers.



AEC

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7. The AEC publishes a Candidate's Handbook that provides information on the electoral process for people intending to nominate as candidates in the election. Intending candidates should read the Handbook, as it becomes available prior to each election, in conjunction with this *Backgrounder*, which specifically addresses candidate disqualifications under ss. 44(i) and 44(iv) of the Constitution. The Candidate's Handbook is available from the AEC website at www.aec.gov.au or by phoning 13 23 26.

Candidate nomination

8. At the issue of the writs for a federal election, the dates are set for the election period, including the date for close of nominations. In order to nominate, intending candidates should obtain an official Nomination Form and a copy of the Candidate's Handbook from the AEC. For more information see the Candidate's Handbook on the AEC website at www.aec.gov.au.

9. Part XIV of the Act governs the process of nomination, and in particular subsection 170(1) provides the following:

A nomination is not valid unless, in the nomination paper, the person nominated:

- (a) consents to act if elected; and
- (b) declares that:
 - (i) the person is qualified under the Constitution and the laws of the Commonwealth to be elected as a Senator or a member of the House of Representatives, as the case may be; and
 - (ii) the person is not, and does not intend to be, a candidate in any other election to be held on the same day as the election to which the nomination relates; and
- (c) states whether the person is an Australian citizen by reason of birth in Australia or other means and provides:
 - (i) in the case of citizenship by birth in Australia - the date and place of birth; or
 - (iii) in the case of citizenship by any other means - particulars of those means.

10. Subsections 170(2) and (3) of the Electoral Act provide that a nomination is not valid unless it is lodged with a particular person, in a particular time period, and is accompanied by the appropriate

deposit (see Candidate's Handbook at www.aec.gov.au). Importantly, a nomination cannot be accepted until after the issue of the writ for an election.

False or misleading statements

11. Division 137 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) makes it an offence to provide false or misleading information or documents in purported compliance with a law of the Commonwealth, with a maximum penalty of 12 months imprisonment.

Qualifications and disqualifications

12. Candidates intending to nominate for election to the Australian Parliament must ensure that they are qualified, and not disqualified, to stand for election under the provisions of the Act. Section 163 of the Act requires any person nominating for election to be 18 years of age, an Australian citizen, and an elector entitled to vote at a House of Representatives election (or qualified to become such an elector).
13. Section 164 prohibits a current member of a state parliament or a territory legislative assembly who has not resigned before the hour of nomination (12 noon on the day nominations close) from nominating as a candidate for the Senate or the House of Representatives. As state and territory laws govern the manner of resignation, intending candidates should make sure that their resignation is effective before the hour of nomination. In addition, Section 165 of the Act prohibits a candidate from nominating for more than one division of the House of Representatives, or for more than one state or territory for the Senate, or for both the House of Representatives and the Senate.
14. Section 43 of the Constitution provides that a member of the Senate or the House of Representatives cannot be chosen or sit as a member of the other house of parliament.
15. Intending candidates should also ensure that they are not disqualified by s. 44 of the Constitution. The disqualifications that most commonly arise are in s. 44(i), relating to dual/plural citizenship; and in s. 44(iv), relating to office of profit under the Crown. The purpose of these provisions is to protect the parliamentary system by disqualifying candidates and members of Parliament who are at risk of allowing conflicts of loyalty to affect their performance.

Section 44 of the Constitution - disqualification

16. 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 subsection (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.

Section 44(i) of the Constitution

17. Section 44(i) of the Constitution applies to three categories of persons:

- a person who is under any acknowledgment of allegiance, obedience or adherence to a foreign power;
- a subject or a citizen of a foreign power; and
- a person who is entitled to the rights or privileges of a subject or a citizen of a foreign power.

18. The first category of disqualification under s. 44(i) appears to have a wide application, disqualifying persons who, although they may not have a formal nationality or citizenship link with another country, may have some other form of allegiance with that country. In the 1998 case of *Nile v Wood* (1988) 167 CLR 133, Mrs Elaine Nile unsuccessfully sought the constitutional disqualification of Mr Robert Wood, recently elected to the Senate for the State of New South Wales on the grounds that Mr Wood's previous protest activity in obstructing shipping, the vessels of a friendly nation, indicated allegiance, obedience or adherence to a foreign power. In this case the High Court held:

...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.

19. That is, it might be concluded that a "formally or informally" acknowledged allegiance to a particular foreign power, whatever this might constitute in particular circumstances, would disqualify a candidate if that candidate had not withdrawn or revoked that allegiance.

20. The second category of disqualification under s. 44(i) refers to a specific type of foreign allegiance, where a person is a "subject or citizen" of a foreign power. It applies to persons who have certain rights because of a formal citizenship link with a foreign power, and therefore to any person who holds dual or plural citizenship. In the 1992 case of *Sykes v Cleary* (1992) 176 CLR 77 the High Court found that candidates are disqualified from election to Parliament if they do not take "all reasonable steps" to renounce their other citizenship before nomination.

21. Taking all reasonable steps necessitates the use of renunciation procedures of the other country where such procedures are available. If the other country refuses renunciation then proof of requesting renunciation is sufficient. Because such procedures were available in relation to the two countries of which candidates Mr Kardamitsis and Mr Delacretaz were citizens (Greece and Switzerland respectively), it was concluded that they had not taken "all reasonable steps" to renounce their foreign citizenship, and were therefore disqualified by s. 44(i) of the Constitution.

22. In the 1999 case of *Sue v Hill* (1999) 199 CLR 462, the High Court found Ms Hill not duly elected because she held dual citizenship of Australia and

the United Kingdom. The Court held that the United Kingdom is classified as a foreign power, within the meaning of s. 44(i) of the Constitution.

23. The third category of disqualification under s. 44(i) refers to the rights or privileges of a subject or citizen. It is unclear whether this means entitlement to all the rights and privileges of such a citizen or merely one or some of such rights or privileges.

Information for dual or plural citizens

24. The procedures for renouncing citizenship vary from country to country. Accordingly, intending candidates should contact the relevant government, Embassy or High Commission to determine the current law.

Section 44(iv) of the Constitution

25. The most recent judicial consideration of the s. 44(iv) disqualification is in the two cases of *Sykes v Cleary* [1992] HCA 60;(1992) 176 CLR 77 and *Free v Kelly* and the Australian Electoral Commission [1996] HCA 42. Mr Cleary was disqualified by the High Court because he was, at the time of his nomination, a Victorian State school teacher on leave without pay. Ms Kelly was disqualified by the High Court because she was, at the time of her nomination, a serving member of the Australian Defence Force who was regarded by the Court to be 'wholly employed' by the Commonwealth. Therefore, the exception to subsection 44(iv) noted above did not apply to her.
26. Both of these occupations are then clearly to be regarded as "offices of profit under the Crown", and by implication, all Federal and State public servants and serving members of the Australian Defence Force would be disqualified from standing for election. This appears to apply even if the person is "unattached", or on leave without pay, and not currently in receipt of remuneration. However, it would appear that the holding of an office involving merely the reimbursement of expenses, say in relation to the membership of boards and committees may not contravene the disqualification provision.
27. The mere holding of an office under the Crown does not necessarily disqualify a person from being chosen or of sitting as a member of either House of Parliament. Factors which must be considered include the actual status of the Crown in the making of the appointment and whether remuneration is

payable. These considerations suggest that such positions as councillors and employees of local government, and members of the governing bodies and the employees of statutory authorities, could be at risk of disqualification, depending on their particular circumstances.

28. It would appear that Assistant Ministers are not at risk in this regard, and Parliamentary Secretaries are governed by the *Parliamentary Secretaries Act 1980*, which is designed to remove the risk of disqualification under s. 44(iv). While Senators-elect do not hold offices of profit under the Crown, they should exercise caution in any chosen form of employment while waiting to take their seats.
29. The second part of the s. 44(iv) disqualification refers to a person in receipt of a "pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth". This part of the provision has not yet been judicially considered. However, it is unlikely that pensions payable under the *Social Security Act 1991* (Cth) or other legislation conferring similar benefits, or superannuation entitlements, would disqualify an intending candidate.

Australian Defence Force

30. Members of the Defence Force who want to nominate for election to the Australian Parliament should consult the relevant Defence Force authority on conditions of resignation and re-entry.

Public servants

31. Federal, State and Territory public servants who want to nominate for election to the Australian Parliament should resign from the relevant Service before nomination in order to comply with s. 44(iv) of the Constitution. Conditions of re-entry by unsuccessful candidates to the various Public Services are matters for the relevant public service authority. Any public servant who intends to resign to stand as a candidate should confirm their particular circumstances with the relevant Federal/State/Territory department or agency.
32. Federal, State and Territory public servants intending to stand as candidates at a federal election should contact their relevant Federal, State or Territory public service authority to determine the process for resignation and re-appointment in their jurisdiction. The 1992 *Sykes v Cleary* decision determined that being on leave without pay from

an office of profit is still a disqualification from standing as a candidate or being elected. Intending candidates who are public servants should consider their position and whether they need to seek legal advice if the period between their resignation and re-appointment is regarded as leave without pay or in some other way deemed to be continued service.

Recent candidate disqualifications under s. 44

33. The complex legal language in s. 44 of the Constitution, and the use of some terms and concepts that no longer have any standard currency, may make it difficult for intending candidates and their advisers to decide whether they are vulnerable to disqualification. The 1997 Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, entitled “Aspects of Section 44 of the Constitution”, recognised these difficulties and recommended a referendum to amend s. 44 of the Constitution:

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. (p iv)

34. In the past two decades there have been four major challenges in the High Court to the qualifications of sitting Members of Parliament, or candidates for election to Parliament, originating under s. 44 of the Constitution.
35. The first challenge involved a sitting Senator, Mr Robert Wood, in 1987; the second involved the election of Mr Phil Cleary in the Division of Wills, in 1992; the third involved the election of Ms Jacqueline Kelly in the Division of Lindsay, in 1996; and the fourth involved the election of Ms Heather Hill to the Queensland Senate, in 1998. Mr Wood was, at the time of the challenge to his qualifications to sit in Parliament, a British subject but not an Australian citizen; Mr Cleary was, at the time of his nomination, a Victorian State school teacher on leave without pay; Ms Kelly was, at the time of

her nomination, a serving member of the Australian Defence Force; and Ms Hill was, at the time of her nomination, both an Australian citizen and a British citizen.

36. The High Court, sitting as the Court of Disputed Returns, disqualified the then Senator Wood from sitting in the Parliament because he was not an Australian citizen as required by s. 163 of the Act (the court did not find it necessary to express a view on the s. 44(i) disqualification issue). Mr Cleary and Ms Kelly, both newly-elected members of the House of Representatives, were disqualified by the High Court, sitting as the Court of Disputed Returns, because they held an office of profit under the Crown, contrary to s. 44(iv) of the Constitution. The Cleary and Hill cases also raised the issue of dual citizenship under s. 44(i) of the Constitution. The High Court declared the then Senator Hill not duly elected to the Senate as a Senator for Queensland because she was an Australian citizen and a British subject, contrary to s. 44(i) of the Constitution.
37. In the case of Mr Wood in 1987, his statutory disqualification resulted in a recount of certain New South Wales Senate ballot papers to fill his vacated Senate position with a person from the same political party; in the case of Mr Cleary in 1992 (who had been elected in a by-election), the electors of the Division of Wills remained unrepresented until the federal election the following year; in the case of Ms Kelly in 1996, a fresh election for the Division of Lindsay was held soon after the court decision, at which she was again elected; and in the case of Ms Hill in 1998, similarly to Mr Wood in 1987, her constitutional disqualification resulted in a recount of the Queensland Senate ballot papers to fill her vacated Senate position.

Legal advice on s. 44

38. Under the provisions of the Act, AEC officers are able to reject nominations only for certain specified technical deficiencies, such as for example, that the nomination declaration is not signed, or that the Nomination Form or nomination fee was not lodged with the AEC before the close of nominations. There is no provision that requires AEC officers to check all nomination declarations against the provisions of s. 44 of the Constitution, or to reject nominations on the grounds that the declaration is incorrect.
39. In 1997, the House of Representatives Standing Committee on Legal and Constitutional Affairs considered the role of the AEC in advising intending candidates on s. 44 of the Constitution, and concluded that:

The Committee agrees that the AEC should have no role in giving legal advice to candidates. The Committee recognises that the AEC's role in running elections must be protected from any criticism that it has given wrong advice. The Committee appreciates that AEC officials have no role in going behind a candidate's declaration that he or she is eligible to stand.

40. Officers of the AEC charged with receiving nominations from intending candidates are not professionally qualified to provide legal advice on the interpretation of the Constitution. Even if AEC officers were so qualified, many nominations are not lodged with the AEC until hours or even minutes before the close of nominations, leaving very little time for the settlement of complex questions of legal interpretation.
 41. Candidates make a declaration on the nomination form and the AEC is required to accept this declaration at face value for the purposes of nomination. If the qualifications of a candidate are found during or after the election to lack credibility, then proceedings can be instituted against the candidate in the Court of Disputed Returns after the election, which could result in the election being voided. Other proceedings in the lower courts could result in a candidate being convicted for the offence of providing false and misleading information on a nomination form.
- S. O'Brien, "Dual Citizenship, Foreign Allegiance and s. 44(i) of the Australian Constitution", Australian Parliamentary Library, December 1992.
 - K. Cole, "Office of Profit under the Crown and Membership of the Commonwealth Parliament", Australian Parliamentary Library, April 1993.
 - House of Representatives Standing Committee on Legal and Constitutional Affairs, "Aspects of Section 44 of the Constitution", Report, July 1997
 - Senate Standing Committee on Constitutional and Legal Affairs, "The Constitutional Qualifications of Members of Parliament", Report, 1981.
 - The decisions of the High Court of Australia in *Nile v Wood* (1988) 167 CLR 133, *Re Wood* (1988) 167 CLR 145, *Sykes v Cleary* (1992) 176 CLR 77, *Free v Kelly* (1996) 185 CLR 296, and *Sue v Hill* (1999) 199 CLR 462.
44. Some guidance on the other parts of s. 44 of the Constitution may be obtained from *Nile v Wood* (1987) 167 CLR 133, in relation to ss. 44(ii) and (iii), and *In re Webster* (1975) 132 CLR 270, in relation to s. 44(v).

Summary

42. It is a candidate's own responsibility to ensure that his or her qualifications for candidacy meet the requirements set out in the Constitution and the Act. With respect to s. 44(i) of the Constitution, intending candidates holding dual citizenship should take 'all reasonable steps', as per the ruling of the High Court in *Sykes v Cleary*, to renounce their other citizenship before nomination. With respect to s. 44(iv) of the Constitution, intending candidates who are employed as public servants by Federal, State or Territory governments, should resign before nomination. In all other cases of possible disqualification under s. 44 of the constitution, it is recommended that intending candidates seek their own legal advice.
43. The information provided in this *Backgrounder* was drawn from the following sources:

Endnotes

The *Commonwealth Electoral Act 1918* can be purchased over the counter in major cities, or accessed through any major public library, or the ComLaw website www.comlaw.gov.au. For information about over the counter or mail order sales, ring CanPrint Information Services 1300 889 873.

Further information in relation to compliance with the Act is set out in the AEC's Electoral *Backgrounder* publications which can be found on the AEC's website at http://www.aec.gov.au/About_AEC/Publications/Backgrounders/index.htm.

AEC Publications

The AEC has available a number of publications for people interested in the electoral process including:

- *Electoral Pocketbook*: a concise hand book of electoral facts and statistics
- *Electoral Boundaries Maps*: maps showing the geographic boundaries of the 150 electoral divisions
- *Nominations pamphlet*: key facts for people considering standing for election
- *Electoral Newsfle series*: editions are produced on various electoral events
- *Candidates Handbook*: a handbook to assist candidates standing for election to the Senate and House of Representatives
- *Scrutineers Handbook*: an information handbook for scrutineers at federal elections and referendums
- *Election Funding and Financial Disclosure Handbook*: a handbook of funding and disclosure requirements of candidates and political parties.

Copies of these and other publications are available from the AEC website www.aec.gov.au, phoning 13 23 26 or at national, state, territory and divisional offices.

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