

Electoral Backgrounder

PARLIAMENTARY REPORT ON SECTION 44 OF THE CONSTITUTION

April 2010

Highlights

The purpose of section 44 of the Constitution 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.

The High Court disqualified Mr Phil Cleary and Ms Jacky Kelly as Members of Parliament because they held offices of profit under the Crown contrary to section 44 of the Constitution.

The Committee concluded that amendments to the Constitution by referendum are necessary to address the operational problems raised by section 44.

The Committee also concluded that the AEC should have no role in giving legal advice to candidates, and no role in going behind a candidate's declaration that he or she is eligible to stand for election.

Improvements to the quality of information provided to candidates will be made by the AEC before the next election

Introduction

The House of Representatives Standing Committee on Legal and Constitutional Affairs was given a reference in late 1996 to inquire into and report on the operation of subsections 44(i) and (iv) of the Constitution, including the exceptions to subsection 44(iv). The Committee

was also asked to inquire into and report on action to address any identified problems, including constitutional amendment, legislative change and administrative action.

The Committee received 37 written submissions, including two from the Australian Electoral Commission (AEC), and conducted seven public hearings in, Canberra, Melbourne, Sydney and Perth, over a period of two months. The Report, entitled "Aspects of Section 44 of the Australian Constitution" was tabled on 25 August 1997 in the House of Representatives by the Chairman of the Committee, Mr Kevin Andrews MP.

Operation of Section 44

As identified in the Foreword to the Report by the Chairman, the Committee identified the problems in the operation of subsections 44(i) and 44(iv) as follows:

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

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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.....

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 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.

The AEC has already provided submissions to the Joint Standing Committee on Electoral Matters following the 1987, the 1990, the 1993 and the 1996 federal elections, highlighting the difficulties that candidates experience in ensuring their compliance with the various provisions of section 44; indicating that the AEC does not have and should not have any statutory responsibility in providing legal advice to candidates on their particular circumstances; and suggesting that short of constitutional amendment by referendum, there are no real legislative or administrative solutions to the problems experienced by candidates in determining their vulnerability to the section 44 disqualifications. These views on section 44 expressed at past inquiries by the AEC, were reiterated in 1997 to the inquiry by the Legal and Constitutional Affairs Committee.

The practical consequences of the failure to attend to the problems in the operation of section 44 are best demonstrated in the outcomes of recent litigation. In the past five years there have been two major constitutional challenges in the High Court to the qualifications of elected candidates, the first involving the election of Mr Phil Cleary in the Division of Wills in 1992, and the second involving the election of Ms Jacqueline Kelly in the Division of Lindsay in 1996.

Both elected members of the House of Representatives were subsequently disqualified by the High Court, sitting as the Court of Disputed Returns, because they held an office of profit under the Crown, contrary to section 44(iv) of the Constitution, and both cases also raised the issue of foreign allegiance under section 44(i). In the case of Mr Cleary in 1992, the people of the Division of Wills remained unrepresented until the federal election the next year, and in the case of Ms Kelly in 1996, a by-election for the Division of Lindsay was held, at which she was re-elected.

Major outcomes of the Inquiry

The Committee concluded that the problems in the operation of section 44 can only be properly addressed by a national referendum to amend the Constitution. In the Foreword to the Report, the Chairman of the Committee said the following:

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....

The likelihood of a referendum being held on section 44 of the Constitution alone is probably remote, but in the context of the forthcoming Constitutional Convention, and other recent debates on the contemporary relevance of the Constitution, it is possible that amendments to section 44 could be put to the people as part of a larger package of reforms. Whatever the pathway to constitutional change, it would appear from the deliberations of this Committee that there is a real

possibility of bipartisan political support for amendments to section 44 of the Constitution.

The role of the AEC

During the course of the inquiry, the reluctance of the AEC to provide direct legal advice to candidates on their possible constitutional disqualifications was subjected to heavy criticism by the secretariats of the Liberal Party and the Australian Labor Party. There was reference made to the “disinherited position” of the AEC, and the “passive role” of the AEC being “part of the problem”. Both secretariats recommended a major escalation in the duties and responsibilities of AEC officers to ensure that candidates are not constitutionally disqualified at the point of nomination.

In response, the AEC submitted that guidance is regularly provided to political parties and candidates on aspects of electoral law, particularly electoral offences, where the law has been tested in the courts, and/or firm and unambiguous advice is available from the Director of Public Prosecutions or the Attorney-General’s Department.

However, with respect to section 44, for significant legal and practical reasons, the AEC submitted that it does not believe it should go beyond the provision of clear warnings to candidates in the Candidates’ Handbook and the Nomination Form, and suggesting to candidates that they seek their own legal advice if in doubt about their personal circumstances. For example, as was demonstrated to the Committee during the course of the hearings, senior constitutional lawyers are unable to agree on the detailed interpretation of section 44, and there is no reason to believe that AEC officers would be any more capable of providing unambiguous legal advice.

In any case, such advice from the AEC would be of an essentially speculative nature and might subsequently be found to be wrong in a court of law, leaving the AEC open to legal action on a number of fronts. Finally, many candidates leave their nominations to the last minute, and any requirement that AEC officers should interrogate candidates on their constitutional qualifications would be practically impossible in the time available.

The Committee concluded its deliberations on the role of the AEC as follows:

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. If the AEC was required to perform such a function the election cycle would take months.

However, the Committee also concluded that the AEC could improve the quality of information provided to prospective candidates and recommended that a new booklet be prepared that would be publicly available at all times, emphasising the possible circumstances where candidates might be disqualified, particularly in relation to foreign allegiance and office of profit under the Crown.

The Committee also recommended that the Department of Foreign Affairs and Trade (DFAT) establish and maintain a database on the renunciation procedures for the ten countries from which most migrants originate, and that the AEC provide information from this database to intending candidates. Finally, the Committee recommended that the Department of Immigration and Multicultural Affairs (DIMA) be responsible for advising new citizens of the foreign allegiance disqualification should they wish to become candidates for federal Parliament.

Conclusion

The Government has yet to respond to the recommendations by the Committee that a referendum be conducted to amend section 44, and that the AEC, DFAT and DIMA work together to improve the quality of information available to the public.

However, there is little doubt that the AEC can and will respond positively to the recommendations of the Committee at the administrative level, in reworking and improving the information on section 44 of the Constitution that is provided to candidates for election to the federal Parliament.

Recommendations

The following 10 recommendations were made by the Committee.

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).

Recommendation 2: The Committee recommends that a referendum be held to make the following changes to the constitution:

- delete subsection 44(i).
- insert a new provision requiring candidates and members of parliament to be Australian citizens.
- empower parliament to enact legislation determining the grounds for disqualification of members of parliament in relation to foreign allegiance.

Recommendation 3: The Committee recommends that subsection 44(iv) be deleted and new provisions be inserted in the constitution.

One provision should require a person who holds judicial office under the Crown in right of the Commonwealth or a state or territory to resign from the office before he or she nominates for election to the federal parliament.

Under the second provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office nominated for election to the Senate or the House of Representatives.

Under the third provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office were elected to the Senate or the House of Representatives.

Recommendation 4: The Committee recommends that if a senator or a member of the House of

Representatives accepts any of the offices covered by the new provisions he or she should be disqualified from membership of the parliament.

Recommendation 5: The Committee recommends that the number of members of parliament who hold executive office (ministers, assistant ministers and parliamentary secretaries) should be limited, under the constitution, to a maximum of 20 per cent of the total membership of the parliament.

Recommendation 6: The Committee recommends that:

the exemption that covers ministers of state for a state should be deleted.

the exemption that currently exists for members of the imperial armed services should be deleted.

Recommendation 7: If the constitutional amendment to delete subsection 44(iv) does not proceed the Committee recommends that the Attorney-General write to those states where there is a concern that the legislation guarantees reinstatement and request that state parliaments take such action as is necessary to ensure that the relevant legislation does not infringe subsection 44(iv).

Recommendation 8: The Committee recommends that the AEC:

- publish a booklet, noting possible problem areas that should cause a potential candidate to consider seeking further advice.
- disseminate other relevant information, for example, extracts of state and territory laws governing the resignation and re-appointment of public sector workers, and papers prepared by the Parliamentary Library, on subsections 44(i) and 44(iv) of the constitution, to interested persons including potential candidates.

Recommendation 9: The Committee recommends that the Department of Foreign Affairs and Trade maintain a data base on the renunciation of citizenship procedures for the ten countries from which most immigrants originate and that information be provided by the Australian Electoral Commission to intending candidates on the basis of this data base.

Recommendation 10: The Committee recommends that when the Department of Immigration and Multicultural Affairs provides information to persons who are taking up Australian citizenship, it draws attention to the need to comply with subsection 44(i) in the event that the person wishes to stand for election to the Commonwealth parliament.

The full text of section 44 of the Constitution is as follows:

Any person who -

- 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
- 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
- Is an undischarged bankrupt or insolvent: or
- 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
- 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 re establish and 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.

Copies of AEC submissions Nos 5 and 35 may be obtained from the Secretary of the House of Representatives Standing Committee on Legal and Constitutional Affairs at Parliament House in Canberra. The August 1997 Report of the Committee, entitled "Aspects of Section 44 of the Constitution" may be purchased from the Commonwealth Bookshop. Copies of the Constitution may be purchased from the Commonwealth Bookshop, or viewed at major public libraries, or on the Internet. The relevant case law, which may be viewed on the Internet or at any law library, is *Sykes v Cleary* (1992) 176 CLR 77, and *Free v Kelly* (1996) 70 ALJR 809.

This issue was prepared by Peta Dawson, Director Parliamentary and Litigation Section, 17 October 1997. For further information on Electoral backgrounders contact the Information Section on (02) 6271 4519

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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