

SECTION 44 OF THE *AUSTRALIAN CONSTITUTION*: OUTDATED OR STILL IMPORTANT?

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I INTRODUCTION

It is undeniable that section 44 of the *Australian Constitution* ('section 44') has caused a lot of political upheaval in contemporary Australian politics.¹ The Australian Parliamentary Eligibility Crisis has resulted in national politicians, including 5 members of the 'Citizenship Seven', being disqualified from parliament due to not meeting section 44 eligibility requirements.² This has raised political debate surrounding the section, with some suggesting it is outdated and should be modified.³ I believe that section 44 operates as intended by the founding fathers, and is not in need of reform. In order to come to this conclusion, I find it necessary to interrogate whether the original purpose of section 44 is relevant to contemporary Australia, and then whether section 44 successfully meets this purpose in practice.

II ASPECTS OF SECTION 44

Although it is undeniable that Australia as a nation has evolved since these subsections were drafted, however each subsection highlights issues that are still of utmost importance in maintaining the 'purity' of the Australian Parliament.⁴ As such, I believe the underlying concepts of the section should not be removed from the *Constitution*, as doing so may jeopardise national sovereignty and integrity of the parliament for future generations of Australians.

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¹ Harry Hobbs, Sangeetha Pillai and George Williams, 'The disqualification of dual citizens from Parliament: Three problems and a solution' (2018) 43(2) *Alternative Law Journal* 73, 80.

² *Re Canavan* [2017] HCA 45.

³ Harry Hobbs, Sangeetha Pillai and George Williams, 'The disqualification of dual citizens from Parliament: Three problems and a solution' (2018) 43(2) *Alternative Law Journal* 73, 76.

⁴ Official Record of the Debates of the Australasian Federal Convention, Sydney, 21 September 1897, 1033.

There are five subsections within section 44, each with their own purpose in terms of maintaining eligibility standards. This essay will examine the four subsections that have caused disqualifications in recent years.

A *Section 44(i)*

Section 44(i) provides that any person who is ‘allegiant’ or otherwise a ‘citizen of a foreign power’ is ineligible to sit in Parliament.⁵ The purpose of this subsection is to ensure parliamentarians have complete and undivided loyalty to Australia and avoid ‘influence from foreign governments’.⁶ This section was drafted to prevent ‘insidious enemies of the Commonwealth’ from infiltrating Parliament,⁷ and ‘selling our defence secrets to a foreign power’.⁸

A case that has developed legal understanding of the operation of this subsection is *Sykes v Cleary*.⁹ In this case, a majority of 5:2 decided a dual citizen is ineligible to sit in Parliament unless they have taken ‘reasonable steps’ to renounce their foreign citizenship.¹⁰ The case also defines the question of eligibility at the point of nomination,¹¹ and held that it is irrelevant whether a person knows of their foreign citizenship status.¹²

However, it was held in *Re Gallagher* that ‘reasonable steps’ are not enough when it is not impossible or unreasonable for the candidate to renounce their foreign citizenship.¹³

Some issues have been raised by this subsection, including uncertainty about its scope,¹⁴ the inconsistency of international citizenship laws,¹⁵ and the fact that many Australians are unaware of their dual citizenship status.¹⁶

⁵ *Australian Constitution* s 44(i).

⁶ Commonwealth, *Aspects of Section 44 of the Australian Constitution Subsections 44(i) and (iv): House of Representatives Standing Committee on Legal and Constitutional Affairs*, Parl Paper No 85 (1997) 10.

⁷ Official Record of the Debates of the Australasian Federal Convention, Sydney, 21 September 1897, 1013.

⁸ *Ibid* 1014.

⁹ *Sykes v Cleary* (1992) 176 CLR 77.

¹⁰ *Ibid* 107.

¹¹ *Ibid* 100.

¹² *Ibid*.

¹³ *Re Gallagher* [2018] HCA 17 [30].

¹⁴ Commonwealth, *Aspects of Section 44 of the Australian Constitution Subsections 44(i) and (iv): House of Representatives Standing Committee on Legal and Constitutional Affairs*, Parl Paper No 85 (1997) 14-7.

¹⁵ *Ibid* 20-1.

¹⁶ *Ibid* 22-4.

B Section 44(ii)

This section serves to disqualify parliamentarians that have been ‘attained of treason’ or any other offence that is punishable by a prison sentence of one year or longer.¹⁷ The treason stipulation relates closely to section 44(i) in that it relates to the need for undivided loyalty to Australia, and no other nation’s governments or political agendas.

The rest of the subsection demonstrates that only those who abide by Australian laws should be bestowed with the power to assist in the lawmaking process. Parliamentarians should be upstanding citizens that serve as role models to the rest of society. This was discussed in the Convention Debates when Barton stated ‘somebody might take a violent affection for a gaol-bird, and put him into parliament. We do not want that sort of thing’.¹⁸

This subsection was discussed in *Re Culleton [No 2]*.¹⁹ This case involved Rod Culleton, a WA Senator, and his former conviction of larceny or theft of personal property in 2016 prior to the federal election. Although the conviction had been annulled, this was deemed irrelevant by the High Court, as he was ‘subject to be sentenced for an offence punishable by one year or more’ at the date of the 2016 election.²⁰ The annulment was deemed not to apply retrospectively, and he was therefore disqualified.²¹

C Section 44(iv)

Section 44(iv) states that any person who holds an office of profit under the Crown is ineligible to sit as a member of the Australian Parliament.²² This subsection relates to the overarching separation of powers principle, by upholding the concept that the separation between the executive and legislature is maintained. As such, its purpose is to prevent the executive from being able to unduly influence the actions of the legislature.²³ Furthermore, it aims to prevent conflicts of interest between a candidate’s finances and Australia’s national interests.

¹⁷ *Australian Constitution* s 44(ii).

¹⁸ Official Record of the Debates of the Australasian Federal Convention, Sydney, 21 September 1897, 1012.

¹⁹ [2017] HCA 4.

²⁰ *Ibid* [22].

²¹ *Ibid* [23].

²² *Australian Constitution* s 44(iv).

²³ Commonwealth, *Aspects of Section 44 of the Australian Constitution Subsections 44(i) and (iv): House of Representatives Standing Committee on Legal and Constitutional Affairs*, Parl Paper No 85 (1997) 53.

This subsection was discussed in the context of the position as Local Mayor in *Re Lambie*,²⁴ where it was decided that this position is an office of profit, but not under the Crown – reinforcing Steve Martin’s eligibility to sit in Parliament.²⁵

The principle of separation of powers is still of utmost importance to the functions of the Australian Parliament,²⁶ and is in place to prevent one branch of government acquiring arbitrary power. I therefore believe that this subsection should not be removed from the *Australian Constitution*.

D *Section 44(v)*

Subsection 44(v) prevents any person who has an ongoing financial benefit from doing business with the Commonwealth public service from being eligible to sit in Parliament.²⁷ This relates to the concept that sitting members should not have any conflicts of interest arising from their complete loyalty to Australia and their business affairs. There is again focus again on the separation of powers principle, as those who are financially invested in the operations of the executive should not be able to unduly influence the actions of the legislature.²⁸

The subsection was originally interpreted in *Re Webster* to only protect parliament against influence by the executive, rather than influence of individual members of Parliament.²⁹ This narrow view was later overturned in *Re Day*.³⁰ In this judgement, the High Court extended the reach of this section to also protect against any potential for influence, also including conflicts of interest between the individual member and their financial affairs.³¹ This resulted in Senator Bob Day being disqualified from Parliament.

III POSSIBLE REFORM

Now that the theoretical purpose of section 44 has been determined, the next logical question to ask is whether the section adequately meets this in practice. Namely, should the section be amended, or should administrative changes should be made in order to better accommodate

²⁴ *Re Lambie* [2018] HCA 6.

²⁵ *Ibid* [36].

²⁶ *Ibid*.

²⁷ *Australian Constitution* s 44(v).

²⁸ *Re Day (No 2)* [2017] HCA 14 [252], [261], [262].

²⁹ *Re Webster* (1975) 132 CLR 270, 280.

³⁰ *Re Day (No 2)* [2017] HCA 14.

³¹ *Ibid*.

the purpose of the section? My discussion revolves largely around submissions made by academics to the to the Joint Standing Committee on Electoral Matters ('JSCEM') in 2018.³²

It has been suggested that the operation of section 44 is too harsh or does not adequately carry out its purpose.³³ Some have suggested reform through referendum is necessary, either to repeal the section, or to amend it in a way that gives the Parliament power to legislate on eligibility thereby reducing ineligibilities overall.³⁴ This would be achieved by inserting the words 'until the Parliament otherwise provides'.³⁵

I disagree that the Parliament should have more leeway in unilaterally determining the eligibility of certain members. I agree with the submission made by Neil Cotter, namely when he states that allowing Parliamentarians to make the rules for eligibility creates an 'inherent conflict of interest'.³⁶ High standards for eligibility should be maintained, as the underlying concepts and values that they represent are necessary, just as they were when the *Constitution* was drafted back in the 1890s. It is integral for the Australian people to have confidence that those able to be elected are loyal to interests of Australia and its people, and equally as important to maintain public confidence by ensuring that the candidates selected through our democratic process are actually eligible to serve.

I believe that it is irresponsible to amend the *Constitution* in a way that minimises ineligibilities. Instead, I agree with Lorraine Finlay's view that 'the aim is to ensure that laws reflect minimum standards expected by Australian people so that when candidates are found to be ineligible this is based on substantial, and not merely technical, factors'.³⁷ Finlay then went on to suggest the creation of 'internal referral guidelines', or 'independent mechanisms'

³² Commonwealth, *Excluded: The impact of section 44 on Australian democracy: Joint Standing Committee on Electoral Matters*, Parl Paper No 153 (2018).

³³ Harry Hobbs, Sangeetha Pillai and George Williams, 'The disqualification of dual citizens from Parliament: Three problems and a solution' (2018) 43(2) *Alternative Law Journal* 73, 77.

³⁴ Commonwealth, *Excluded: The impact of section 44 on Australian democracy: Joint Standing Committee on Electoral Matters*, Parl Paper No 153 (2018) 87.

³⁵ Commonwealth, *Excluded: The impact of section 44 on Australian democracy: Joint Standing Committee on Electoral Matters*, Parl Paper No 153 (2018) 87; Luke Beck, Submission No 16 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 9 January 2018, 1.

³⁶ Neil Cotter, Submission No 48 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 2018, 1.

³⁷ Lorraine Finlay, Submission No 51 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 9 February 2018, 1.

for referrals to prevent Parliament using the section as a political weapon.³⁸ I believe this approach is preferable to amending the Constitution.

It was proposed by Michael C Douglas in his submission to the JSCEM that no constitutional changes need to be made to section 44(i), instead observing that the section is clear, and not procedurally unfair or otherwise unjust.³⁹ He went on to state that the criticism directed towards section 44(i) is better directed towards politicians who ‘failed to come to terms with the plain language of our Constitution prior to seeking election’.⁴⁰ This view was also favoured by Les Yule, who went on to state that inability to ‘honestly declare such details’ leading to ineligibility should result in prosecution.⁴¹

The suggestion that candidates that falsely declare eligibility at nomination should incur penalties was supported by Mr Allan Laws. He suggested that ‘ignorance is no excuse’ and described the lack of penalties as ‘a disgrace’.⁴² I believe that this approach would certainly serve as a deterrent to candidates taking a lax approach to eligibility. I would not go as far as to support Brian Capamagian’s suggestion of ‘life imprisonment’,⁴³ but would contend that some form of penalty is supported by section 46 of the *Constitution* which gives rise to the power to impose penalties on those parliamentarians who sit while ineligible.⁴⁴

I believe that recent controversy means that there is already far greater awareness around the eligibility requirements in section 44. Professor Anne Twomey suggested in her submission that this awareness means that political parties and individual candidates will be more diligent in the future in order to avoid disqualification.⁴⁵ I agree with this statement.

It is important to note that several measures have already been taken in order to increase awareness around the section, with the Australian Electoral Commission (‘AEC’) offering an optional Qualification Checklist that asks questions to do with compliance of section 44

³⁸ Ibid 4.

³⁹ Michael C Douglas, Submission No 49 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 2018, 1-7.

⁴⁰ Ibid.

⁴¹ Les Yule, Submission No 15 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 29 December 2017, 1.

⁴² Allan Laws, Submission No 26 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 2018, 1.

⁴³ Brian Capamagian, Submission No 28 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 5 February 2018, 1.

⁴⁴ *Australian Constitution* s 46.

⁴⁵ Anne Twomey, Submission No 34 to Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution*, 7 February 2018, 2.

requirements.⁴⁶ For example, questions surrounding family heritage, including the citizenship status of parents and grandparents. I believe it may be useful to make this questionnaire mandatory for all candidates. Candidates also have the ability to consent to the publication of their checklist, which is then available on the AEC website for the duration of the election campaign.⁴⁷

I agree that the AEC should not have the ability to reject nominations based on information provided in the checklist as doing so is a risk to the perception of their position as an unbiased, independent body.⁴⁸ However, I believe making the checklist mandatory would force nominees to cast their minds to the requirements, and perhaps seek their own independent legal advice. This, as well as the newly established citizenship register created by the Federal Parliament,⁴⁹ both increase public confidence in the Parliament and make for a more transparent political system.

IV CONCLUSION

It is my opinion that the purpose of section 44, namely to maintain the ‘purity of parliament’,⁵⁰ is a valuable concept that has not become outdated in contemporary society. Parliament should maintain high entry standards, as doing so reinforces public confidence in Australia’s political system. Although I believe that there are perhaps procedural or administrative reform options that could be implemented, I disagree with the need for constitutional reform via a referendum. It is the duty of nominees to ensure that they meet the key eligibility requirements laid out in section 44, and the time and money it takes to hold a referendum should not be sacrificed for the sake of mere convenience. I believe that it is irresponsible to erode eligibility requirements dictated in section 44 and replace them with legislation, as the power of parliament to legislate on eligibility creates a direct conflict of interest. This would undermine the integrity of the Commonwealth Parliament – something that is still of integral importance in 21st century Australia.

⁴⁶ *Electoral Backgrounder: Constitutional disqualification and intending candidates* (30 May 2018) Australian Electoral Commission <https://www.aec.gov.au/About_AEC/Publications/backgrounders/constitutional-disqual-intending-candidates.htm>.

⁴⁷ *Ibid.*

⁴⁸ Commonwealth, *Excluded: The impact of section 44 on Australian democracy: Joint Standing Committee on Electoral Matters*, Parl Paper No 153 (2018) 69-71.

⁴⁹ *Citizenship Register – 45th Parliament* (25 September 2018) Federal Parliament of Australia <https://www.aph.gov.au/Senators_and_Members/Members/Citizenship>.

⁵⁰ Official Record of the Debates of the Australasian Federal Convention, Sydney, 21 September 1897, 1033.