

**DUAL CITIZENS AND THE POSTAL SURVEY:
WHAT MIGHT THE HIGH COURT SAY?**

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The Constitution is not normally front-page news in Australia. Despite the profound impact it has on our politics and society, it is easy to see why.

The United States Constitution reflects its revolutionary origins in beginning with the famous call ‘We the people’. By contrast, our Constitution is contained in a British Act of Parliament that opens with:

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania

‘Whereas’ is hardly the sort of beginning that gets the heart racing. In addition, these words are not even complete in failing to mention Western Australia, which joined the Federation just before the commencement of the Constitution in 1901.

The remainder of the Constitution deals with the mechanics of government, but assumes that the reader knows how that system works. Important material is omitted, including the office of Prime Minister. Nor does it contain anything like a Bill of Rights, which is now regarded as essential in every other democratic system.

Overall, the document is a dry and difficult read that bears out the lawyers’ language and values of the 1890s. Former Senator and High Court judge Lionel Murphy remarked that he kept a copy by his bedside. No doubt it was a perfect antidote for sleepless nights.

It is not surprising then that it has been a long time since the Constitution so captured public attention. The last time was in the 1970s during the Whitlam era, when a series of events sent people searching for answers in the nation’s founding document.

Aspects of that era resonate today. Both the Whitlam and Turnbull governments have been mired in crisis due to the terms of the Constitution. Both also displayed a willingness for constitutional adventurism by pushing the envelope on their powers.

In the case of Turnbull, this has been via a unique, non-binding, non-compulsory postal survey on same-sex marriage conducted by the Australian Bureau of Statistics. Remarkably, the government is pursuing this policy despite Parliament twice rejecting the idea.

The Turnbull government's electoral experimentation does not stop there. It moved with such speed to bring on the postal survey that the first administrative order issued by Finance Minister Mathias Cormann unwittingly extended the vote to 16 and 17-year-olds. This would have been the most progressive extension of the franchise since Whitlam granted the vote to 18-year-olds in 1973. Cormann has since backtracked by issuing a second, corrective order, thereby dashing the hopes of these young Australians that they might have a say on same-sex marriage.

Popular knowledge

Recent media coverage of the Constitution must come as a surprise to Australians. After all, many apparently do not know that the document exists, with a poll taken some years ago for the Constitutional Commission finding 47 per cent of the community unaware that we have a written Constitution.

Even where Australians know of the Constitution, they can have false assumptions about what it contains. A nationwide poll taken in 2006 Roy Morgan Research asked people if we have a national Bill of Rights. Remarkably, 61 per cent said yes, with only 13 per cent indicating no and 26 per cent saying they could not say.

I saw evidence of this when I chaired a process in Victoria that led to that state enacting Australia's first State Bill of Rights, the Victorian Charter of Human Rights and Responsibilities. Time and time again people said Victoria did not need such a law because they were already protected by Australia's Bill of Rights.

When I asked what was in this law, most often people mentioned freedom of speech, but next most often they said that they could plead the fifth in court. This is of course a reference to the fifth amendment to the United States Constitution. It seems that popular understandings of our own national law owe less to Australia's media and education system than to US cop shows like Law and Order.

Dual Citizenship

It seems fitting that Australia's current crisis over dual citizenship is similarly founded in ignorance, this time that of our politicians about their foreign entitlements and obligations under the Constitution.

The crisis itself is absurd. There is no suggestion that the parliamentarians have been involved in wrongdoing. Nor do they lack the support of the communities they represent. Instead, in a nation in which half the population is born or has a parent born overseas, we render people as unfit for political service when another country recognises them as a citizen.

This has made these events a matter of international curiosity. It is hard to understand why Australia has put itself in this predicament when dual nationals are permitted to serve in the parliaments of the United Kingdom, the United States, Canada and New Zealand.

Nevertheless, these are not small matters that can be put to one side. The rules are set down by the nation's highest law. They threaten the political futures of many politicians, and even that of the Turnbull government. They also raise questions about the legitimacy of the Parliament chosen at the July 2016 federal election.

Matters may also get much worse. In addition to the seven MPs already referred or soon to be referred to the High Court, many others may be in difficulty.

The question is whether they have breached section 44 of the Constitution. It disqualifies from Parliament any person who is a subject or a citizen of a foreign power. What is often forgotten is that it also excludes any person who is merely 'entitled to the rights or privileges of a subject or citizen of a foreign power'. It is not clear what meaning the High Court will

give these words, but they may disqualify someone who is not yet a citizen, but who is entitled to apply for this due to birth, descent or marriage.

It must also be remembered that section 44 extends well beyond citizenship. A person cannot sit in Parliament if they hold 'any office of profit under the Crown'. The meaning here is again uncertain, but could extend to anyone who enters Parliament as a local councilor or university employee. Many past members have fallen into these categories, but an unspoken accommodation between the major parties meant that they served out their terms unchallenged.

Section 44 also rules out any person with a 'direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth' otherwise than member an incorporated company of more than twenty-five people. In disqualifying Bob Day from the Senate earlier this year, the High Court reached a broader reading of these words that leaves far less room for parliamentarians to have any connection to a contract with the Commonwealth.

There may be parliamentarians who are caught by this, if only because they structured their affairs according to the prior High Court reading of these words. Indeed, Labor has already initiated an action on this ground seeking the disqualification of Nationals MP David Gillespie, the Assistant Minister for Health.

Some people have suggested that Parliament should resolve this crisis by conducting an independent audit of its 226 members. This would have the advantage of moving beyond the ad hoc, somewhat random way that parliamentarians have been identified as being caught by section 44. An audit though would not be a quick fix, and could reveal further members in difficulty. The number affected could easily rise to 20 or more.

An audit also has several problems. One is that members may refuse to comply with a request for information. Another is that Parliament has legislated to give the High Court the power to resolve these matters. Until the Court does so, the law remains uncertain on several fronts, and more members would be left in legal limbo. An audit could be conducted after the High Court rulings, but this would prolong the uncertainty as it could lead to further rounds in the Court.

Questions of legitimacy

As the number of parliamentarians under challenge grows, so will questions about the legitimacy of this parliament. It also raises important questions about prior parliaments given that everything points to the fact that these bodies were constituted by representatives who were constitutionally prohibited.

One thing we can say is that no law is likely to be undone because it was tainted by the ballot of an ineligible member. This is backed by the past practice of the High Court, which has avoided involvement in the internal affairs of Parliament. The Court has been aware of the chaos that would ensure from undoing laws that might have led to the imprisonment of people, or the structuring of business affairs.

On the other hand, the situation of ministers is less clear. The wisest course is for them to refrain from making decisions or to step down pending the outcome of the High Court hearing.

This is because their authority to run their departments and to make decisions under legislation depends upon the law regarding them as being properly appointed. Section 64 of the Constitution says that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives'.

If current ministers are ruled in breach of section 44, they will have made many decisions without apparent legal support from when the three-month period of grace ran out late last year. This would be especially problematic from the point at which they and members of the public became aware they were in jeopardy of being disqualified. Decisions from this point on, including any about contentious matters such as Adani's Carmichael coal mine in Queensland, might be challenged in the courts.

The crisis was predictable

Another concerning aspect to this crisis is that it was so predictable. It has long been known that the dominoes were waiting to fall. In this case, it only took one Senator, Scott Ludlam, to declare their hand to start the ball rolling.

Not only experts that were aware of this. Parliament itself has identified repeatedly that section 44 of the Constitution might wreak havoc.

In 1997, the House of Representatives Standing Committee on Legal and Constitutional Affairs convened a report into *Aspects of s 44 of the Australian Constitution*. It has been forgotten now, but this report was a response to earlier suggestions that many representatives might be disqualified. The committee recognised this in saying:

It is possible that there will be an increasing number of challenges under the provision ... After one election 35 members of parliament, and after another election 57 members, were alleged to be disqualified.

It warned that:

One complication caused by the ways dual citizenship can be acquired is that there are probably many Australian born citizens who are not aware that they are, or are eligible to be, dual nationals ... [At] some time in the future a parliamentarian could declare that he or she is unaware that he or she is a dual citizen and therefore does not know that there is any other citizenship to renounce.

The parliamentary committee gave an example that reflects the current position of Nick Xenophon:

British citizenship may extend to the Australian born children of British citizens or the Australian born children of persons born in British colonies or former British colonies.

The committee concluded that section 44 was a recipe for chaos:

The Committee considers that the potential exists for challenges to the eligibility of a significant number of parliamentarians especially in view of the fact that a large number of Australian citizens possess dual citizenship. This represents a risk to the integrity and stability of the parliamentary system and to the government of the nation.

For example, it is not difficult to envisage a situation where, following an election, the balance between the major political parties, or coalitions of parties, in the House of Representatives was fairly even and where challenges to five or six elected representatives could throw into doubt the outcome of the whole election. It could make government virtually impossible since neither political grouping could take office confident of majority support. In those circumstances, it could take months for High Court challenges to be resolved and for by-elections to occur.

This was the prediction Parliament itself made 20 years ago.

The response of this committee, and indeed other processes in 1981 and 1988, was to recommend a straightforward and sensible fix to section 44. The current words of disqualification would be replaced with a requirement that parliamentarians be an Australian citizen. This would remove the ability of other nations to determine who is eligible to be a member of our Parliament.

Many bills have been put forward to implement these and other changes to section 44. Even Senator Mal Colston, who was not a noted reformer, put forward two proposals to amend the section.

Successive governments provided a consistent response to these reports and bills. They did nothing. Reports were shelved, and warnings of future harm ignored.

This background is important not only in revealing a failing of our political system. It is also relevant to how the High Court may decide the cases before it. Why should the Court reach a strained interpretation of section 44 of the Constitution to remedy a problem Parliament has identified, but failed to fix?

Section 44 of the Constitution

In cases such as these, the High Court always begins with the text of the Constitution. Its job is to assign meaning to those words. In doing so, it considers the surrounding sections of the Constitution and the historical background.

In some cases, this can lead to the meaning of words changing over time. An example is the federal Parliament's power over 'marriage' in section 51(21) of the Constitution. In 1901, this undoubtedly referred to a relationship between a man and a woman. However, in 2013, the High Court said that its meaning had evolved, and it can now be taken to include same-sex relationships.

In the case of section 44, it disqualifies peoples in two circumstances. First, where through their own actions they are:

under any acknowledgment of allegiance, obedience, or adherence to a foreign power

Second, where under the laws of another country they are:

a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power

A draft of section 44 considered in the 1890s proposed additional words to this clause:

done any act whereby he has become a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a Foreign Power.

This would not have disqualified a person who acquired foreign citizenship merely due to birth or descent. Instead, some positive action on their part to adopt that foreign citizenship would have been required

However, this more limited wording was not adopted. The framers instead took the stricter path of disqualifying any person with a foreign nationality, whether or not that person had taken steps to acquire this. The framers did not see dual nationals as people to be trusted.

Another limitation on section 44 is that it only disqualifies people where they possess the citizenship of a *foreign power*. It might be argued that the United Kingdom, and other former dominions such as Canada and New Zealand, do not fit this description. After all, when section 44 came into force in 1901 we shared a common citizenship with these nations in the form of being British subjects. Australia did not adopt its own separate citizenship until 1949.

However, the High Court has already rejected this argument. It did so in 1998 in disqualifying One Nation Senator Heather Hill on the basis that she had failed to renounce her British citizenship.

We are left then with the apparently clear statement in section 44 that it applies to any person who is ‘a subject or a citizen ... of a foreign power’. On their face, these words say that any person, irrespective of their circumstances, is disqualified when they are a dual citizen.

The breadth of this language, and of other parts of section 44, is reflected in the rate at which the High Court has disqualified parliamentarians.

To date, 10 members have faced High Court challenge. The Court has disqualified eight of them: Robert Wood; Phil Cleary; Bill Kardamitsis; John Delacreatz; Jackie Kelly; Heather Hill; Rod Culleton and Bob Day.

Only two have survived. The first was Gordon Anderson, who in 1950 was challenged on the basis that as a Roman Catholic he was disqualified because he owed allegiance to the Vatican. The case was heard by a single judge, and was dismissed because the Constitution separately provides that no religious test can be imposed for a public office.

The other member to escape disqualification was Senator James Webster in 1975. He did so when Chief Justice Sir Garfield Barwick heard the matter himself, rather than referring it to the full court, and reached a surprisingly narrow and technical reading of the pecuniary interest limb of section 44. The High Court revisited Barwick’s reading earlier this year. It

rejected his approach in adopting a much broader interpretation, which led to the disqualification of Senator Bob Day.

All up, the record shows little evidence of High Court willingness to interpret section 44 in a manner favourable to parliamentarians. It makes grim reading for anyone hoping for a lenient court. This is particularly true when it comes to disqualification due to dual citizenship.

Sykes v Cleary

The most important case on this point came in 1992 in *Sykes v Cleary*. Bob Hawke's resignation from Parliament produced a by-election won by the independent Phil Cleary. He was challenged on the basis that as a school teacher he held an office of profit under the Crown.

The High Court's approach was strict. It gave Cleary no leeway for the fact that he was on leave without pay at the time of his election. The Court also found, to the great inconvenience of later candidates, that section 44 cuts in not at the point that a candidate is elected to Parliament, but from the time of their nomination.

The Court also considered the eligibility of two other candidates, Kardamitsis and Delacretaz, who were born in Greece and Switzerland respectively. Both had gone through an Australian naturalisation ceremony 'renouncing all other allegiance'. They believed as a result that they were in the clear.

However, the High Court held that this was not enough because the Australian ceremony did not effect a renunciation of citizenship under the laws of Greece or Switzerland. Accordingly, section 44 excluded both because they had failed to renounce their dual citizenship in accordance with the law of these countries.

In ruling both ineligible, High Court crafted an exception to the dual citizenship disqualification. It said that a person should not be struck out if they have taken 'reasonable steps' to announce their foreign citizenship. This means that a person can stay in Parliament even where they are a dual citizen if, for example, the other country refuses to let them renounce their citizenship, or imposes unreasonable cost or delay.

Sykes v Cleary may be a quarter of a century old, but it represents the current state of the law on section 44. It is not favourable to the seven parliamentarians who will face the High Court. It is difficult to see that any have taken reasonable steps to renounce their citizenship.

Their hope is that the High Court today will take a more liberal approach. The seeds of this may lie in the judgment of Justice William Deane in the 1992 decision. He found that section 44 should only disqualify a dual national 'where the relevant status, rights or privileges have been sought, accepted, asserted or acquiesced in by the person concerned'. This is a promising line of argument, but suffers from a major problem: Justice Deane was in dissent. It is rare to find a dissenting view such as this being accepted by a subsequent Court.

Another option is that the High Court may craft a new exemption that says section 44 only excludes members whose foreign citizenship has been conferred by birth. This is a plausible argument, though again not strong. It is hard to see how the words of section 44 can support this.

In addition, it is not clear why an exception should be made for citizenship by descent. It is one of the most common ways that a person becomes a citizen of another country. Any candidate consulting a lawyer about their citizenship status would be asked about the birthplace of their parents (not to mention the birthplace of their grandparents, and whether they may have acquired the right to citizenship through marriage).

It might also be argued that the High Court should excuse parliamentarians who are ignorant of their foreign nationality. This again is problematic. Candidates can hardly be unaware of the need to comply with section 44, and to investigate whether they have dual nationality.

Consider the case of Barnaby Joyce. When he last nominated for Parliament, Joyce was required to sign a form in which he had to tick Yes or No to:

I am not, by virtue of section 44 of the Constitution, incapable of being chosen or of sitting as a Member of the House of Representatives

The form also set out the full text of section 44, and stated:

Candidates who have any doubts about their eligibility, by virtue of section 44 of the Constitution, are advised to obtain their own legal advice.

As I have mentioned, descent from a parent or grandparent is a common and well-known way of acquiring citizenship. If Joyce had consulted a lawyer, he should have been told that he was a New Zealand citizen. Even if he did not want to consult a lawyer, he could have discovered this through a simple check.

When the media first approached me about whether Joyce was a New Zealand citizen, I Googled ‘am I a New Zealand citizen’. I was taken to an official New Zealand government website entitled ‘Check if you are a citizen’. I was asked four straightforward questions, which I answered using Joyce’s details. The process took under three minutes to provide the answer:

You are a New Zealand citizen by descent

It is hard to see why the High Court would excuse a person in these circumstances. Ignorance is not a plausible explanation when citizenship by descent is so common, and the barest inquiry would have identified the problem. Joyce’s case, and those of the Greens members, speak less of a problem with the Constitution, and more of complacency and inadequate party vetting processes.

The Prime Minister has said of his Deputy that he is ‘qualified to sit in the house and the High Court will so hold’. Such confidence is misplaced. Joyce may survive the High Court challenge, but I would be surprised if he does so. No more can be said, as the High Court can be notoriously difficult to predict.

The Court has set down these matters for hearing over three days from 10 to 12 October. This though does not settle the date at which these matters will be resolved. The High Court will still likely take time to consider the answer, and weeks may pass before we have both the Court’s orders and reasons. Its reasons will be particularly important to determining who else might be caught in the web of section 44.

Postal plebiscite challenge

The government should receive a much quicker answer on the High Court challenge to its postal survey, which is due to be heard next week on 5 and 6 September. It is again facing an uphill battle in this case, with its position running counter to line of High Court authority.

Over a series of recent decisions, the High Court has found that the federal government generally requires parliamentary approval to spend taxpayers' money. This reasoning led the High Court to twice strike down the National Schools Chaplaincy Program.

In this case, the government has attempted to secure parliamentary support for holding a plebiscite on same-sex marriage. Having been rebuffed, it is seeking to proceed anyway, but in doing so has opened itself to constitutional attack.

The government's defence is that it has found a different source of parliamentary approval for this expenditure. This is by making an advance to the Minister of Finance under the *Appropriation Act (No 1) 2017-2018*. Section 10 states:

10 Advance to the Finance Minister

- (1) This section applies if the Finance Minister is satisfied that there is an urgent need for expenditure, in the current year, that is not provided for, or is insufficiently provided for, in Schedule 1:
 - (a) because of an erroneous omission or understatement; or
 - (b) because the expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Bill for this Act before that Bill was introduced into the House of Representatives.

The government's argument is that expenditure on the postal survey is authorised because it is 'urgent' and 'unforeseen'.

Given the long-running debate on same-sex marriage, it is far from obvious that it fits into these categories. How could this expenditure be said to be unforeseen at the relevant date of 5 May 2017 when the government had a long-standing policy of holding a plebiscite on same-

sex marriage? And what about this survey is urgent, except for the fact that it is necessary because of the government's own political imperatives?

The postal vote is also being attacked on the basis that it falls outside the powers of the Australian Bureau of Statistics. It is said that the postal survey does not amount to the collection of statistical information, but is a ballot of electors outside of what can be conducted by the ABS. There is again merit in this argument.

Overall, I would be surprised to see the government emerge with a victory. If nothing else, it would seem unlikely that the Court will permit the government to use this backdoor means of avoiding explicit parliamentary authorisation of its expenditure.

If the postal survey is struck down, the many arrangements underway will come to an immediate halt. Pressure will return to the government to allow a conscience vote, but at a time when its own membership is unclear due to continuing uncertainty over the eligibility of several of its members. It is hard to see how it will be able to resolve this mess.

The main legacy of the postal survey will have been the many tens of thousands of young people who have joined the roll to have their say. They would miss the opportunity to vote on same-sex marriage, but will be on the rolls in good time to cast a ballot at the next federal election.

Conclusion

The government faces a challenging task in convincing the High Court of its positions on dual citizenship and the postal survey. In both cases, it is running against the grain of existing High Court authority.

The debate over section 44 also reveals deeper problems. The section is out of date and over-broad. As a result, it leaves the fate of Australia's federal parliamentarians subject to the laws of other nations. This is hardly consistent with our sovereignty, or the stability of our democratic system.

The many problems with section 44 are not a good reason for the complacency of our parliamentarians. It remains the law, and must be enforced. It cannot be dismissed as an inconvenience.

If the section is to be changed, this lies within the power of Parliament, which has the sole authority to initiate a referendum of the Australian people to do so. The fact that section 44 is still in place speaks to how Parliament and our leaders have abdicated their responsibility for keeping the Constitution up-to-date to the High Court. Unfortunately, as the Constitution has aged, this failure has become ever more apparent.

Governments have put 44 referendum proposals to the Australian people to change the Constitution since 1901. On average, a proposal has been put to the people every two and a half years.

However, there has been no evidence of this in recent times. Not a single referendum proposal has been put to the Australian people in the nearly two decades since the vote on the Republic.

Indeed, the same-sex postal survey is the first vote of any such kind nationally in Australia since 1999. They have chosen this path at great cost. At \$122 million, the price of the postal survey is roughly double what it would cost to hold a referendum at election time on remedying the problems with section 44.

The community is paying an even larger price for government inaction in other areas of constitutional change. Limits in the Constitution that made sense in the 1890s are today putting a break upon efficient government and national prosperity. Many examples can be found in our federal system, which all sides of politics have recognised as being dysfunctional and long in need of repair.

The costs of not reforming this system are enormous. A decade ago, the Business Council of Australia calculated that federal flaws mean that people are paying wasted taxes of around \$9 billion each year, which amounts to \$1,100 per family. This is not just a loss to taxpayers, but a lost opportunity: every dollar squandered could have been used for schools, hospitals, affordable housing or tax cuts.

The problems with section 44 are small change compared to this. We do need to ask though what price Australia is paying for several months of political uncertainty. After all, this should be when the Turnbull government is hitting its stride, with the last election well behind it, and another poll for the House of Representatives not due until 2019. Instead, its fortunes, and its capacity to serve the nation, are being undermined by an arcane constitutional provision that Parliament itself said should have been fixed decades ago.