

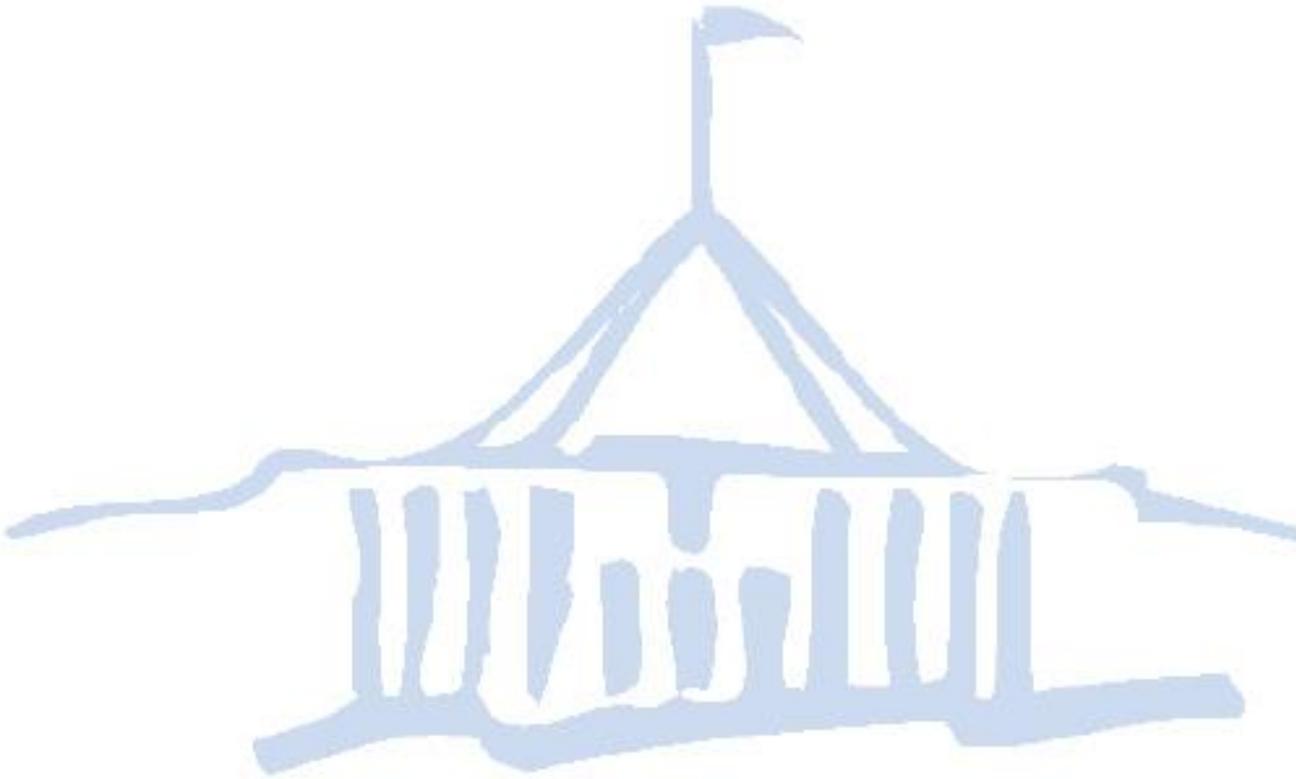
CONVENTION pre-reading

Is Section 44 of the Constitution
relevant in Modern Australia?

The Museum of Australian Democracy at
Old Parliament House, Canberra
20 TO 22 MARCH 2018

23RD NATIONAL SCHOOLS
CONSTITUTIONAL CONVENTION





Introduction and background

Definition and purpose of a Constitution

A constitution is a document that sets out the rights, powers and processes that regulate the behaviour of governments. In most countries, it is a document that has been endorsed by the Parliament of the country or by the citizens. In the case of the Australian Constitution it was an Act of the British Parliament.

One central feature of most constitutions is the detailing of the powers of the government. For those countries that have a 'unitary' system of government—that is, the national government has authority across all areas, this can be a fairly simple statement about the powers of the government to legislate for “peace, order and good government”. In other words they have a general power to legislate on whatever topic the Parliament sees fit (subject to any limitations in the rest of the constitution). For those countries that have federal systems—in other words, have powers divided between the central and state or provincial governments—it is more complicated. In these cases there is normally a statement or section in the constitution that sets out which level of government has authority over which policy areas.

In the Australian Constitution this takes the form of a list of matters over which the Commonwealth government has either concurrent or exclusive authority with all other 'residual' matters being regarded as state powers. In some other countries it is the state legislative powers that are defined as well as the central ones.

Needless to say, there is nearly always room for argument about exactly what matters are covered by these definitions. This can be because of changing interpretations of the wording, or because certain matters not explicitly defined in the Constitution have become more important since the drafting of the document. For

example, given that the Australian Constitution was drafted in the 1890s, there is, of course no reference to air transport or to modern telecommunications. In these instances, any areas of doubt have normally been resolved through judicial interpretation or through subsequent changes to the written document.

At other times, even when the meaning is quite clear there have been political debates about whether the level of government that has responsibility for a particular issue is the 'right' one. In Australia recently there has been debate about whether Section 44 of the Australian Constitution is relevant in modern Australia. Our task is to consider the merits of the cases for and against a change of Section 44 of the Australian Constitution.

You will be asked to look at the House of Representatives Standing Committee on Legal and Constitutional Affairs' recommendations to amend Section 44, discuss whether all subclauses of Section 44 are still relevant to today's society and if there are still grounds for disqualification in Parliament. You will also consider how other international jurisdictions approach these issues.

So our purpose at this Convention is to:

- Introduce and inform you about the history, purpose and impact of Section 44 of the Australian Constitution.
- Consider why the subclauses of Section 44 might be grounds for disqualification.
- Think about what are the implications of these subclauses.
- Consider the role of the High Court in interpreting Section 44.
- Ask whether there should be a change to Section 44 in the Australian Constitution.

Selected Pre- Reading

The selected following reading will provide you with information on Section 44 of the Australian Constitution, details of a House of Representatives Committee Inquiry with suggestions and recommendations for changing the constitution. It also includes a public handout prepared by the High Court on challenges to a number of parliamentarians' eligibility to serve in the Australian Parliament and several opinion pieces.

Section 44 of the Australian Constitution – disqualification

Section 44 of the Constitution is as follows:

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.

Standing Committee on Legal and Constitutional Affairs

Aspects of Section 44 of the Australian Constitution 44(i) and 44(iv).

The report of the inquiry into aspects of section 44 of the Australian Constitution was tabled in the House of Representatives on 25 August 1997.

The following is the forward to the report by the committee Chair, Kevin Andrews MP.

It provides a background and overview to the committees work detailed in the full report which can be found [here](#) .

FORWARD

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

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

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

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

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

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

The Committee consulted with Commonwealth agencies, political parties, academics and the wider public in an attempt to assess current community attitudes to issues such as dual citizenship and the iv application of the concept of office of profit to changing public sector employment trends.

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

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

I commend the report to all members of the parliament.

Kevin Andrews, MP

Chairman

High Court Public Handout

The High Court prepared a Public Handout in October 2017 relating to a number of cases referred to it to determine whether Section 44 had been contravened. It sets out the back ground to the cases and the process followed for each case. The document can be found [here](#) .