

## **Subsection 44(i) of the Australian Constitution and Dual Citizenship**

It is notable that over the last decade, there has been almost no public discussion of Section 17 of the *Australian Citizenship Act 1948* in Australia. Perhaps this is because Section 17 primarily affects Australians living abroad. However, research by the Southern Cross Group reveals that the subject of dual nationality has been broadly debated, but almost exclusively within the context of subsection 44(i) of the *Australian Constitution*. Similarly, dual nationality was also raised during the Constitutional Convention in 1998 in reference to the necessary qualifications for any future elected President of an Australian Republic.

The Australian Citizenship Council received very few submissions against the repeal of Section 17 in 1999 when preparing its Report. In fact, the overwhelming majority of opinions expressed called for the repeal of Section 17. The small number of submissions that were against repeal brought up the issue of "divided loyalties" and mentioned the perceived danger that the repeal of Section 17 might "weaken the value of Australian citizenship".

The Southern Cross Group believes that some who have expressed these reasons against the repeal of Section 17 of the *Citizenship Act* may be articulating concerns that are actually primarily relevant in the context of subsection 44(i) of the *Constitution*. Our discussions have revealed that the difference between these two provisions may be blurred in some people's minds. In this part of our website, we would like to spend some time looking at subsection 44(i) of the *Constitution*.

A clear distinction should be drawn between Section 17 of the *Citizenship Act*, and subsection 44(i) of the *Constitution*. The Southern Cross Group is not advocating the repeal of subsection 44(i) and is only concerned with Section 17 at this time. Even if/when Section 17 of the *Citizenship Act* is repealed, all Australians will remain subject to subsection 44(i) of the *Constitution*.

Section 17 already directly disadvantages or has the potential to negatively impact the millions of Australians who hold only Australian nationality. The repeal of Section 17 would result in the removal of practical and financial barriers for a number of individuals immediately, and more in the future as the Australian population becomes increasingly globally mobile and growing numbers of people spend part of their lives living abroad. Subsection 44(i) of the *Constitution*, on the other hand, is a provision that only comes into play when an individual wishes to stand for Federal Parliament. Many who will benefit from the repeal of Section 17 will never be affected by subsection 44(i).

Subsection 44(i) of the Australian Constitution provides:

Any person who -

- (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights and privileges of a subject or a citizen of a foreign power:

Shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

The principle of "divided loyalties" clearly underlies this Constitutional provision, which was drafted over one hundred years ago. The idea that members of parliament must have a clear and undivided loyalty to the Australian community is very much in evidence. Subsection 44(i) seeks to avoid either actual or perceived conflicts of interest that might arise for an individual elected to Federal parliament, and to prevent subversion by foreign governments.

It is interesting to note that subsection 44(i) of the *Constitution* does not state that individuals wishing to stand for parliament or already sitting must be Australian citizens. At the time the provision was drafted, and indeed until the middle of the twentieth century, there was no concept of Australian citizenship. Australian residents were divided into British subjects and aliens. Today, section 163(1) of the *Commonwealth Electoral Act* requires Australian citizenship.

There have been a number of inquiries or reviews into subsection 44(i) over the years. Most recently, in 1997-98, the House of Representatives Standing Committee on Legal and Constitutional Affairs reviewed subsection 44(i) and concluded that the policy underlying the provision was still valid today. The Committee, and almost all those who made submissions to it, agreed that the principle underlying subsection 44(i) is vitally important to the integrity of the political system and should be maintained.

However, the Committee found that while the policy behind the provision should be maintained, the means of achieving the policy should be changed. It recommended that subsection 44(i) be deleted from the Constitution, and that a simple new provision be inserted requiring candidates and members of parliament to be Australian citizens. It also recommended empowering parliament to enact legislation determining the grounds of disqualification of members of parliament in relation to foreign allegiance, and that proper protection against divided loyalty for Federal members of parliament be achieved by legislative rather than constitutional means. These recommendations have been implemented to date.

Subsection 44(i) of the Constitution as it presently stands raises various issues. Its scope is not clear. What is the meaning of "under any acknowledgement of allegiance, obedience, or adherence to a foreign power?" What is the meaning of "is entitled to the rights or privileges of a subject or a citizen of a foreign power?" Furthermore, up to five million Australians have the legal right to hold dual nationality. This represents a quarter of the Australian population. If one of these five million people wishes to stand for Australian federal parliament, what does he or she have to do to renounce or surrender their foreign citizenship?

The High Court of Australia first interpreted subsection 44(i) in *Sykes v Cleary* (1992) 176 CLR 77. That case concerned Philip Cleary, who was elected as the Federal Member for Wills in a by-election in April 1992. The Court found that Mr Cleary had not been duly elected and that his election was absolutely void. However, this was not because he had fallen foul of subsection 44(i), but because he had breached subsection 44(iv). Subsection 44(iv) disqualifies from the election process and parliament individuals who hold an office of profit under the Crown. At the time of his nomination and polling, Mr Cleary was a teacher with the Education Department of Victoria but was on leave without pay. The Court found that this was an office of profit under the Crown. In order to stand for election, he would have had to resign from the Education Department.

Subsection 44(i) of the Constitution was dealt with by the Court in the case, not with respect to Mr Cleary, but in relation to other candidates at the same by-election, Mr Delacretaz and Mr Kardamitsis. The Court held, *obiter dicta*, that these two candidates were not eligible to be chosen for Federal parliament under subsection 44(i). Both were naturalized Australian citizens. The justices agreed that dual citizenship in itself would not be a disqualification under subsection 44(i), provided that a person had taken "reasonable steps" to renounce his or her foreign nationality. The majority of justices found that the candidates in this case had not taken such reasonable steps, as they had omitted to take action open to them to seek release from or discharge of their original citizenships.