

08/02/2018

Submission to the Joint Standing Committee on Electoral Matters:
Inquiry into matters relating to Section 44 of the Constitution

Dear Committee,

I am a Senior Lecturer in the Department of Social Inquiry at La Trobe University. I make this submission in my capacity as a private citizen. Here I reiterate and expand on some points that I made in my appearance as a witness at the Committee's public hearing in Melbourne on Feb 1, 2018.

Background

I write this submission as a social scientist and as a citizen with a strong interest in Australia's democracy and the legitimacy and functioning of its political system.

The current legal and public doubts raised about the eligibility of some Senators and MPs to sit in the Federal parliament, mainly related to issues of dual citizenship arising from the wording of Section 44(i) of the constitution, and to a lesser extent because of holding 'any office of profit under the Crown' etc. outlined in Section 44 (iv) of the constitution, have been damaging to Australia's democracy. So too have been the resignations from parliament, the referrals to the High Court, and the High Court rulings that some Senators and MPs are ineligible to sit in the parliament (MP Joyce, Senators Roberts, Waters, Ludlam and Nash). This is not a criticism of the High Court, but rather of the wording of section 44 of the constitution that is outdated and ill-adapted to contemporary Australia, in a globalising world.

Though it is not surprising that politicians and political parties in an adversarial system have pursued political advantage by questioning the citizenship status of fellow members of parliament, this has also been damaging. The whole saga has meant that the Labor, Liberal and National Parties have adopted tit-for-tat tactics of accusing each other of being lazy or inept with processes, and demanding that MPs or Senators produce evidence that they are not dual citizens, or refer themselves to the High Court. I suspect that this, alongside unfavourable media reporting, has contributed to the perception among the public that politicians have not followed the rules, or have failed to get their paperwork in order. This public perception will not aid the case for a change to the constitution by referendum, which I believe is necessary to deal with what has become an untenable situation. Politicians and political parties should seriously reconsider this political strategy and approach of attacking the legitimacy of other MPs and Senators, and adopt a commonsense rather than legalistic approach to possible dual citizenship among current members of parliament.

The current perception and reality that dual citizens are ineligible to sit in the Federal parliament is at odds with the realities of citizenship and belonging in Australia, that has been built on

immigration apart from its original Indigenous peoples, and which has very high levels of dual citizenship.

Australia has for a very long time had forms of dual citizenship – for example, over the last 70 odd years (since the beginning of the mass immigration program in the late 1940s) many children of migrants to Australia were already dual citizens (or eligible to be dual citizens), and some migrants were able to keep their home country citizenship after they took up Australian citizenship.

By the beginning of the 2000s it was estimated that over a quarter of Australians had or were eligible to hold dual citizenship. The ABS does not have Census statistics on dual or multiple citizenship – it does not ask any questions about dual citizenship. The Department of Immigration and Multicultural Affairs estimated in the late 1990s that the number of dual citizens was somewhere between 4 and 5 million. And the Australian Citizenship Council's 2000 report *Australian Citizenship for a New Century*, estimated that there were 4.4 million dual citizens, based on surveys undertaken by the Department of Immigration and Multicultural Affairs in 1999.

That wide-ranging report - *Australian Citizenship for a New Century* - of course strongly recommended the repeal of section 17 of the Australian Citizenship Act that had cancelled the Australian citizenship of those who had taken up a foreign citizenship. The Howard government, and the parliament, repealed section 17 in 2002, and thus allowed Australian-born citizens to take up another citizenship without losing their Australian citizenship, thus extending dual citizenship to them.

Dual citizenship is thus now an acceptable feature of Australian life, which many Australian citizens take advantage of. It does not seem to have affected in any way overall loyalty and commitment to Australia. Many scholars (including me), especially those concerned with multicultural societies, and related issues like globalisation and cosmopolitanism, welcome a more relaxed approach by national governments to the holding of dual and even multiple citizenships – as is the case in contemporary Australia. This just reflects the reality of a much more globally open world, where people move back and forth between societies for various reasons, and maintain strong connections (including family connections) across countries; where people's identities are complex, having many layers, and are also open to change across time and in different contexts.

Critics of dual and multiple citizenship argue that it is dangerous for social cohesion and for national identity. Neither claim is sustained by evidence in Australia's case. For example, even though Australia has a large number of dual citizens, Australia is widely regarded as a very socially cohesive country. The Scanlon Foundation 'Mapping Social Cohesion' surveys, which have been conducted since 2007, make a strong claim for that continued social cohesion.

Similarly, survey after survey has shown, since the 1990s, that Australians have a strong and robust sense of national identity. For example, in response to questions like "How close do you feel to Australia", in the Australian Survey of Social Attitudes, during the 2000s over 90% of Australians have responded 'close or very close', including in the 2013/2014 survey (92%). Similarly, the Scanlon Foundation's 'Mapping Social Cohesion' Reports, which amongst other

things measure identification with and sense of belonging to Australia, have consistently found high levels of identification with Australia by the vast majority of Australians. In 2014, 92% of Australians expressed a sense of belonging to Australia (95% in 2012), 88% indicated pride in the Australian way of life, and 91% believed that the maintenance of that way of life was important (Scanlon Foundation, 'Mapping Social Cohesion Report 2014', p. 2).

Australia seems comfortable as a society to accept the idea of dual or even multiple citizenship for its citizens. The question inevitably arises of why it should necessarily be a different case for its elected officials. Dual citizenship is not an issue for Australia's state and territory governments – except in the case for some where a sitting member does something positive to attain another citizenship, there is no disqualification on the grounds of holding dual or multiple citizenships.

It has been argued that even if states and territories do not worry about dual citizenship, national governments should and must. In terms of the possible conflict of interest of federal MPs and Senators when they hold dual citizenship, there are obviously circumstances where that might happen. War is an important example, but special legislation could be brought in to handle such contingencies, and other potential conflicts of interest related to dual citizenship. The bureaucratic rule of not being able to hold dual citizenship will not stop this potential conflict of interest. People can still feel some loyalty or allegiance to some other country, even if they do not have citizenship of that country. The more important issue is whether, as Australian citizens representing the Australian people in the Australian parliament, they take seriously their obligation to the Australian people and to the parliament, to serve them in Australia's interests. None of those Senators and MPs who resigned or were disqualified from parliament because of dual citizenship could be accused of not being loyal to Australia and the parliament. And, of course, there are many other examples of conflict of interest beyond potential conflict of interest related to dual citizenship.

The fact that countries including the US, the UK, Canada and New Zealand do not exclude from their national parliaments all those who hold dual citizenships suggests that dual citizenship is not a major issue for political leadership in stable democracies. I looked at examples of qualifications and disqualifications in some of these countries. For example, New Zealand's candidate nomination form for national elections says nothing about foreign citizenship:

A candidate must —

- Be a New Zealand citizen.
- Be a registered elector for an electorate (but does not need to be an elector for the electorate in which the candidate wishes to stand). If you have been wrongly removed from the electoral roll, attach to this nomination form the statutory declaration required by s 49 of the Electoral Act 1993.
- Not be disqualified from registering as an elector —

The main ground for disqualification for a New Zealand citizen is he or she is outside New Zealand, and has not been in New Zealand within three years. There are exceptions to this rule. For example, public servants or members of the Defence Force who are on duty outside New Zealand, as well members of their families.

A person who is in prison serving a sentence of imprisonment is also disqualified.

There are other grounds for disqualification that affect a very small number of people. For

further details, see section 80 of the Electoral Act 1993.

Bankruptcy is not a ground for disqualification.

- If born outside New Zealand, attach evidence of New Zealand citizenship (for example, certificate of citizenship, or extract from New Zealand passport). A copy is sufficient. A certified copy is NOT required. A candidate unsure of their citizenship status should check with the Citizenship Office, Department of Internal Affairs.

The UK Electoral Commission's advice on UK Parliamentary general elections states qualifications for standing for election, including age (at least 18 years old), being 'either a British citizen, a citizen of the Republic of Ireland or an eligible Commonwealth citizen', but excludes 'Citizens of other countries (including EU member states other than the UK, Republic of Ireland, Cyprus and Malta)'. Thus, some candidates can hold more than one citizenship, and some do not even need to be British citizens.

It has been argued that if a person wants to sit in the Australian parliament, then as long as they are an Australian citizen (and do not fall foul of the other disqualifiers in section 44), then all they have to do is renounce their other citizenship (in the circumstance that they are aware of it). And, it is argued that they should be willing to do so because they should be prepared to act only in Australia's national interest. The assumption is that everyone should be happy to renounce any other citizenship if they want to represent other Australian citizens in the national parliament. But there can be many reasons why a person is reluctant to renounce another citizenship, and to only have an exclusive Australian citizenship.

As a multicultural society the legitimacy of our democracy will be enhanced when people from ethnically and linguistically diverse backgrounds see that diversity truly represented in our parliaments and local governments. We need to find ways to further encourage the diversity of our political leadership, at all levels of society, which will further enhance Australia's legitimacy – in the eyes of its own diverse population – as a diverse, just, multicultural society. The point is often made by critics of Australia's multiculturalism that our true diversity is not reflected in the leadership of the major institutions of our society, including our political institutions. Allowing dual citizenship, and also allowing people who hold various public offices (i.e. teachers, public servants) to nominate and be elected to the Federal parliament, would help broaden, and uphold the key democratic principle that all citizens should be able to stand for election.

Specific Recommendations

Responding to A. How electoral laws and the administration thereof could be improved to minimise the risk of candidates being found ineligible pursuant to section 44(i) (this could involve, among other matters, a more comprehensive questionnaire prior to nominations, or assistance in swiftly renouncing foreign citizenship);

The online tool that representatives from the AEC discussed at the December 8 public hearing of this Inquiry seems like a good idea. At least it will raise some red flags for potential candidates who are trying to check their eligibility to nominate and stand for election in Federal elections. This would be helpful in the lead up to the next Federal election, if a Referendum to change

Section 44 has not been held, or fails.

Responding to B. Whether the Parliament is able to legislate to make the operation of section 44(i) more certain and predictable (for example, by providing a standard procedure for renunciation of foreign citizenship, or by altering procedures for challenging a parliamentarian's qualifications in the Court of Disputed Returns);

Based on my reading of what legal scholars have written and said, it would seem that there is little that can be done through legislation, without beforehand changing the wording of Section 44 (i), that will help to clear up these problems. As has been repeatedly emphasised by legal scholars, foreign citizenship is decided by the rules of foreign states – Australia has no control over this.

Responding to question C. Whether the Parliament should seek to amend section 44(i) (for example, to provide that an Australian citizen born in Australia is not disqualified by reason of a foreign citizenship by descent unless they have acknowledged, accepted or acquiesced in it);

We need to get rid of the ridiculous circumstance of MPs and Senators having a citizenship (for example by descent, or by fact of the unpredictable changeability of foreign citizenship laws), that they are not aware of, and thus being disqualified. So yes, definitely amend section 44 (i).

Many previous inquiries have recommended changing section 44 of the constitution. This includes the 1997 inquiry into 'Aspects of Section 44 of the Constitution' by the House of Representatives Standing Committee on Legal and Constitutional Affairs, which strongly recommended amending or repealing section 44 of the constitution, in part, or in total. The Australian Citizenship Council in their previously mentioned report to the Howard government, *Australian Citizenship for a New Century* (2000) argued that dual citizenship for parliamentarians should be allowed, and that we should find another way to ensure and measure loyalty to Australia. Similarly, in 1995 the National Multicultural Advisory Council in their report to the Keating Government 'The Next Steps, Beyond 2000', recommended (in Recommendation 10) that all Australian citizens should be able to hold office and that this principle should be considered in any discussions of constitutional change to section 44.

Legal scholars have suggested various formulations for constitutional change to section 44 over the last 20 or 30 years. I think that it would make sense, in contemporary Australia, to try to limit the wording in the constitution, of exclusion based on holding other citizenships, and then leave it up to the parliament to legislate for the most important forms of exclusion necessary to answer questions of possible conflicts of interest, including conflicts of national loyalty. The simplest course seems to be to delete section 44(i) altogether, rather than try to change its wording. The 1997 House of Representatives Standing Committee on Constitutional Affairs inquiry recommended repealing section 44(i), including in the constitution as a requirement for election to the national parliament the holding of Australian citizenship, and considering a legislative option like 'prohibiting candidates from taking advantage of foreign citizenship'. The Committee could revisit some of the arguments and recommendations of that 1997 inquiry report in order to find the way forward.

Responding to Question D. Whether any action of the kind contemplated above should be taken in relation to any of the other paragraphs of section 44 of the Constitution, in particular sections 44(iv) and 44(v);

Section 44(iv) could also be repealed. Too many possibly fine political candidates are ruled out automatically because they cannot forgo income when they have to quit their positions to nominate as a candidate. There could be specific disqualifications then specified in legislation, where necessary.

A final comment on communication strategies for a Referendum.

Given the notorious difficulty of getting referendums up with the public, the communication of the reasons for the need to change is really important.

1. It is vital that all political leaders commit to the constitutional change, from all parties, and hopefully independents as well. A united voice will help convince the public that change is absolutely necessary, and sensible.
2. The message could be that this is really essential to fix and improve Australia's democracy. This includes allowing for the broadest number of Australian citizens to be able to stand for parliament. And, as many scholars of democracy have asked– is it sensible or right for a democracy to exclude from seeking office so many of its citizens? How many potential candidates are simply put off ever considering running for parliament because they do not want to give up their non-Australian citizenship, or their job (considered a 'public office') before they even have a chance of being elected to parliament (under the current conditions of nominating)?
3. There should be a clear message about the difficulties of renouncing all foreign citizenships.
4. The message should be put that Australians are, and should be, comfortable with dual citizenship, and that we can still ensure the loyalty and commitment to Australia of Australia's federal leaders even if they hold a citizenship besides their Australian citizenship.

Yours Sincerely,

Dr Anthony Moran,
Sociology Discipline,
Department of Social Inquiry,
La Trobe University, Bundoora Campus,
Victoria 3086.

