‘Purity of Election’: Foreign Allegiance and Membership of the Parliament of New South Wales

Mel Keenan

Director, Legal and Governance, NSW Electoral Commission[1]

Abstract

In 2017, the High Court’s strict application of s 44(1) of the Australian Constitution caused considerable turnover in the membership of the Australian Parliament, particularly the Senate.[2] This paper examines the ‘foreign allegiance’ disqualification in relation to membership of the Parliament of New South Wales contained in s.13A(1)(b) of the New South Wales Constitution Act 1902, comparing its likely application with that of s.44(i), and offers a suggestion as to a more effective 21st century alternative to the disqualification.

Introduction

In 2017, the parade of members of the Commonwealth Parliament on the evening news acknowledging that they may never have been eligible for election by dint of their dual citizenship provided a rare example of the provisions of the Australian Constitution forming part of the public discourse. Most likely, many staff of the offices of Members of State and Territory Parliaments were quickly tasked with ascertaining whether they were subject to a provision equivalent to s.44(i) of the Constitution, to the effect that anyone under any acknowledgment of allegiance, obedience, or adherence to a foreign power, a subject or a citizen or entitled to the rights or privileges of a subject, or a citizen of a foreign power is incapable of being elected or sitting in Parliament.

In all States, save Victoria, they would have found some corresponding provisions, although certainly not ones as ‘brutal’ as those at the Commonwealth level.[3] This paper will consider the scope of and background to the New South Wales (NSW) equivalent to s.44(1), namely s.13A(1)(b) of the *Constitution Act 1902* [Constitution Act], noting that it can only take effect after a person has been elected to the NSW Parliament. Ultimately, the paper queries whether in the 21st century a statutory legacy of an age when Australian Britons regarded nervously anyone less Anglo-Saxon than themselves remains a useful indicator of the ability of Members of the NSW Parliament to effectively represent their electors. In doing so, in the absence of a corpus of decisions at State level, it will examine the development of High Court jurisprudence on the scope of s.44(i), which reasonably can be expected to be pivotal in any future consideration of the practical application of s.13A(1)(b).

The Foreign Allegiance Disqualification

Under s.13A(1)(b) of the Constitution Act, a member of the NSW Parliament vacates his or her seat if that member:

[1] The views expressed herein are my own and do not necessarily express those of the NSW Electoral Commission. This article is based on a paper given at the Electoral Regulation Research Network Seminar, ‘Who Can Sit?: Section 44 and Disqualification from the Federal Parliament’, NSW Parliament House, 17 October 2017.

[2] *Re Canavan* [2017] HCA 45. For a highly critical view of the decision, see J. Gans, *The Mikado in the Constitution*, https://blogs.unimelb.edu.au/opinionsonhigh/2017/10/30/the-mikado-in-the-constitution-re-canavan-re-ludlam-re-waters-re-roberts-no-2-re-joyce-re-nash-re-xenophon-2017-hca-45/

[3] See the Commonwealth Attorney General’s characterisation of the decision in *Re Canavan* as ‘almost brutal literalism’:https://www.theguardian.com/australia-news/2017/oct/29/brutal-literalism-brandis-critiques-high-court-and-contradicts-pm-on-reform

> …takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power or does or concurs in or adopts any act whereby he (*sic*) may become a subject or citizen of any foreign state or power or become entitled to the rights, privileges or immunities of a subject of any foreign state or power.

The provision in these terms dates back to the Imperial *Act for the Government of New South Wales and Van Dieman's Land 1842*; it found its way into s.5 and s.26 of the *New South Wales New Constitution Act 1855*, which evolved—with little change[4]—into sections 19 and 34 of the *Constitution Act 1902*; and finally was moved to s.13A in the course of the constitutional changes implementing the reform of the NSW Legislative Council in 1978.

Immediately, the contrast with s.44(i) of the Australian Constitution is evident in that, at the Commonwealth level, a person may not nominate for election simply if they are 'entitled to the rights or privileges of a subject or a citizen of a foreign power', such that no action on the part of the aspiring Member is necessary. On the contrary, the entitlement to rights, or an existing allegiance to a foreign power does not disqualify a person from being elected as a Member of either House of the NSW Parliament; it is only if an elected Member does some act in acknowledgement of allegiance or to obtain such rights that the provision applies.

Given their shared constitutional evolution, it is hardly surprising that, with the exception of Victoria, other States retain similar disqualification provisions relating to dual allegiance to those in NSW. For example, in unicameral Queensland a member's seat becomes vacant if the Member 'takes an oath or makes a declaration or acknowledgement of allegiance, obedience or adherence to, or becomes an agent of, a foreign state or power'.[5] Equivalent provisions apply in Tasmania[6] and Western Australia.[7] South Australia at least provides clarity to the effect that acquiring or using a foreign passport or travel document is not sufficient for a dual allegiance.[8] Neither the Australian Capital Territory nor the Northern Territory has similar provisions.

Eligibility for the NSW Parliament

Membership of the NSW Parliament ultimately derives from a successful bid for election, which begins with the statutory process of nomination. The *Parliamentary Electorates and Elections Act 1912* [*NSW Elections Act*][9] sets very broad eligibility criteria for nominating as a candidate for either House of the NSW Parliament; every person enrolled as an elector in NSW as at 6.00 pm on the date of issue of the relevant writ is qualified, unless disqualified under the *Constitution Act* or the *NSW Elections Act*.[10] In NSW, a person is entitled to be enrolled for a district if the person:

- has attained 18 years of age;
- is an Australian citizen; and

[4] The *Constitution Act 1902* merely consolidated existing statutes relating to the Constitution of NSW which were brought into being before federation in 1901. For example, the legislative power conferred on the NSW Parliament by s.5 of the *Constitution Act 1902* was made expressly 'subject to the provisions of the Commonwealth of Australia Constitution Act'.

[5] Section 72(1)(d) of the Parliament of Queensland Act 2001.

[6] Section 34(b) of the Tasmanian *Constitution Act 1934*.

[7] Section 38(f) of the WA *Constitution Acts Amendment Act 1899*, specifically that where a member 'takes any oath or makes any declaration or acknowledgment of allegiance, obedience, or adherence, to any foreign Prince or Power, or does, concurs in, or adopts any Act whereby he [*sic*] may become a subject or citizen of any foreign State or Power, or whereby he may become entitled to the rights, privileges, or immunities of a subject or citizen of any foreign State or Power'.

[8] Sections 17(2) and 34(2) of the *Constitution Act 1934*

[9] While the *Electoral Act 2017* received the Royal Assent on 30 November 2017, none of its provisions have commenced as at January 2018.

[10] Sections 79(1) and 81B(1) respectively.

- has lived at an address in that district for at least one month before the enrolment.[11]

However, there remains in the *NSW Elections Act* an exception to the requirement for Australian citizenship: under s.22(2)(a) of that *Act*, candidates for election are not disqualified by virtue of any foreign allegiance provided they are a British subject enrolled to vote prior to 26 January 1984.[12] Since the 1998 High Court decision in *Sue v Hill*,[13] the interpretation of 'foreign power' as applicable to Members of Parliament is simply any polity or State recognised under international law, other than the Commonwealth of Australia. As Gerard Carney has noted, the *NSW Elections Act* raises an apparent inconsistency with the finding in *Sue v Hill* that British subjects owe allegiance to a foreign power for the purposes of s 44(i) of the Constitution. In keeping with the terms of s.13A(1)(b) of the *Constitution Act*, he suggests that that such British subjects are qualified to be elected but cannot later as members acknowledge their British allegiance in any way, for example by renewing their passport.[14]

Under s.25 of the *NSW Elections Act*, a person is not entitled to be on the electoral roll in NSW if the person:

> (a) is, because of being of unsound mind, incapable of understanding the nature and significance of enrolment and voting;
> (b) has been convicted of a crime or an offence, whether in New South Wales or elsewhere, and has been sentenced in respect of that crime or offence to imprisonment for 12 months or more and is in prison serving that sentence; or
> (c) is the holder of a temporary entry permit or is a prohibited immigrant under the Commonwealth *Migration Act 1958* as amended and in force for the time being.

Accordingly, anyone who falls within these exemptions is also incapable of being nominated for election to either House. However, Anne Twomey notes that the last-mentioned prohibition appears only to relate to a person who has lost residency rights in Australia and is unlikely to impact upon a person's entitlement to be a member of the NSW Parliament.[15]

Operation of s.13A(1)(b) of the Constitution Act

In a 1982 article on disqualification provisions in the various State legislatures, Michael Pryles proposed that s.13A(1)(b) can be broken down into three possibilities leading to the disqualification of a member, namely:

> (1) the taking of any oath or the making of any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power - something less than the acquisition of foreign nationality or citizenship;
> (2) the doing or concurring in or adoption of any act whereby the member may become a subject or citizen of any foreign state or power – e.g., the act of applying for foreign citizenship; and

[11] Section 22(1)(a) of the *Parliamentary Electorates and Elections Act 1912*. In its 1998 Report, the NSW Parliament's Joint Standing Committee on the Independent Commission Against Corruption recommended that the Act be amended to require candidates to declare any foreign citizenship when nominating for election

[12] Section 22(2)(a) of the *Parliamentary Electorates and Elections Act 1912* mirrors the provisions of s 93(1)(b)(ii) of the *Commonwealth Electoral Act 1918,* introduced by the Hawke Labor Government in 1983 after negotiations with the Australian States as a grandfathering provision which maintained the voting rights of British citizens as at Australia Day 1984.

[13] (1998)165 CLR 178.

[14] Carney suggests that this effectively requires them to take out Australian citizenship to avoid the risk of disqualification: Gerard Carney, 'Foreign allegiance: a vexed ground of parliamentary disqualification', *Bond Law Review*, 11(2), 1999, p. 4.

[15] A Twomey, *The Constitution of New South Wales*. Leichhardt: The Federation Press, 2004, p 400.

> (3) the doing or concurring in or adoption of any act whereby the member may become entitled to the rights, privileges or immunities of a subject of any foreign state or power.[16]

In its December 1998 Report on the *Inquiry into Section 13A Constitution Act 1902,* the NSW Parliamentary Committee on the Independent Commission Against Corruption [the ICAC Committee] set out the instances of Members' seats being vacated by s 13A or its equivalent in earlier forms of the *Constitution Act* (see Table 1).

Table 1: Seats Vacated by Operation of s 13A (or its predecessors)[17]

	Legislative Council		**Legislative Assembly**	
Cause	Incidents	Most recent	Incidents	Most recent
Absence	12	1925	3	1925
Foreign allegiance	0	NA	0	NA
Bankrupt	1	1932	7	1931
Public defaulter	0	NA	0	NA
Conviction	1	1940	0	NA
Total	14	1940	10	1931

When a vacancy occurs in the NSW Legislative Assembly, the Assembly itself (if it is sitting) may declare the existence of a vacancy 'and the reason thereof';[18] when a vacancy occurs in the Legislative Council, the Governor responds by convening a joint sitting of the two Houses.[19] If the Assembly or the Council has a question regarding a vacancy, it can refer the matter to a single judge of the NSW Supreme Court sitting as the Court of Disputed Returns.[20] Thus, while s.13A acts of its own force, it is the Legislative Assembly or, in the case of a Legislative Council seat, the Governor, who declares the existence of the vacancy. If the relevant House chooses to refer the matter, the Court of Disputed Returns does so.

The jurisdiction of the Court of Disputed Returns would be to consider whether a relevant Member had in fact been disqualified. It would not have jurisdiction to review the merits of a declaration by the House that a seat was or was not vacant. If, however, a House made a declaration without any proper basis, such a declaration would be beyond its powers and could be nullified by the Supreme Court on application from the Member concerned. In *Armstrong v Budd*, the Court noted:

> …this Court has a jurisdiction to determine whether in a particular case the House has exceeded the powers conferred upon it by the Constitution. In the exercise of that jurisdiction the Court will determine whether the limits upon the power of expulsion enjoyed by the House have been exceeded or not…The Court has power in a proper case to declare a resolution for expulsion null and void.[21]

---

[16] See M Pryles, 'Nationality Qualifications for Members of Parliament', *Monash University Law Review*, 8, 1982, p. 167.

[17] The table excluded office of profit and pecuniary interest disqualifications, and the ICAC Committee noted also that it did not include Members who opted to resign in circumstances likely to 'attract the operation of s.13A', such as five-time Premier, Sir Henry Parkes, who twice resigned from Parliament due to financial embarrassment. New South Wales Joint Parliamentary Committee on the Independent Commission Against Corruption*, Inquiry into Section 13A Constitution Act 1902*, p 4. https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5464/Committee%20Report%2001%20December%201998%20-%20Inquiry%20into%20G.pdf

[18] Section 70 Parliamentary Electorates and Elections Act 1912.

[19] Section 22D Constitution Act 1902.

[20] Sections 175B and 175H Parliamentary Electorates and Elections Act 1912.

[21] The Supreme Court was considering the expulsion of the Hon Alexander Armstrong MLC, after he had been found by a judge to have conspired to produce false evidence and contemplated attempting to bribe a Supreme Court judge: (1969) 71 SR(NSW) 386 at 398.

In the abovementioned ICAC Committee Report, the Committee expressed its preference that s.13A continues to operate of its own force, but that jurisdiction to declare that a vacancy be given to the Court of Disputed Returns on the application of any elector. This proposal has the advantages that:

- disqualification under s 13A remains a question of law rather than politics;
- it is administratively efficient; a clear case being dealt with by resolution of the House;
- it provides judicial expertise for the determination of difficult cases; and
- it maintains public confidence in Parliament by assuring the possibility of judicial determination regarding the base standards of what is acceptable behaviour for Members as set in law by the Parliament.[22]

From Subjects to Citizens

The potential impact of s.13A(1)(b) of the *Constitution Act* places it at the intersection of the development of understandings of citizenship, allegiance, and qualifications of both electors and elected members within Australia. The terminology 'allegiance, obedience or adherence to any foreign prince or power' has justly been criticised as archaic. However, it simply reflects its origins in an Australian colony populated by British subjects jealous of that status; in 1902 'foreign' was simply equated to 'non-British'.[23]

In the British metropole, from 1700 the *Act of Settlement* defined the qualifications for membership of the Westminster Parliament partly by distinguishing between natural born subjects and those who were naturalised:

> …no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust, either civil or military.[24]

With the expansion of the British Empire, the UK *Aliens Act 1844* provided that a naturalised person became entitled to all of the rights of a natural born subject, except those of serving as a Privy Councillor or Member of Parliament.[25] From 1870 onwards, any male born a British subject, but who became a foreign citizen (including by descent) could sit in Parliament notwithstanding that dual nationality.[26] By contrast, a British subject who was voluntarily naturalised as a foreign citizen by reason of some act after his birth could not sit in Parliament, as they ceased to be a British subject upon foreign naturalisation.

---

[22] ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*, p 5, https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5464/Committee%20Report%2001%20December%201998%20-%20Inquiry%20into%20G.pdf

[23] I would like to acknowledge my considerable debt to the submission of the Commonwealth Attorney General in the recent Commonwealth disqualification matters before the High Court. In doing so, I note the observation of the Amicus Curiae brief that '[i]nteresting as the Commonwealth's exegesis of the historical antecedents to s 44(i) is, it is of limited to no relevance to the resolution of the present question of construction': G .Kennett SC, and M. Lim, *Re Senator the Hon Matthew Canavan, Re Senator the Hon Fiona Nash, Re Senator Nick Xenophon, References under s 376 of the Commonwealth Electoral Act 1918 (Cth) Annotated Submissions of the Amici Curiae*, http://www.hcourt.gov.au/assets/cases/03-Canberra/c11-2017/Canavan_KennettSubs.pdf

[24] Although the Act of Settlement 1701 was continued in its application in NSW by the *Imperial Acts Application Act 1969*, it would not appear to have been by implication repealed by the Imperial laws applying expressly to NSW and the allegiance of the Members of its Legislature. A. Twomey, *Constitution of New South Wales*, p 4, referencing G.J. Linden.

[25] *Aliens Act 1844* (Imp), 7 and 8 Vict, c 66, s.6.

[26] See s.4 of the *Naturalisation Act 1870* (UK).

The liberalisation of the requirements for parliamentary qualification in the United Kingdom was preceded by developments in the Australian colonies. As early as 1842, both natural born and naturalised subjects of Queen Victoria were qualified to sit in the NSW Legislative Council.[27] Shortly after, the *Naturalisation Act 1847* (Imp) empowered colonial legislatures to regulate such entitlements 'within the respective limits of such colonies or possessions respectively'.[28] However, when electoral legislation was first developed under the Australian Federation, it continued earlier, divisive, concepts. The *Commonwealth Franchise Act 1902* limited eligibility to vote in federal elections to 'natural born or naturalized subjects of the King' but still excluded a wide range of Indigenous subjects of King Edward VII (except New Zealand Maori).

The interaction between State and Commonwealth consideration of dual allegiance is highlighted by the fact that one submission to the NSW ICAC Committee Inquiry suggested the term 'foreign prince' was originally aimed at Roman Catholics loyal to the Pope, a position argued in the challenge brought under s.44(i) of the Constitution to the election of a Catholic to the House of Representatives at the 1949 federal Election. In *Crittenden v Anderson*,[29] the respondent's election was challenged on the basis that, as a Catholic, he was disqualified for being 'under acknowledgment of adherence, obedience and/or allegiance to a foreign power', namely, the 'Papal State'. Fullagar J rejected the challenge on the basis that it amounted to a religious test, which s 116 of the Constitution prohibited as a 'qualification for any office or public trust under the Commonwealth'. Moreover, his Honour drolly found that no investigation of the Papal States as a foreign power under the Lateran Treaty of 1929 by which Italy recognised the Vatican City State could 'possibly be relevant to the election of a Member of the House of Representatives for Kingsford Smith'.[30]

Following the 1992 resignation from Parliament of former Prime Minister Bob Hawke, the High Court had cause to consider the provisions of s.44 of the Constitution, when Independent candidate Phil Cleary won the ensuing by-election for the seat of Wills. The decision of *Sykes v Cleary*[31] is more widely known for the finding that, as a permanent secondary school teacher in the Victorian public-school system, Cleary held an 'office of profit under the Crown' which disqualified him from election to the House of Representatives, due to s.44(iv) of the Constitution.

While the focus may have been on Cleary's eligibility, two other candidates in the Wills by-election were also disqualified, as the Court found that although after emigrating they had become Australian citizens, they had not 'taken reasonable steps' to renounce their birthplace foreign citizenship.[32] The Court found that, although Mr Bill Kardamitsis and Mr John Delacretaz easily could have renounced their respective Greek and Swiss citizenships, neither had taken any steps to do so. Brennan J stressed the importance of the simple existence of dual citizenship, rather than any positive actions arising from it, noting that there are 'few situations in which a foreign law, conferring foreign nationality ... is incapable in fact of creating

[27] An Act for the Government of New South Wales and Van Diemen's Land 1842 (Imp) 5 and 6 Vict, c 76, s.8.

[28] *Naturalisation Act 1847* (Imp) 10 and 11 Vict, c 83, s.1. However, that territorial limitation resulted in the situation that 'a Frenchman naturalised in New Zealand was a British subject there, but a Frenchman in England'. R Karatani, cited in *Submission of the Attorney Genera*l, para 20.

[29] Unreported decision of Fullagar J on 23 August 1950, noted in (1977) 51 ALJ 171. A similar challenge, *Sarina v O'Connor*, was tabled in the House of Representatives by the Clerk on 20 November 1946 but withdrawn before proceeding to the High Court. Sarah O'Brien, *Dual Citizenship, Foreign Allegiance and s 44(i) of the Australian Constitution*, Department of the Parliamentary Library, 1992. http://www.aph.gov.au/binaries/library/pubs/bp/1992/92bp29.pdf

[30] (1977) 51 ALJ 171. For an exultant view of the decision, see 'Catholic M.H.R. wins case', *Catholic Weekly*, 31 August 1950, https://trove.nla.gov.au/newspaper/article/146737170

[31] (1992) 176 CLR 77.

[32] *Sykes v Cleary* (1992) 176 CLR 77 at 25 per Brennan J.

a sense of duty, or is incapable of enforcing a duty, of allegiance or obedience to a foreign power'.[33]

The *Sykes v Cleary* decision piqued interest in the potential impact of s.13A(1)(b) of the Constitution Act. Thus, in a response to a question from Labor MLC Franca Arena, Liberal Attorney General John Hannaford advised the NSW Legislative Council that:

> …the view of the Crown Solicitor is that the member would have to swear allegiance to a foreign power after becoming a member of Parliament in New South Wales in order to be disqualified from continuing as a member of this Parliament. However, … a failure to swear allegiance [to the Queen] may be a matter of concern which could affect the member's ability to remain in the Parliament.[34]

Comparing the NSW and Commonwealth statutory regimes, the Attorney General noted that under the NSW Constitution the critical time was after a member's election, not the time of candidature. He therefore concluded that '[i]f a person swears allegiance to the Queen upon being elected, and has not sworn allegiance to any other power, that person would remain a member of Parliament'.[35]

Cutting the Crimson Thread of Kinship

In 1997, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that a referendum be held to make the following changes to the Constitution:

- delete subsection 44(i) of the Constitution;
- insert a new provision requiring candidates and members of parliament to be Australian citizens; and
- empower parliament to enact legislation determining the grounds of disqualification of members of parliament in relation to foreign allegiance.[36]

The following year, in *Sue v Hill,* two electoral petitions were brought against the election to the Senate in 1998 from Queensland of Ms Heather Hill, on the ground that she was at the time of her nomination a citizen of the United Kingdom and hence a subject of a 'foreign power' within the meaning of s.44(i). In laying the groundwork for this conclusion, in the 1988 decision of *Nolan v Minister for Immigration & Ethnic Affairs*, Brennan J observed that the denotation of 'alien' had changed since Federation to include British subjects, as a result of 'the emergence of Australia as an independent nation, the acceptance of the divisibility of the

---

[33] *Sykes v Cleary* (1992) 176 CLR 77 at 113 per Brennan J.

[34] Hon J P Hannaford MLC, Attorney-General, Legislative Council *Hansard*, 26 November 1992. Note that swearing allegiance does not of itself constitute a nationality requirement, as an alien can take the oath of allegiance: *In re Ho* (1975) 10 S.A.S.R. 250, 254; *Kahn v Board of Examiners of Victoria* (1939) 62 CLR 422 at 430-4; *Borensztein v Board of Examiners* [1961] VR 209 at 211.

[35] Hon J P Hannaford MLC, Attorney-General, Legislative Council *Hansard*, 26 November 1992

[36] House of Representatives Standing Committee on Legal and Constitutional Affairs, Aspects of Section 44 of the Australian Constitution - Subsections 44(i) and (iv) I, August 1997 https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=/laca/inquiryinsec44.ht. The Senate Standing Committee on Legal and Constitutional Affairs had also recommended deleting s 44(i) in its 1981 Report The Constitutional Qualifications of Members of Parliament. https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/pre1996/constitutional/index. On 28 November 2017, Prime Minister Turnbull referred matters relating to Section 44 of the Constitution to the Joint Standing Committee on Electoral Matters for inquiry and report.

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Inquiry_into_matters_relating_to_Section_44_of_the_Constitution

Crown which was implicit in the development of the Commonwealth as an association of independent nations and the creation of a distinct Australian citizenship'.[37]

The effluxion of time had therefore nullified Attorney-General Garfield Barwick's declaration in 1959 that Australian citizenship was the only national status which people had in relation to Australia, but, 'by dint of our relationship to the Queen and to the British Commonwealth of Nations', Australian citizens were also British subjects.[38] After almost 40 years, the High Court in *Sue v Hill* finally put to rest the 'common code concept' which had once sheltered all Commonwealth citizens 'under the umbrella of British nationality'.[39]

Inquiry of the NSW Joint Standing Committee on the Independent Commission Against Corruption

In 1995, the NSW Independent Commission Against Corruption (ICAC) investigated the circumstances surrounding the payment of a parliamentary pension to Mr P.M. Smiles, the former Member for North Shore, which highlighted that attention needed to be given, *inter alia*, to matters relating to the criteria for the vacation of a seat in either House. The ICAC determined that these matters should be the subject of further consideration and a supplementary report.[40]

In response to recommendations made by the ICAC, each NSW House of Parliament referred a number of issues to the ICAC Committee, including general questions relating to s.13A of the Constitution Act. The ICAC Committee noted that it was the first to consider these disqualifications since the *Report from the Select Committee on the Proposed New Constitution* in 1852 had decided that:

> With a view to prevent corruption, and maintain purity of election in the Assembly, and to preserve it, as far as possible, from sectarian influences, it has been deemed expedient to introduce those leading grounds of disqualification which exist in the Parent Country...[41]

Almost twenty years later, the ICAC Committee's report remains the most thorough examination of the issues surrounding foreign allegiance and the NSW Parliament. The ICAC Committee felt that conduct which may conceivably, but not necessarily, be incompatible with being a Member was better dealt with by the Houses' discretion rather than the inflexible application of the law. As the stark terms of s 13A were unsuitable to borderline instances, it was more appropriate that difficult or ambiguous cases should be left to the Houses' discretionary common law power to discipline or expel.[42] The ICAC Committee ultimately concluded that:

> The purpose of disqualification provisions is to ensure that electorates may maintain confidence in their candidates and that the Parliament is protected from disrepute by providing base standards of what is necessary for an elected representative. As disqualification provisions nullify a decision of the electorate,

[37] (1988) 165 CLR 178 at 185-186.

[38] Letter from Department of External Affairs to Australian Diplomatic Posts, 12 January 1962, A1838/2, 557/2 part 3, NAA.

[39] See Hon Stewart West MP, Minister for Immigration, introducing amendments to the Citizenship Act, *Commonwealth Parliamentary Debates*, Vol 134, 7 December 1983.

[40] NSW ICAC, *Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr P M Smiles, Second Report*, April 1996. http://www.icac.nsw.gov.au/dmdocuments/pub2_41i.htm

[41] Quoted in ICAC Committee, Inquiry into Section 13A Constitution Act 1902, p. v.

[42] In the NSW Legislative Assembly, this power is expressed by Standing Order 294, which provides that 'A Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the seat declared vacant'. Standing Order 295 provides that consideration of an expulsion may be deferred and the Member suspended pending an outcome of a criminal trial.

> they should only apply in cases so extreme that disqualification from Parliament is necessary for community confidence in Parliament to be maintained.[43]

Therefore, the provisions of s.13A of the *Constitution Act* should:

- only apply to cases where a Member clearly would forfeit the electorate's confidence;
- be clear, precise and unambiguous in its terms; and
- only operate on circumstances which have occurred or come to light after the election of the Member.[44]

The ICAC Committee's recommendation for resolving issues of s.13A disqualification was that the provision continue to operate of its own force, with resulting vacancies being declared by the House, and electors be given the right to make an application to the Court of Disputed Returns for the declaration of a vacancy arising from the operation of the section. Appropriate mechanisms would be required to discourage spurious and vexatious claims.[45]

Fundamentally, the ICAC Committee was concerned that the main detriment of s.13A(1)(b) was that its lack of clarity could result in 'a Member unwittingly being disqualified for action which does not conflict with the interest of the State or his or her role as a Member'.[46] Ultimately, it recommended the repeal of the disqualification for two reasons, namely that foreign allegiance hardly posed a serious conflict of interest; and that disqualification was too grave a penalty, especially when it arose in innocent circumstances.[47] This proposal has not been implemented to date.

Conclusion

The object of preventing divided loyalties is, undoubtedly, a valid public policy aim. It is one which goes to the heart of public confidence in the ability of Members of Parliament to represent the interests of their electorate and of the State, neatly defined by political scientist Campbell Sharman as 'ensuring that members of Parliament have a clear and undivided loyalty to the political community of Australia'.[48]

Arguably, in the globalised world in which politics operate, a better approach would be not to simply focus on the type of allegiance symbolised by a rarely-used foreign passport, but on the matrix of business dealings in which Members of Parliament regularly are involved. In the current climate—in which concerns as to the influence of foreign business interests in the Australian political sphere could apparently only result in the voluntary resignation of NSW Labor Senator Sam Dastayari due to internal party pressure[49]—arguments for accountability

[43] ICAC Committee, Inquiry into Section 13A Constitution Act 1902, pp. 6-7.

[44] ICAC Committee, Inquiry into Section 13A Constitution Act 1902, pp. 6-7.

[45] The ICAC Committee also recommended that the Government cover the costs of any Member defending such an action. ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*.

[46] ICAC Committee, Inquiry into Section 13A Constitution Act 1902, p. 7.

[47] ICAC Committee, *Inquiry into Section 13A Constitution Act 1902*, pp. 26-29. As Professor Twomey notes, sections 7A(1)(c) and (d) of the Constitution Act purport to entrench provisions with respect to the persons capable of being elected or of sitting and voting as Members of either House of Parliament, or any provision with respect to the circumstances in which the seat of a Member of either House of Parliament becomes vacant. However, she concludes that this purported entrenchment is unlikely to be effective, as a law amending a disqualification provision is unlikely to trigger the application of s.6 of the *Australia Acts 1986*. Therefore, repealing s.13A(1)(b) without a referendum remains an option.

[48] Associate Professor Campbell Sharman, *Submission to the Commonwealth Parliament's Standing Committee on Legal and Constitutional Affairs*, p. S79.

[49] Stephanie Peatling and Fergus Hunter, 'China Scandal: Embattled Labor Senator Sam Dastyari Resigns from Parliament', *Sydney Morning Herald*, 12 December 2017. https://www.smh.com.au/politics/federal/china-scandal-embattled-labor-senator-sam-dastyari-resigns-from-parliament-20171211-h02ddn.html

and transparency by way of enforceable Codes of Conduct and independent bodies to publicly scrutinise disclosures of pecuniary interests will inevitably grow stronger.

Perhaps the recent High Court decisions on disqualification under s.44 of the Constitution might be the catalyst for sufficient political interest in the potential operation of s.13A(1)(b) of the *NSW Constitution Act* for the ICAC Committee's findings to be revisited, so that a contemporary, nuanced approach to the possibility of divided loyalties for members of the NSW Parliament can be crafted, in which the broadest approach to 'clear and undivided loyalty' to the political community will be adopted and enforced.