

The Constitutional Companion

This book contains details about every section of the Constitution required for the WA Politics and Law Syllabus

By Stephen King

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Stephen wrote the Year 11 and 12 textbooks for the Western Australian ATAR Politics and Law courses. He has taught Politics and Law since 2002 and has produced resources for teachers and students since 2015.

Stephen is passionate about civics education because he believes young people deserve and desire a better future. His work seeks to empower them with the tools to become good and influential citizens.

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Prologue

The Commonwealth Constitution (Australia) is Australia's foundational document.

It governs the Australian political and legal system.

Western Australia's ATAR Politics and Law course students must understand particular sections and how they influence the Australian political and legal system.

This book summarises every Constitutional section required by the Politics and Law Syllabus. It outlines the function, impact and powers related to each section. It also refers to landmark High Court cases and course links.

Constitution Sections referenced in the Politics and Law Syllabus

| Sections | Function | Notes |
|------------|---|---|
| 7 | Creates the Senate and makes it a states' house | Equal state representation. To be "directly chosen by the people" |
| 24 | Creates the House of Representatives and makes it a people's house | Representation of States based on population. To be "directly chosen by the people" The nexus clause - the House must be twice the size of the Senate (as near as practicable) |
| 28 | 3-year limit on the life of a Parliament. | The Governor-General's power to dissolve parliament for an election. This power is used on the Prime Minister's advice or as a reserve power |
| 51 | Powers of the Parliament | Allocates legislative powers to the Commonwealth Parliament. It does not make these powers 'exclusive' - so many are 'concurrent' unless 'exclusive by nature' |
| 51(ii) | 'tax power' | A concurrent financial power |
| 51(xx) | 'corporations power' | Power to regulate incorporated bodies like companies |
| 51(xxix) | 'external affairs power' | Power to make laws based on international agreements like treaties or UN Conventions and Covenants |
| 51(xxxvii) | 'referral of powers' | Any State can voluntarily transfer a residual power to the Commonwealth. It only affects the referring State. |
| 52 | Exclusive power of the Parliament over the seat of the national government and federal public service | Exclusive power over the Australian Capital Territory and the Australian Public Service |
| 53 | Prohibits Senate from originating or amending money bills | A limitation the Senate's legislative power |
| 57 | The double dissolution power | The conditions and procedure for resolving legislative deadlocks between the two Houses |
| 61 | Creates the executive | Vests executive powers in the King, making it exercisable by the Governor-General |
| 62 | Creates the Federal Executive Council | The Federal Executive Council is chaired by the Governor-General. Ministers are members. |
| 63 | Governor-General in Council | Defines the Federal Executive Council |
| 64 | Governor-General to appointment and dismiss ministers | A 'formal' power of the Governor-General used on advice. Also a 'reserve' power of the Governor-General |
| 68 | Governor-General is the Commander in Chief of the armed forces | A 'fictional' power - this power is never used |
| 71 | Creates the High Court and gives parliament power to create a federal judiciary | Vests the judicial power of the Commonwealth in the High Court and other courts created by the Parliament |
| 72 | Establishes the independence of the judiciary | Appointment, removal and tenure of judges Protects judicial independence |
| 73 | Appellate jurisdiction of the High Court | Makes the HCA the final court of appeal for all types of cases in Australia |
| 75 | Original jurisdiction of the High Court | Cases that must start in the High Court - e.g. disputes concerning treaties, cases in which the Commonwealth is party, inter government (<i>inter se</i>) cases |
| 76 | Additional original jurisdiction of the High Court | The Parliament can add additional original jurisdiction to the HCA through legislation |
| 87 | Commonwealth to grant 75% of revenue from 'excise and customs duties' to the States for the first 10 years after federation | The "Braddon Blot". A 'spent section' that is no longer active |

| | | |
|-----|--|--|
| 90 | Exclusive power over excise | Makes excise an exclusive power of the Commonwealth |
| 92 | Trade between the States to be 'absolutely free' | Prevents States making laws that hinder the trade of goods and services across state borders |
| 96 | 'grants power' | Allows the Commonwealth to transfer surplus revenues to the States as tied or untied grants |
| 107 | Preserves the legislative power of State parliaments | Enables States to legislate in all areas of residual and concurrent power. Gives the States plenary power |
| 109 | Commonwealth laws to prevail over conflicting State laws | Resolves conflicts in fields of concurrent power by making Commonwealth law override State laws 'to the extent of the inconsistency' |
| 128 | Alteration of the Constitution | Specifies the process for formal constitutional change |

Section 7 – The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate... There shall be six senators for each Original State... senators shall be chosen for a term of six years. (Abridged)

Purpose

Section 7 is in Chapter 1 of the Constitution and creates the Senate, the upper house of Australia's bicameral parliament. The Senate is also the States' House and a House of Review. Section 7 borrows heavily from Article 1 Section 3 of the United States Constitution.

Key features

1. Electors directly choose senators.
2. Each Original State has the same number of senators, and each State is a single electorate.
3. Senators have six-year terms.

Function

Number 1 makes the Senate a democratic house.

Number 2 makes the Senate a States' House.

Number 3 upholds the Senate's House of Review function by preserving senators' experience.

Section 13 complements the review function by establishing the Senate rotation. Half the Senate is elected at a general election, which makes it a 'continuing house', like the US Senate. The continuation of half the Senate conserves the experience and memory of the Senate. Consequently, the Senate has more legislative experience than the lower house.

Impact

Section 7's direct election provision makes Australia a representative democracy. Section 24 does the same for the House of Representatives - see Section 24.

The States' House function has had little impact since the first decade after federation. Senators are overwhelmingly partisan MPs who 'toe the line' of their political parties rather than act as State delegates or trustees.

The House of Review function is the most influential aspect of the Senate. It is a powerful upper house compared to the upper chambers of other liberal democracies. It

frequently checks the legislative power of the House of Representatives, in which the government is formed.

Section 7 makes the Senate a powerful upper house.

High Court Interpretations

The most significant interpretations of Section 7 relate to the words “directly chosen by the people”.

Noteworthy cases are:

- *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106
- *Stephens v West Australian Newspapers Ltd* (1994) HCA 45 & *Theophanous v Herald & Weekly Times Ltd* (1994) HCA 46
- *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
- *Brown v Tasmania* (2017)
- *Clubb v Edwards & Preston v Avery* (2019) HCA 11
- *Comcare v Banerji* (2019) HCA 23
- *LibertyWorks Inc v Commonwealth of Australia* (2021) HCA 18
- *Ruddick v Commonwealth of Australia* (2022) HCA 9

In *Australian Capital Television*, the High Court held that Section 7 (& 24) make Australia a representative democracy, which means Australians have an implied right to freedom of political communication.

The implied right to freedom of political communication has been refined through other cases listed above.

High Court Justice Simon Steward has cast doubt on the implied freedom of political communication, saying it may not exist and was not settled law. His opinion leaves open the possibility a future case may overrule all the above cases and erase the implied right.

Course Links

- Unit 3 - Functions of Parliament
- Unit 4 - Human rights

Section 24 – The House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators. The number of members chosen in the several States shall be in proportion to the respective numbers of

their people... five members at least shall be chosen in each Original State.
(Abridged)

Purpose

Section 24 is in Chapter 1 of the Constitution and creates the House of Representatives, the lower house of Australia's bicameral parliament. The House is also the People's House and the House of Government. Section 24 borrows heavily from the United Kingdom's House of Commons.

Key features

1. Electors directly choose members.
2. Each State has members in proportion to its population. There is a minimum of five members per Original State.
3. The House shall be "as nearly practicable" twice the size of the Senate.

Details

Section 24 makes the House of Representatives a democratic house.

It also makes the lower house a People's House by making representation proportional to State populations. This feature enables one-vote-one-value, an essential democratic principle - unachievable in the Senate because of equal State representation.

Section 24 contains the "nexus clause". The nexus clause binds the two houses of parliament according to size. A referendum proposal to break the nexus failed in 1967.

Section 24 says nothing about the House of Representatives' function to form and hold governments to account. Westminster conventions of responsible government establish this function. Following the convention established by the UK's House of Commons, whoever commands the confidence of the House of Representatives forms the government. Thus, Australia's executive is a 'parliamentary executive'. The government is responsible - i.e. accountable - through the Westminster conventions of individual and collective ministerial responsibility.

Impact

Section 24's direct election provision makes Australia a representative democracy. Section 7 does the same for the Senate. Section 24 is more fundamental than Section 7 because it is the People's House and represents Australians more or less equally.

Direct election makes Australia a representative democracy and grants Australians a constitutional right to freedom of political communication.

Section 24 makes Australia a representative democracy and implies a constitutional right to freedom of political communication.

High Court Interpretations

The most significant interpretations of Section 24 relate to the words “directly chosen by the people”.

Notable cases are:

- *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106
- *Stephens v West Australian Newspapers Ltd* (1994) HCA 45 & *Theophanous v Herald & Weekly Times Ltd* (1994) HCA 46
- *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
- *Brown v Tasmania* (2017)
- *Clubb v Edwards & Preston v Avery* (2019) HCA 11
- *Comcare v Banerji* (2019) HCA 23
- *LibertyWorks Inc v Commonwealth of Australia* (2021) HCA 18
- *Ruddick v Commonwealth of Australia* (2022) HCA 9

In *Australian Capital Television* 1992, the High Court held that Section 24 was the primary constitutional provision that makes Australia a representative democracy and grants Australians an implied right to freedom of political communication.

The High Court's reasoning about the implied right has developed through the other cases listed above.

The implied right to freedom of political communication is a constitutional right. Still, it may be overruled by future interpretations of Section 24 because it is not a specifically entrenched right.

2019 High Court Justice Simon Stewart said in *obiter dicta* in *LibertyWorks* 2021 that the implied right may not exist.

The High Court split 4 to 3 in *Ruddick* 2022, indicating the continuing controversy surrounding the implied right to freedom of political communication.

Course links

- Unit 3 - Functions of Parliament
- Unit 4 - Accountability of Parliament, human rights

Section 28 – Power to dissolve the House of Representatives for election

Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Purpose

Section 28 is in Chapter 1 of the constitution. It sets a maximum term of three years for the House of Representatives. It is a formal power of the Governor-General, by convention, used only on advice. It is also a reserve power of the Governor-General.

Key features

1. Limits the term of the House of Representatives to a maximum of three years. There is no minimum term. Senate terms are unaffected by Section 28 - they are fixed at six years unless there is a double dissolution election (see Section 57).
2. The three-year term permits elections for the House of Representatives and Senate to be held on the same day.

Details

Section 28 ensures elections are regular, which is desirable for the representativeness and accountability of the Commonwealth Parliament.

In practice, the Governor-General almost always dissolves the House of Representatives before the maximum term expires. Only the 3rd Parliament lasted a full three-year term from 20 Feb 1909 to 19 Feb 1910. Between federation in 1901 and 2019, the average length of a Parliament was slightly less than 136 weeks or approximately two and half years. The shortest Parliament was the 11th, which was dissolved after 223 days.

In reality, it is the Prime Minister who determines the duration of the House of Representatives because, by convention, the Governor-General excises Section 28 power on advice.

Section 28 enables conjoint - or synchronous - elections for both houses of Parliament by making the term of members of the House of Representatives half that of senators. Thus, it enables elections of the whole House and half the Senate to occur on the same election day.

By convention, the Governor-General has the reserve power to refuse advice to dissolve the House of Representatives if...

- a) The government has lost the confidence of the House of Representatives, and
- b) The Prime Minister advises the Governor-General to dissolve the House, and
- c) The House can form another government, and
- d) There is time remaining before the expiry of the House's term.

Impact

Section 28 directly impacts the frequency of elections and the representativeness and accountability of the Parliament.

Section 28 upholds the representativeness and accountability of the Parliament

The House of Representatives' maximum three-year term has been criticised as too short and promoting "short-termism" in contemporary politics. Proposals for fixed three-year terms have yet to be successful. This solution has been adopted in several States, including Western Australia, which has fixed terms.

Another suggested reform is to increase the term of the House of Representatives to four years. However, this would necessitate lengthening the Senate's term to eight years, reducing the representativeness and accountability of the upper house. Alternatively, separate elections for each house would be required, which would double the cost of elections.

Any change to Section 28 would require a referendum, which is unlikely to succeed.

Course links

- Unit 3 - Roles and Powers of the Governor-General
- Unit 4 - Accountability of the Parliament

Section 44 – Qualifications to sit in Parliament

Any person who... (see the five key features below) ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.
(Abridged)

Purpose

Section 44 in Chapter 1 of the Constitution lists five reasons a person may be disqualified from sitting in the Commonwealth Parliament.

Key features

Persons are disqualified from sitting in Parliament on the following grounds...

1. Allegiance to or citizenship of a foreign power.
2. Convicted of treason or crimes with a sentence of one year or more.
3. Bankruptcy.
4. Employed by the Australian government (i.e. public servants) - except Ministers.
5. Having a financial agreement or interest with the Commonwealth.

Section 44 says persons fitting any of the above criteria “shall be incapable of being chosen” as a member of parliament. Thus, it applies from the moment a person nominates as a candidate.

Details

Section 44 is essential for the accountability of the Parliament. It ensures the loyalty of lawmakers to the Commonwealth of Australia. Furthermore, it ensures persons of good character are eligible by excluding criminals and bankrupts. The exclusion of employees of State and Federal executives ensures a separation of executive and legislative powers. Finally, disqualifying persons with financial relationships with the Commonwealth prevents conflicts of interest.

The exception applied to Ministers in Section 44(iv) is necessary because the Westminster system depends on Ministers being members of parliament - see Section 64.

Impact

Section 44 was written when Australia was a Dominion of the British Empire, and all Australians were British subjects. There was no Australian citizenship, and the problem of dual citizenship did not arise.

The *Australian Nationality and Citizenship Act 1948* established Australian citizenship. From then on, the impact of Section 44(i) has been problematic due to the increasing number of Australians with dual nationality. It undermines the political representation of Australia’s ethnic diversity.

Section 44 severely impacted the 45th Parliament. Fifteen members and senators resigned or were disqualified - i.e. 6.6% of the 45th Parliament was forced out of Parliament because of Section 44.

High Court Interpretations

Section 44(i)

- *Re Wood (1988) 167 CLR 145*
- *Sue v Hill (1999) HCA 30*
- *Re Canavan and others (2017) HCA 45: The Citizenship Seven case* involved the Deputy Prime Minister, Barnaby Joyce and six senators. Five were disqualified on Section 44(i) grounds.
- *Re Gallagher [2018] HCA 17*

Notes

- In 2017/18, other members of parliament resigned before they could be referred to the High Court - e.g. Senator Jacqui Lambie.
- Replacement senators determined by the High Court were also found ineligible before they could take their seats - e.g. Holly Hughes was found ineligible to replace the disqualified senator Fiona Nash.

Section 44(ii)

- *Re Cullerton No2 (2017) HCA 4 - see Section 44(iii) below*

Section 44(iii)

- *Re Cullerton No2 (2017) HCA 4*

Senator Rod Cullerton (WA) was declared bankrupt by the Federal Court in December 2016. The President of the Senate notified the Governor of Western Australia of Mr Cullerton's disqualification. Mr Cullerton applied for Special Leave to appeal his disqualification in the High Court. The High Court rejected his application. On the same day, the High Court held Mr Cullerton ineligible to be chosen under Section 44(ii) because of a criminal conviction - see Section 44(ii) above.

Section 44(iv)

- *Sykes v Cleary (1992) 176 CLR 77*
- *Free v Kelly (1996) 185 CLR 296*

These cases resulted in people employed in the executive branch of government being disqualified from election to Parliament.

Mr Cleary was a Victorian state schoolteacher and Ms Kelly served in the RAAF.

Both occupied an “office of profit under the Crown” - i.e., they were employed in either State or Federal executive branches at their nomination.

Section 44(v)

- *R v Day (2017) HCA 14*

Mr Day was a senator who owned a building with offices leased by an Australian Public Service department. The rental contract meant he had a financial agreement with the Commonwealth, disqualifying him from Parliament.

There are many cases besides the above, which indicates the need for clarity concerning Section 44.

The High Court has applied strict legalist interpretations to Section 44 that fail to resolve its undemocratic limitations. For example, it held that mere entitlement to foreign citizenship is sufficient for disqualification. Candidates could be disqualified even if they were unaware of entitlement to foreign citizenship.

The problematic nature of Section 44 creates uncertainty. Its impact on representing Australia's multicultural community is of particular concern because it disqualifies many Australian citizens from election to Parliament.

The problems with Section 44 have long been recognised and led to reform proposals.

Referendum Proposals

- 1981: the Senate Standing Committee on Constitutional and Legal Affairs recommended in its report, *The Constitutional Qualifications of Members of Parliament*, that all five subsections of Section 44 be amended or deleted.
- 1985-2000: the Australian Democrats, a Senate minor party often holding the Senate balance of power, proposed four bills to initiate a referendum. All failed.
- 1988: The Constitutional Commission, a body established to examine reforming the Constitution, proposed similar reforms to those of the Constitutional and Legal Affairs Committee in 1981.
- 1996: The House of Representatives Standing Committee on Legal and Constitutional Affairs recommended a referendum to amend Section 44(i) and (iv). It proposed replacing Section 44(i) with a subsection requiring members of parliament to be Australian citizens and to give Parliament powers to make laws concerning foreign allegiance - (note, this is common practice in most liberal democratic constitutions). It also recommended Section 44(iv) be replaced with a provision making public servants' jobs vacant if they were nominated or were elected to Parliament. The government at the time accepted the recommendations and stated

that *constitutional and legislative action is the only realistic way to overcome these shortcomings [of Section 44]*. No action was taken.

- 1998: Senator Bob Brown (TAS) introduced the *Constitutional Alteration (Right to Stand for Parliament Qualification of Members and Candidates) Bill 1998*. The private senator's bill proposed altering subsections 44(i) and 44(iv). Debate on the bill revealed most members of parliament agreed that change was needed but disagreed about what changes.
- 2003: the Senate voted that Section 44(i) and (iv) should be amended to overcome the ban on dual citizens and public servants running for parliament.
- 2017: the Joint Standing Committee on Electoral Matters conducted an inquiry during the term of the disrupted 45th Parliament. It recommended that Section 44 be repealed in full or the words "until the Parliament otherwise provides" be inserted. The effect of either amendment would be to give Parliament the power to legislate the conditions of disqualification.

Without bipartisan and cross-party support, none of the above referendum proposals could pass Parliament for a referendum. The Australian public is unsympathetic to change and would likely reject any change to Section 44.

Course links

- Unit 3 - Roles and Powers of the High Court, at least one reform proposal to change the Commonwealth Constitution (Australia) such as Commonwealth Constitution (Australia) Section 44 (i), (ii) and (iii)
- Unit 4 - Accountability of the Parliament

