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1105-1603
1108-1606



SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MC15-003418

Dr Dennis Jensen MP
Chair
House of Representatives Standing
Committee on Petitions
PO Box 6021
Parliament House
CANBERRA ACT 2600

A handwritten signature in blue ink, appearing to read 'Dennis'.

Dear Dr Jensen

Thank you for your letter dated 24 November 2015 to the then Special Minister of State, the Hon Mal Brough MP, referring copies of two petitions (1105-1603 and 1108-1606) submitted to the Standing Committee on Petitions regarding section 44 of the *Australian Constitution* (the Constitution). I am responding as the minister responsible for electoral matters.

Petition 1105-1603 raised the issue of monitoring, policing and prosecution of breaches under section 44 of the Constitution. Petition 1108-1606 raises the issue of compliance with section 44 of the Constitution by the Hon Tony Abbott MP.

Responsibility for compliance with the requirements of section 44 rests with each person who nominates to stand for election. It is an offence for a member of the Parliament to sit in the Parliament while they are disqualified under the *Common Informers (Parliamentary Disqualifications) Act 1975*, which imposes a \$200 per day penalty.

Section 44 of the Constitution sets out five categories of persons who are '...incapable of being chosen or sitting as a senator or member of the House of Representatives.' This section seeks to protect the parliamentary system by disqualifying candidates and members of the Parliament who are at risk of allowing conflicts of loyalty to affect their performance. Specific categories of ineligibility include: persons who are '...under any acknowledgement 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' (subsection 44(i)), and persons who '...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' (subsection 44(iv)). The mere fact that a person was born overseas does not mean that they hold dual citizenship or will be in breach of section 44 of the Constitution.

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The candidate nomination form, required to be lodged with the Australian Electoral Commission (AEC), for a person seeking to be elected to the Parliament contains a mandatory declaration. This declaration includes a statement that the person is capable of being chosen to sit as a senator or a member of the House of Representatives by virtue of section 44 of the Constitution. Under section 172 of the *Commonwealth Electoral Act 1918* the AEC's responsibility is restricted to confirming that the declaration has been provided. The AEC has no role in checking the legitimacy of the declaration.

The making of a false declaration is, namely, an offence under section 136.1 of the *Criminal Code Act 1995*. The investigation and prosecution of such an offence is a matter for the Australian Federal Police (AFP). Where evidence is available of an offence, it should be brought to the attention of the AFP for consideration and appropriate action.

In addition, the High Court, sitting as the Court of Disputed Returns, has jurisdiction to try petitions disputing the validity of an election, including on the ground of disqualification under section 44 of the Constitution, or refer those petitions for trial to the Federal Court of Australia. The petition must be filed with the High Court within 40 days of the return of the writ for the relevant election. Where any individual, who has standing, considers a candidate has been elected illegally in a manner which affects an election result, they are able to lodge a petition with the Court of Disputed Returns.

All current senators and members of the House of Representatives have made the required declaration. Given the mechanisms available to examine alleged breaches of section 44 of the Constitution, I do not propose to take any further action with regard to these petitions.

Thank you for bringing the concerns referred to in the petitions to my attention.

Kind regards


Mathias Cormann
Minister for Finance

 January 2016

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