

8 February 2018

Committee Secretary  
Joint Standing Committee on Electoral Matters  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Secretary

## **Inquiry into matters relating to Section 44 of the Constitution**

Thank you for the opportunity to make a submission to this inquiry.

Our submission begins with an overview of the significant problems with s 44 of the Constitution, and then provides detailed responses to each of the terms of reference. Our view is that resolving the current issues surrounding s 44 in a satisfactory and durable manner requires constitutional change. Our overall recommendation is that a referendum should be held, at the time of the next federal election, to insert the words ‘until the Parliament otherwise provides’ at the start of s 44.

### **1. The problems with s 44**

The five disqualification provisions in s 44 of the Constitution are underpinned by a number of key objectives. Subsection (i) and the treason component of sub-s (ii) seek to protect national security by ensuring that federal parliamentarians hold allegiance and undivided loyalty to Australia.<sup>1</sup> The criminal conviction component of sub-s (ii) and sub-s (iii) seek to ensure that parliamentarians are beyond moral reproach.<sup>2</sup> Subsection (iii) also seeks to minimise the susceptibility of parliamentarians to financial persuasion.<sup>3</sup> Subsections (iv) and (v) are designed, in different ways, to limit the influence of the Executive over Parliament.<sup>4</sup> Subsection (iv) also seeks to avoid parliamentarians holding offices that are incompatible with membership of Parliament, and to protect the principle of ministerial responsibility.<sup>5</sup> Subsection (v) also aims to protect against conflicts of interest that could lead a parliamentarian to prioritise his or her pecuniary interests over the public interest.<sup>6</sup>

While many of these objectives remain appropriate today, interpretative uncertainties and changing circumstances have turned s 44 into an increasingly maladapted mechanism for dealing with parliamentary disqualifications. This has become clear in 2017-18, with six disqualifications in the recent cases of *Re Canavan*,<sup>7</sup> and *Re Nash [No 2]*,<sup>8</sup> five resignations, ongoing uncertainties about how future cases are likely to be decided, and, to date, the

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<sup>1</sup> See House of Representatives Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Aspects of Section 44 of the Australian Constitution—Subsections 44(i) and (iv)* (1997), 10-11; Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *The Constitutional Qualifications of Members of Parliament* (1981), 17.

<sup>2</sup> Senate Standing Committee on Constitutional and Legal Affairs, above n 1, 19, 36.

<sup>3</sup> *Ibid*, 36.

<sup>4</sup> *Ibid*, 41; *Re Day [No 2]* [2017] HCA 14, [19] (Kiefel CJ, Bell & Edelman JJ).

<sup>5</sup> Senate Standing Committee on Constitutional and Legal Affairs, above n 1, 41.

<sup>6</sup> See *Re Day [No 2]* [2017] HCA 14, [23], [49] (Kiefel CJ, Bell & Edelman JJ).

<sup>7</sup> [2017] HCA 45.

<sup>8</sup> [2017] HCA 52.

absence of a workable resolution to this situation that leaves prospective candidates with clarity about their eligibility.

Many of the recent s 44 issues relate to s 44(i), which states that a person shall be incapable of being chosen for Parliament if he or she:

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 or privileges of a subject or a citizen of a foreign power.

There are a number of difficulties with s 44(i) in its current form, which we outline briefly below. Some of these difficulties also pertain to other limbs of s 44.

*(a) At the time of its drafting, s 44(i) was more onerous than similar disqualification provisions in other Commonwealth constitutions*

Referrals to the High Court relating to s 44(i) have overwhelmingly concerned candidates who held (or were thought to have held) a foreign citizenship that they were unaware of ever having held,<sup>9</sup> or that they believed they had renounced.<sup>10</sup> The High Court held in *Sykes v Cleary*, and confirmed in *Re Canavan*, that a person can be disqualified under s 44(i) in such a circumstance, because disqualification hinges upon whether a person holds the status or rights of citizenship under the law of a foreign country.

In part, the explanation for this lies in the fact that, at federation, there was not yet any distinct status of Australian citizenship. Section 44(i) thus sought to disqualify candidates who held any citizenship or allegiance other than British subject status. At the time, this was the fullest formal measure of membership of the Australian community.

The purpose of s 44(i) was to protect against split allegiances, and prevent the entry into the parliament of ‘insidious enemies of the Commonwealth’.<sup>11</sup> However, the principle of ensuring that parliamentarians are singularly loyal to Australia does not require the disqualification of a candidate who unknowingly possesses dual citizenship. Indeed, other Commonwealth constitutions tended to disqualify a person from Parliament only where they had taken positive steps to acquire a foreign citizenship or allegiance.<sup>12</sup> This was also the standard adopted in the constitutions of the Australian colonies.<sup>13</sup>

*(b) There is a lack of clarity about when a candidate will be disqualified under s 44*

Despite adopting a more onerous standard than similar provisions in other constitutions, in the early years of Federation s 44(i) served its intended purpose of protecting against divided

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<sup>9</sup> See *Re Canavan* [2017] HCA 45.

<sup>10</sup> See *Sykes v Cleary* (1992) 176 CLR 77.

<sup>11</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897, 1013 (Edmund Barton). See also 1014 (Simon Fraser).

<sup>12</sup> See eg *British North America Act 1840* (Imp) 3 & 4 Vict. c. 35, s 7; *British North America Act 1867* (Imp) 30 & 31 Vict c. 3, s 31(2); *New Zealand Constitution Act 1852* (Imp) 15 & 16 Vict. c. 72, ss 36, 50.

<sup>13</sup> See eg *New South Wales Constitution Act 1855* (Imp) (18 & 19 Victoria, Cap.54) Schedule 1, ss 5, 26; *Victoria Constitution Act 1855* (Imp) Schedule 1, s 24; *The Constitution Act 1854* (Tas) (18 Vict. No. 17), ss 13, 24; *Constitution Act 1855-6* (SA), ss 12, 25; *Constitution Act 1867* (Qld) (31 Vict. No. 38), s 23; *Western Australia Constitution Act 1890* (Imp) (53 & 54 Vict. c, 26), Sch 1, s 29(3).

loyalties without significant issue. This is because dual citizenship was not a common phenomenon, and most migration to Australia came from within the British empire.

Circumstances today are very different. The British empire has dissolved, and Australia has full legal independence and its own legislative status of citizenship. Migration to Australia has increased, and the range of countries that people migrate from has broadened. The 2016 Census shows that 49% of the Australian population were born overseas or have a parent who was born overseas. Dual citizenship has emerged as a common phenomenon.

This combination of factors is significant, because birth in a foreign country, and descent – where a parent or grandparent is born in or is a citizen of a foreign country – are two of the main ways in which a person can acquire a foreign citizenship. Moreover, it is common for the eligibility requirements for citizenship in foreign countries to change from time to time (as indeed they have in Australia). This produces uncertainty about which individuals hold dual citizenship at any given point in time. In addition, processes for renouncing foreign citizenships can sometimes be unclear, cumbersome or expensive.<sup>14</sup>

Complicating matters further, there are a number of questions about the operation of s 44(i) that remain open because the High Court, which is responsible for the interpretation of the provision, has not yet had occasion to answer them. This is not an issue that is unique to s 44(i) – it also affects the other paragraphs of s 44.<sup>15</sup>

These factors make it difficult, often expensive, and sometimes impossible for even a very diligent candidate to comprehensively assess their potential for disqualification under s 44.

*(c) Section 44 imposes inappropriate barriers to democratic participation*

One effect of the lack of clarity about the scope and operation of s 44 is that prospective candidates who are unable to obtain assurance that they are safe from disqualification under s 44 may elect not to nominate. This poses particular challenges for independent candidates and minor parties, who are more likely to lack sufficient resources to undertake a thorough investigation, to the extent that it is possible to do so. It is undesirable that Australian citizens who satisfy the legislative qualifications for election to Parliament should in effect be barred from seeking election on this basis.

The fact that candidates are required to comply with the requirements of s 44 from the time of nomination, irrespective of whether they are ultimately elected to Parliament is a further impediment to full democratic participation. Section 44(iv), which requires those who hold offices of profit under the Crown to resign their positions prior to nomination is particularly onerous in this regard.<sup>16</sup> This is exacerbated by the High Court's most recent finding in *Re Nash [No 2]* that in order to escape disqualification under s 44(iv), an unsuccessful candidate who has any prospect of replacing an elected parliamentarian must not resume any office of profit under the Crown through the entire period of the incumbent's service.

*(d) The uncertainties that arise under s 44 produce an increased likelihood of litigation, and in doing so threaten the integrity and stability of the parliamentary system*

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<sup>14</sup> See further House of Representatives Standing Committee on Constitutional and Legal Affairs, above n 1, Ch 1.

<sup>15</sup> See further Part 2 below.

<sup>16</sup> See further House of Representatives Standing Committee on Constitutional and Legal Affairs, above n 1, 58.

While one effect of the uncertainties under s 44 is that some prospective candidates will be deterred from seeking nomination, the opposite is also true. The lack of understanding around what s 44 requires creates a risk that candidates who fall foul of the disqualification criteria but who do not realise this will stand for election, and in some cases will be elected.

As the House of Representatives Standing Committee on Constitutional Affairs noted in 1997, where the potential exists for the eligibility of a significant number of parliamentarians to be challenged, this ‘represents a risk to the integrity and stability of the parliamentary system and to the government of the nation’.<sup>17</sup>

These risks have been recently realised, with the current spate of disqualifications and ongoing referrals. Until the problems with s 44 are satisfactorily resolved, there is a likelihood that this will continue.

Ineligible candidates who run for Parliament have the potential to alter election results, even where the ineligible candidates are not themselves elected. This is because many candidates are elected as a result of preference flows, particularly in the House of Representatives. This creates an additional risk: where an unsuccessful candidate is found to be ineligible as a result of s 44, their disqualification could be used to challenge the eligibility of a parliamentarian whose election hinged upon the disqualified candidate’s preference flows. While cases disputing elections must be commenced within 40 days of polling,<sup>18</sup> this places a question mark, at least for a period of time, over the eligibility of a large number of federal parliamentarians, even those whose compliance with s 44 is not in any doubt.<sup>19</sup>

*(e) Next steps*

The terms of reference for this inquiry foreshadow three potential approaches for addressing the issues with s 44(i): administrative reform, legislative reform and constitutional reform. We address each of these in detail below.

We suggest that the best approach to resolving this issue is a multifaceted one that utilises all three reform avenues. However, for the reasons we outline below, we believe that constitutional reform is the linchpin of a successful long-term solution. Administrative and legislative change can play a valuable supplementary role, but are in and of themselves insufficient.

**2. How can electoral laws and the administration thereof be improved to minimise the risk of candidates being found ineligible pursuant to section 44(i)?**

There are significant limitations to the extent to which the issues with respect to s 44(i) can be resolved through administrative reform. The primary reason for this is that it is often difficult or impossible to determine with certainty whether a candidate would fall foul of s 44(i). The question that must be answered is whether a candidate holds citizenship of a foreign country, *under the law of that country*. Determining this often requires specialist

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<sup>17</sup> Ibid 37, 57-8.

<sup>18</sup> *Commonwealth Electoral Act 1918* (Cth) s 355.

<sup>19</sup> See further Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 8 December 2017, 24-5, 26-7 (George Williams); Luke Beck, Submission to the Joint Standing Committee on Electoral Matters Inquiry into Matters Relating to Section 44 of the Constitution (January 2018), 2.

advice from foreign citizenship lawyers, and indeed, even when such advice is obtained, the answer is not always clear. For instance, in *Re Canavan*, experts in Italian citizenship law could not reach consensus on whether Senator Matt Canavan held Italian citizenship.

This difficulty is compounded by the fact that there are questions about the scope of s 44(i) that the High Court has not yet answered, and any advice on these matters can be tentative at best.

For instance, while the Court has said that a candidate will not be disqualified under s 44(i) where they have taken ‘all steps that are reasonably required by foreign law’ to divest themselves of any foreign citizenship,<sup>20</sup> when ‘all reasonable steps’ will be deemed to have been taken remains unclear. The forthcoming case of *Re Gallagher* may clarify this, but it is unlikely to do so comprehensively, as what constitutes ‘reasonable steps’ may vary from country to country, and depending on broader circumstances. Similarly, the circumstances in which a candidate would be disqualified under s 44(i) on the grounds that they are ‘entitled to the rights or privileges of a subject or citizen of a foreign power’ are unclear.

Ongoing interpretative uncertainties also affect other parts of s 44. For example, the scope of what constitutes an office of profit under the Crown, for the purposes of sub-s (vi) remains unresolved. When a candidate will be said to have a ‘pecuniary interest’ that falls foul of purposes of sub-s (v) is also unclear, particularly in light of the fact that different standards were suggested by different members of the Court in the most recent case of *Re Day [No 2]*.<sup>21</sup>

Because of the uncertainties about what precisely is required to comply with s 44, administrative measures – such as a more comprehensive pre-nomination questionnaire, audit processes, or services to assist candidates with the renunciation of foreign citizenship – cannot provide a complete resolution to the difficulties that arise out of s 44. Such measures can assist candidates to comply with the aspects of s 44 that are clear, but they cannot create clarity about the constitutional rules where clarity does not presently exist. We believe that an adequate long-term solution to this issue requires the implementation of clear rules that accord with community standards and that operate in a manner that is readily ascertainable by prospective candidates. This can only be achieved through constitutional change following a successful referendum.

However, improvements to administrative processes can provide important supplementary assistance: in the immediate term to help restore public confidence, and on an ongoing basis, as a risk mitigation device.

The establishment of a Citizenship Register in December 2017, requiring Senators and Members of the House of Representatives to declare information that might help reveal circumstances in which a referral under s 44(i) is warranted was a useful device to promote transparency and help restore public confidence in the immediate term. However, several improvements are required before the Register can serve this purpose effectively.

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<sup>20</sup> *Re Canavan* [2017] HCA 45, [72]. See also *Sykes v Cleary* (1992) 176 CLR 77, 107 (Mason, Toohey & McHugh JJ); 113-114 (Brennan J); 131 (Dawson J).

<sup>21</sup> See Tony Blackshield ‘Close of Day’, *AUSPUBLAW* (12 April 2017) <<https://auspublaw.org/2017/04/close-of-day/>>.

For example, parliamentarians are not currently required to disclose the citizenship of their parents, grandparents or spouses, despite these being very common avenues which people acquire dual citizenship. In addition, the declarations lack a supporting process, with no clear practical consequences for parliamentarians who fail to provide documentary evidence, or who have provided declarations without having taken reasonable steps to check if they are a foreign citizen. The effectiveness of the Register would also be strengthened if parliamentarians were required to disclose information that could help reveal where referrals under other s 44 grounds are warranted. The potential for current parliamentarians to be disqualified under ss 44(iv) and (v) has come to light, yet no process has been put forward to deal with these issues.

In the longer-term, administrative services such as more comprehensive pre-nomination questionnaires, and services to assist candidates to ensure they comply with disqualification rules have the potential to serve as practical aids. The most effective way in which to develop any such measures will depend on what decision is ultimately reached with respect to reforming s 44.

### **3. Can the Parliament legislate to make the operation of s 44(i) more certain and predictable?**

The extent to which Parliament can make the operation of s 44(i) more predictable through legislation is very limited, and does not provide an adequate solution to the current problems.<sup>22</sup> Parliament cannot legislate to alter the disqualification criteria in section 44(i) to improve certainty and predictability. The interpretation of s 44(i) is a task for the High Court, and the Court has made it very clear that compliance depends upon the operation of foreign citizenship laws, which cannot be altered by Australian legislation.

A clear majority in *Sykes v Cleary* rejected the proposition that unilateral renunciation of foreign citizenship will suffice. As Brennan J explained:

It is not sufficient...for a person holding dual citizenship to make a unilateral declaration renouncing foreign citizenship when some further step can reasonably be taken which will be effective under the relevant foreign law to release that person from the duty of allegiance or obedience. So long as that duty remains under the foreign law, its enforcement – perhaps extending to foreign military service – is a threatened impediment to the giving of unqualified allegiance to Australia. It is only after all reasonable steps have been taken under the relevant foreign law to renounce the status, rights and privileges carrying the duty of allegiance or obedience and to obtain a release from that duty that it is possible to say that the purpose of s. 44(i) would not be fulfilled by recognition of the foreign law.<sup>23</sup>

That a unilateral renunciation would not satisfy section 44(i) was confirmed by a unanimous Court in *Re Canavan*.<sup>24</sup>

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<sup>22</sup> This is in line with the weight of evidence presented to the House of Representatives Standing Committee on Constitutional and Legal Affairs during its 1997 inquiry into ss 44(i) and (iv): see House of Representatives Standing Committee on Constitutional and Legal Affairs, above n 1, 50.

<sup>23</sup> *Sykes v Cleary* (1992) 176 CLR 77, 113-114 (Brennan J).

<sup>24</sup> [2017] HCA 45, [66], [68]-[69].

Parliament does not have the constitutional power to relax this standard by passing legislation providing a standard procedure (such as a unilateral declaration of renunciation) for divesting oneself of any foreign citizenship. The requirements of s 44(i) are constitutional, and altering them requires a referendum. Parliament also lacks the constitutional power to pass legislation that dictates what would constitute ‘reasonable steps’ to divest oneself of foreign citizenship. This is a question pertaining to the interpretation of s 44(i), and can only be answered by the High Court.<sup>25</sup>

However, if constitutional change along the lines we suggest in Part 4 below is approved at a referendum, then Parliament will have the power to pass legislation clarifying or amending the operation of s 44(i), or removing the prohibition on dual citizens sitting in the Commonwealth Parliament.

Parliament’s existing powers do allow it to legislate to alter the procedures for challenging a parliamentarian’s qualifications. Under s 376 of the *Commonwealth Electoral Act 1918* (Cth), any question respecting the qualifications of a Senator or a Member of the House of Representatives, or respecting a vacancy in either house of the Parliament, may be referred by resolution to the Court of Disputed Returns by the house in which the question arises. Parliament could amend this Act to alter the procedure for referring candidates to the High Court, or even to remove this procedure altogether. However, while this is possible, it would neither restore public confidence nor ensure that each and every member of the federal Parliament is entitled to remain in their seat. We therefore do not consider legislation along such lines to be a viable or durable solution.

#### **4. Should Parliament seek to amend s 44(i)?**

For the reasons set out above, we believe that seeking to amend s 44 through a referendum is the only mechanism that can provide an effective long-term solution to the current issues that arise with respect to s 44, and the potential issues that may arise in the future. We suggest that the best time to do this would be at the next general election. This would allow adequate time to build a public case for change, and would be significantly cheaper than a standalone referendum. Indeed, the Australian Electoral Commission told a Parliamentary inquiry in 2015 that a standalone referendum would cost around \$160 million but holding a referendum on the same day as a general election would cost \$44 million.<sup>26</sup>

There are various ways in which constitutional reform could be approached. The two main ones are to amend s 44 (and associated provisions) in a way that modernises and clarifies the eligibility criteria for Parliament,<sup>27</sup> or, alternatively, to grant Parliament the power to determine the criteria for disqualification through legislation.

Our view is that the preferable option is to empower Parliament to determine the applicable disqualification criteria. This is in line with how we currently determine a number of related

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<sup>25</sup> Moreover, the Court made it clear in *Re Canavan* that the steps to renounce citizenship that must be taken to satisfy are all those that are reasonably required by foreign law: [2017] HCA 45, [13].

<sup>26</sup> Lisa Cox, ‘Separate Poll on Same-Sex Marriage would cost \$158 million: Australian Electoral Commission’, *Sydney Morning Herald*, 8 September 2015 <<http://www.smh.com.au/federal-politics/political-news/separate-poll-on-samesex-marriage-would-cost-158-million-australian-electoral-commission-20150908-gjhd1j.html>>.

<sup>27</sup> As we outline below, this is not our preferred approach. However, if it is ultimately the approach that is taken, we suggest that the new disqualification provision should be drafted in a way that holds all prospective candidates to the same standard, irrespective of whether they acquired their citizenship by birth, descent or conferral.

matters, including voter eligibility, eligibility for citizenship, and – most significantly – the *qualifications* of members of parliament. Moreover, it would have the advantage of allowing the criteria for parliamentarians to evolve over time, in response to changing circumstances and community standards. This would help to guard against any repeat of the current predicament years into the future.

The simplest way to grant Parliament such legislative power is to insert the words ‘until the parliament otherwise provides’ at the beginning of s 44. This would leave the existing disqualification criteria in place, as a transitional measure, but would enable Parliament to tweak these criteria as required through the passage of legislation. This mirrors the text of s 34, which sets out transitional criteria for the qualification of members,<sup>28</sup> which have now been superseded by s 163 of the *Commonwealth Electoral Act 1918* (Cth). Indeed, during the lead-up to Federation, Patrick Glynn proposed that s 44 should also be subject to parliamentary amendment, though the proposal did not ultimately win favour.<sup>29</sup>

This suggested approach has several advantages. It adopts a constitutional formula that has been used, without issue, in related contexts. It would also allow Parliament freedom to amend the disqualification criteria as needed, while leaving a constitutional standard in place where no changes have been made. The benefits of this are twofold: it offers a durable solution by enabling the criteria to be progressively updated to reflect changing community standards or practical realities, and it forces Parliament to justify why change is needed when any such updates are proposed.

**5. Should any action of the kind contemplated above be taken in relation to any of the other paragraphs of section 44 of the Constitution, in particular sections 44(iv) and 44(v)?**

The approach that we recommend would provide Parliament with the power to pass legislation to modify or clarify the requirements in any of the paragraphs of s 44.

Yours sincerely

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<sup>28</sup> Section 34 applies to members of the House of Representatives. Section 16 provides that the qualifications of senators are identical.

<sup>29</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 21 September 1897, 1013.