

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

Professor Kim Rubenstein, Australian National University.

I am grateful to the Committee for providing me an opportunity to appear before it and I am also submitting the following document to provide a structure to the discussion, according to the Committee's terms of reference.

I also refer the Committee broadly to my book *Australian Citizenship Law* (2nd edition, 2017) and the specific references below to the parts of the book relevant to section 44(1) of the Constitution.

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

I am not an Electoral Law expert, but I do think this should be investigated further so that the situation that has evolved over the last year is less likely to occur in the future.

It would ensure that those considering nominating are more thoughtful in future elections about the issues around section 44 as it is currently worded.

Questions that the Australian Electoral Commission could ask of potential candidates regarding the possibility of holding another citizenship include – Were you born in another country – were either of your parents or any of your grandparents born in or able to hold citizenship of another country and is/was your spouse born in or a citizen of another country?

If yes to any of the above, have you made inquiries from legal authorities in that other country about whether you are automatically regarded as a citizen of that country, if you have not applied yourself?

What documentation do you have to confirm that you are not a citizen of that other country?

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

It is not possible for Parliament to change the requirements of section 44 (nor provide a standard procedure for renunciation of foreign citizenship given it is dependent on that foreign law).

See *Sykes v Cleary* (No 2) (1992) 176 CLR 77 and
Re Canavan *Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts* [No 2]; *Re Joyce*; *Re Nash*; *Re Xenophon* [2017] HCA 45 (27 October 2017)
<http://classic.austlii.edu.au/au/cases/cth/HCA/2017/45.html>

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

I believe section 44 should be repealed.

A successful referendum would be assisted by a bipartisan approach to the change – Constitutional change is largely dependent on bipartisanship.

I have made submissions to Parliament over the years, and contributed to public discussion around section 44 through my work on citizenship in Australia.

I refer to the Committee to my submissions to the Standing Committee on Legal and Constitutional Affairs inquiry on *Aspects of section 44 of the Australian Constitution* in 1997 and my submissions to and participation in the 2008 Legal and Constitutional Committee Roundtable on *Reforming our Constitution* in which I was given carriage to start the discussion around citizenship in our Constitution. This and other parliamentary submissions I have made are all referred to and included in my book *Australian Citizenship Law* (2017, 2nd ed). (See in particular Pages 263-275)

In each of those contexts, since 1997, I have advocated the repeal of section 44(1).

The history of dual citizenship in this country is fascinating around many levels – the move from British subject status to Australian citizenship, the holding of both statuses until 1987 and then the move to solely Australian citizenship. It is also interesting in the context of a multicultural Australia, a globalizing world, and the changes to dual citizenship in Australian legislative history around the Australian Citizenship Act 2007.

Given the profound changes in Australian society, and changes to legislation, and within a commitment to representative democracy, there are numerous real and philosophically sound reasons to repeal section 44.

While some people may say that being a dual citizen doesn't preclude a person from nominating for Parliament because a person can renounce that other citizenship, there are a few reasons why that is not desirable.

First, if the 'concern' is about emotional conflicts of interest and dual loyalties – formally renouncing another country's citizenship does not necessarily remove those connections or emotional attachments to that other country. It would be better, if one feels there are concerns to be engaged with about dual loyalties, to set up a

register of foreign citizenships in Parliament so that it is transparent, and individual members can be openly asked in Parliament about the impact of that other citizenship on any of their voting/representation. Ultimately it would then be up to the electorate to determine whether they want that person (who may be a dual citizen) to represent them in Parliament.

Second, if section 44 remains, there are many people who are dual citizens who would not want, for a range of reasons, to renounce that other citizenship formally, who would then choose not to consider running for Parliament – even though they might otherwise be interested. This impediment means we have a smaller pool of individuals prepared to become involved in Parliament and this limits the breadth of our representation. And of course, nominating for Parliament does not necessarily mean one is elected – so it is a significant ‘sacrifice’ to renounce one’s other citizenship just to be considered to be a member of Parliament.

Third, in light of the changing nature of citizenship laws around the world, it is difficult to be sure whether someone is constitutionally precluded from nominating for Parliament. This leads and has led to too much uncertainty and instability as this inquiry is reflective of.

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

The point above about ‘sacrifices’ that need to be made to nominate is relevant to 44(iv) and (v). That is, a decision needs to be made by a person who may fall within any of the sections whether to ‘sacrifice’ that status (citizenship or office of profit under the Crown) for the ‘hope’ of being elected.

E. Any related matters.

The simplest way to remedy the section and enable these matters to be debated fully by Parliament, is to seek a Constitutional change that introduces into section 44 and section 45 the words that begin section 46 and 47 – Until the Parliament otherwise provides.

This would then enable the specific questions around disqualification, and when disqualification occurs to be debated fully in our democratic institutions. This would enable our Parliament to be fully engaged with the questions underpinning section 44 without it being dependent any longer on Constitutional change.