



FACULTY OF LAW

GEORGE WILLIAMS AO

DEAN
ANTHONY MASON PROFESSOR
SCIENTIA PROFESSOR

14 December 2017

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

Dear Secretary

Inquiry into decisions made by the Court of Disputed Returns

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

The disqualification of Senators Bob Day and Rodney Culleton illustrates the impact of section 44 of the Constitution. It also shows the willingness of the contemporary High Court to take a strict, literal interpretation of the words of that section. It means that the reach of disqualification is now significantly larger than many had thought.

The approach of the High Court is especially significant when it comes to the disqualification of Senator Day. In rejecting the prior approach that had been taken to s 44(v) by Chief Justice Garfield Barwick in *Re Webster*, the Court laid down an interpretation that will lead to far greater scope for disqualification. It is not surprising that a further matter has already been initiated in the High Court involving David Gillespie MP. It may be that other parliamentarians will find themselves potentially disqualified, including where they have structured their business affairs in accordance with the earlier, now discredited, approach of Chief Justice Barwick.

Unfortunately, uncertainties remain about this aspect of disqualification. It is not clear what interests will give rise to disqualification, nor when an indirect interest will be realised. This will make it difficult to provide clear advice to parliamentarians about their compliance with section 44.

Just as the dual citizenship provision in section 44 has given rise to significant debate and the need for reform, so too do these other aspects. It is concerning that the declaration process so far instituted by Parliament only deals with dual citizenship, when other, pressing issues of disqualification arise also under other parts of section 44. This should be remedied.

Two options are available. The first is to expand the process of declaration to include interests that could give rise to disqualification under the other parts of section 44. This should go further than the current declaration process for dual citizenship. It should also include a means to verify information, and to seek further documentation and the like where required. There should also be a means of independently assessing the risk of disqualification so that Parliament can make well-informed decisions as to which matters to refer to the High Court.

The second, more preferable, option is to reform section 44 itself. Recent High Court decisions reveal the section to be unworkable and at odds with contemporary values. A referendum should be held at the next election to remedy this by way of repealing section 44 and providing instead that Parliament can, as it does for the qualification of electors, set down legislative standards for disqualification that can be amended over time.

Yours sincerely

George Williams AO