Report on the inquiry into decisions made by the Court of Disputed Returns

Joint Standing Committee on Electoral Matters
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Terms of Reference

On 6 December 2017, the Senate resolved that the following matter be referred to the Joint Standing Committee on Electoral Matters for inquiry and report by 6 February 2018:

The implications of recent decisions by the Court of Disputed Returns concerning section 44 of the Constitution on questions referred by the Parliament under section 376 of the Commonwealth Electoral Act 1918, with particular reference to:

(a) the decisions in connection with the disqualification of former Senators Bob Day and Rodney Culleton;

(b) a regime for disclosing information relating to aspects other than section 44(i), for which the Parliament has already provided;

(c) the form such a process might take and how it could be implemented; and

(d) any related matters.
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1. Inquiry outcomes

Overview

1.1 This report covers the following matters:
   - the conduct of the inquiry and inquiry background;
   - a summary of the evidence received during the inquiry; and
   - the Committee’s position on the inquiry.

Conduct of the inquiry and background

1.2 This inquiry relates to the implications of recent decisions made by the Court of Disputed Returns concerning Section 44 of the Constitution.

1.3 The Senate referred the inquiry to the Committee on 6 December 2017 and requested a report by 6 February 2018. The Committee called for submissions with a closing date of 22 December 2017.

1.4 Section 44 of the Constitution establishes the rules for disqualification from Parliament. Any person who fulfils the grounds set out in Section 44 is disqualified from ‘being chosen or of sitting’ in Parliament. The full text of the relevant Constitutional provisions can be found at Appendix A.

1.5 In summary, there are five grounds for being disqualified from Parliament:
   i. foreign citizenship and allegiances;
   ii. treason and punishable offences;
   iii. bankruptcy;
   iv. holding an office of profit under the Crown; and
v. having a pecuniary interest with the Commonwealth Public Service.

1.6 The terms of reference for this inquiry ask the Committee to formulate a regime for Senators and Members to disclose information relevant to Sections 44 (ii), 44 (iii), 44 (iv) and 44 (v) of the Constitution.

1.7 As noted in the terms of reference, there is already an existing regime in place for Section 44 (i). The Senate and House of Representatives have resolved to require Senators and Members to disclose information relevant to Section 44 (i) to identify any cases of potential foreign citizenship.¹

1.8 Under this arrangement, Senators and Members are required to lodge a statement declaring their citizenship status. The statement must include information on parentage, details of foreign citizenship renouncement or steps taken to renounce this citizenship. Knowingly providing false information has been proclaimed to be a ‘serious contempt’ of Parliament. Further details of the requirements can be found in Appendices B and C.

1.9 The terms of reference also asked the Committee to consider the decisions made by the Court of Disputed Returns in relation to former Senators Bob Day and Rodney Culleton. The Committee notes these decisions and the Court’s reasons in those matters.²

1.10 The Court of Disputed Returns hears and determines matters referred on questions regarding the qualification of Senators and Members, in accordance with the Constitution and the Commonwealth Electoral Act 1918.³ The role, powers and function of the Court of Disputed Returns are outlined in Part XII of the Commonwealth Electoral Act. For further information, refer to Appendix D.

1.11 In addition to the Committee’s inquiry into decisions made by the Court of Disputed Returns, the Prime Minister has referred to the Committee an inquiry into the operation of Section 44 of the Constitution.⁴

¹ The Senate resolved on 13 November 2017 and the House of Representatives resolved on 4 December 2017.


⁴ See <https://www.aph.gov.au/s44>.
1.12 While having a different emphasis, the Prime Minister’s referral involves issues related to the inquiry into decisions made by the Court of Disputed Returns. These include:

- decisions of the Court of Disputed Returns resulting in Senators and Members of the House of Representatives being disqualified from sitting in Parliament; and
- how similar disqualifications could be avoided in future.

Evidence received

1.13 The Committee received one submission to the inquiry from Professor George Williams AO (University of NSW).

1.14 The submission noted the willingness of the High Court to take a strict interpretation of Section 44, which may lead to other parliamentarians being potentially disqualified. The submission highlighted that the disqualification of former Senators Bob Day and Rodney Culleton means ‘the reach of disqualification is now significantly larger than many had thought.’ Prof Williams submitted that this is ‘especially significant’ in relation to Section 44 (v), which relates to pecuniary interests with the Commonwealth.\(^5\)

1.15 Prof Williams submitted that the preferred option is to reform Section 44:

> 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.\(^6\)

1.16 Prof Williams noted that an alternative option is to expand the existing declaration and disclosure process beyond citizenship matters, which would involve:

- developing a means to verify information;
- having a mechanism whereby further documentation could be sought; and

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\(^5\) Prof George Williams, Submission 1, p.1.

\(^6\) Prof George Williams, Submission 1, p.2.
▪ developing a means to independently assess the risk of disqualification, ‘so that Parliament can make well-informed decisions as to which matters to refer to the High Court.’

1.17 The terms of reference for the inquiry relate to the implications of decisions made by the Court of Disputed Returns. The Committee received numerous emailed documents, including from Mr Culleton and Mr Day. Most of these items requested the Committee re-examine the circumstances behind the disqualification of Mr Culleton. These items, while read and noted, were received as correspondence as they did not directly relate to the implications of the decisions made by the Court of Disputed Returns and were lodged after the submission closing date.

Committee view

1.18 This inquiry’s terms of reference invite the Committee to examine issues currently subject to a separate inquiry into matters relating to Section 44 of the Constitution.

1.19 The Senate’s requested reporting date provided insufficient time to gather evidence and only resulted in one submission. The Committee does not intend to present a rushed report on such a significant constitutional issue. Rather, the Committee intends to focus on its other related Section 44 inquiry, which has a later reporting date.

1.20 Any conclusion, observation or recommendation relating to Section 44 and decisions of the Court of Disputed Returns will be contained in the Committee’s forthcoming report on the inquiry into matters relating to Section 44 of the Constitution.

Senator Linda Reynolds CSC
Chair

Prof George Williams, Submission 1, p.2.
A. Extracts from the Constitution

44 Disqualification

Any person who:

(i) is under any acknowledgment 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; or

(ii) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

(iii) is an undischarged bankrupt or insolvent; or

(iv) 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; or

(v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;
shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But subsection (iv) does not apply to the office of any of the Queen’s Ministers of State for the Commonwealth, or of any of the Queen’s Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen’s navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

45 Vacancy on happening of disqualification

If a senator or member of the House of Representatives:

(i) becomes subject to any of the disabilities mentioned in the last preceding section; or

(ii) takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors; or

(iii) directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State;

his place shall thereupon become vacant.

46 Penalty for sitting when disqualified

Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of
one hundred pounds to any person who sues for it in any court of competent jurisdiction.

47 Disputed elections

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.
B. Senate citizenship register

Extracted from the Journals of the Senate

On 13 November 2017, the Senate resolved:

1 That not later than 5 pm on Friday, 1 December 2017 (and within 21 days of making and subscribing an oath or affirmation as a Senator) each Senator shall provide to the Registrar of Senators’ Interests a statement containing the following:

a. a declaration by the Senator that, at the time the Senator nominated for election to the Senate in this 45th Parliament he or she was an Australian citizen;

b. a declaration that the Senator is not a citizen of any country other than Australia;

c. a declaration stating:
   – the place and date of the Senator’s birth;
   – the citizenship that the Senator held at the time of birth; and
   – if he or she did not obtain Australian citizenship at birth, the date he or she was naturalised as an Australian citizen;


d. so far as the Senator is aware:
   – the place and date of birth of the Senator’s parents and grandparents;
e. whether the Senator has ever been a citizen of another country and if so which country or countries;
f. what steps the Senator has taken to assure him or herself that they have not inherited citizenship of another country from a parent or grandparent;
g. if the Senator has answered the question in paragraph (e) in the affirmative, then provide details and evidence of the date and manner in which the Senator’s citizenship of that other country was renounced (if it was renounced) or the date and manner in which it came to an end in accordance with the laws of that other country;
h. if the Senator’s citizenship of that other country had not come to an end at the date of his or her nomination for the Senate, detail and provide evidence of any steps the Senator has taken to renounce the citizenship of that other country prior to the date of nomination; and
i. if the Senator has declared that he or she was at the time of nomination or is now a citizen of a country other than Australia, on what basis the Senator contends that he or she is, nonetheless, not disqualified under section 44(i).

2 If at any time the Senator becomes aware that information provided in their statement is no longer accurate they shall update their statement as soon as practicable but not later than 21 days of being so aware.

3 Statements shall be made in accordance with this resolution and in a form determined by the Committee of Senators’ Interests. The Registrar shall, in accordance with procedures determined by the committee, maintain a Citizenship Register comprising statements provided under this resolution. Other than as specifically provided for in this resolution, the committee has the same powers and functions in relation to the citizenship register as it does in relation to the Register of Senator’s Interests.

4 The Registrar shall, upon the expiry of the time for providing statements under this resolution, and at other times determined by the committee, publish the register and any alterations or additions to the register on the Parliament’s website.
5 Any Senator who:

a. knowingly fails to provide the statement and evidence required by this resolution to the Registrar of Senators’ Interests by the due date; or

b. knowingly fails to correct an inaccuracy in his or her statement within the required timeframe; or

c. knowingly provides false or misleading information to the Registrar of Senators’ Interests;

shall be guilty of a serious contempt of the Senate and shall be dealt with by the Senate accordingly, but the question whether any senator has committed such a serious contempt shall first be referred to the Privileges Committee for inquiry and report.
C. House of Representatives citizenship register

Extracted from the House Votes and Proceedings

On 4 December 2017, the House of Representatives resolved:

That this House require all Members to provide statements in relation to citizenship in the following terms:

Members’ statements in relation to citizenship

1. By not later than 9 am, 5 December 2017 (and otherwise within 21 days of making and subscribing an oath or affirmation as a Member of the House of Representatives) each Member shall provide to the Registrar of Members’ Interests a statement containing the following:

   a. a declaration by the Member that, at the time the Member nominated for election to the House of Representatives in this 45th Parliament, he or she was an Australian citizen;

   b. a declaration that the Member is not a citizen of any country other than Australia;

   c. a declaration stating:
      i. the place and date of the Member’s birth;
      ii. the citizenship that the Member held at the time of birth; and
iii. if he or she did not obtain Australian citizenship at birth, the date he or she was naturalised as an Australian citizen;

d. so far as the Member is aware the place and date of birth of the Member’s parents, grandparents and spouse (if applicable);

e. whether the Member has ever been a citizen of another country and, if so, which country or countries;

f. what steps the Member has taken to assure him or herself that the Member has not acquired citizenship of another country by descent, marriage or other means;

g. if the Member has answered the question in (e) in the affirmative, details and evidence of the date and manner in which the Member’s citizenship of that other country was renounced (if it was renounced) and/or the date and manner in which it came to an end in accordance with the laws of that other country;

h. if the Member’s citizenship of that other country had not come to an end at the date of his or her nomination for the House of Representatives, details and evidence of any steps the Member has taken to renounce the citizenship of that other country prior to the date of nomination; and

i. if the Member has declared that he or she was at the time of nomination or is now a citizen of a country other than Australia, on what basis the Member contends that he or she is, nonetheless, not disqualified under section 44(i) of the Constitution.

2 If at any time the Member becomes aware that information provided in the statement is no longer accurate he or she shall update the statement as soon as practicable but by no later than 21 days of being so aware.

Committee of Privileges and Members’ Interests

3 Statements shall be made in accordance with this resolution and in a form determined by the Committee of Privileges and Members’ Interests. The Registrar shall, in accordance with procedures determined by the committee, maintain a Citizenship Register comprising statements provided under this resolution. Other than as specifically provided for in this resolution, the committee has the same powers and functions in relation to the citizenship register as it does in relation to the Register of Members’ Interests.
Citizenship Register published on website

4 The Registrar shall, upon the expiry of the time for providing statements under this resolution, and at other times determined by the committee, publish the register and any alterations or additions to the register on the Parliament’s website.

False statements or omissions regarded as contempt

5 Any Member who:
   a. knowingly fails to provide the statement required by this resolution to the Registrar of Members’ Interests by the due date; or
   b. knowingly fails to correct an inaccuracy in his or her statement within the required timeframe; or
   c. knowingly provides false or misleading information to the Registrar of Members’ Interests;

shall be guilty of a serious contempt of the House of Representatives and shall be dealt with by the House accordingly; a question of whether any Member has committed such a serious contempt shall first be referred to the Committee of Privileges and Members’ Interests for inquiry and report.

Referrals to the Court of Disputed Returns

6 Notwithstanding anything contained in the standing orders or any other resolution, referral of a Member to the Court of Disputed Returns may be moved without notice by a Minister or the Manager of Opposition Business.
**D. The Court of Disputed Returns**

*Extracted from the Commonwealth Electoral Act*

360  Powers of Court

(1) The Court of Disputed Returns shall sit as an open Court and its powers shall include the following:

(i) To adjourn;

(ii) To compel the attendance of witnesses and the production of documents;

(iii) To grant to any party to a petition leave to inspect in the presence of a prescribed officer the rolls and other documents (except ballot papers) used at or in connexion with any election and to take, in the presence of the prescribed officer, extracts from those rolls and documents;

(iv) To examine witnesses on oath;

(v) To declare that any person who was returned as elected was not duly elected;
(vi) To declare any candidate duly elected who was not returned as elected;

(vii) To declare any election absolutely void;

(viii) To dismiss or uphold the petition in whole or in part;

(ix) To award costs;

(x) To punish any contempt of its authority by fine or imprisonment.

(2) The Court may exercise all or any of its powers under this section on such grounds as the Court in its discretion thinks just and sufficient.

(3) Without limiting the powers conferred by this section, it is hereby declared that the power of the Court to declare that any person who was returned as elected was not duly elected, or to declare an election absolutely void, may be exercised on the ground that illegal practices were committed in connexion with the election.

(4) The power of the Court of Disputed Returns under paragraph (1)(ix) to award costs includes the power to order costs to be paid by the Commonwealth where the Court considers it appropriate to do so.

[...]

376 Reference of question as to qualification or vacancy

Any question respecting the qualifications of a Senator or of 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 and the Court of Disputed Returns shall thereupon have jurisdiction to hear and determine the question.
377 President or Speaker to state case

When any question is referred to the Court of Disputed Returns under this Part, the President if the question arises in the Senate, or the Speaker if the question arises in the House of Representatives, shall transmit to the Court of Disputed Returns a statement of the question upon which the determination of the Court is desired, together with any proceedings, papers, reports, or documents relating to the question in the possession of the House in which the question arises.

378 Parties to the reference

The Court of Disputed Returns may allow any person who in the opinion of the Court is interested in the determination of any question referred to it under this Part to be heard on the hearing of the reference, or may direct notice of the reference to be served on any person, and any person so allowed to be heard or so directed to be served shall be deemed to be a party to the reference.

379 Powers of Court

On the hearing of any reference under this Part the Court of Disputed Returns shall sit as an open Court and shall have the powers conferred by section 360 so far as they are applicable, and in addition thereto shall have power:

(a) to declare that any person was not qualified to be a Senator or a Member of the House of Representatives;

(b) to declare that any person was not capable of being chosen or of sitting as a Senator or a Member of the House of Representatives; and

(c) to declare that there is a vacancy in the Senate or in the House of Representatives.
380 Order to be sent to House affected

After the hearing and determination of any reference under this Part the Chief Executive and Principal Registrar of the High Court shall forthwith forward to the Clerk of the House by which the question has been referred a copy of the order or declaration of the Court of Disputed Returns.
E. Submissions

Professor George Williams AO