Excluded

*The impact of section 44 on Australian democracy*

Joint Standing Committee on Electoral Matters
Contents

Chair's Foreword ......................................................................................................................... ix
Terms of Reference ....................................................................................................................... xiii
Members ....................................................................................................................................... xv
List of Recommendations ............................................................................................................ xix
Executive Summary ...................................................................................................................... xxi

The Report

1 Introduction ............................................................................................................................... 1
   Overview ..................................................................................................................................... 1
      The Constitution ..................................................................................................................... 2
         Section 34 ........................................................................................................................... 3
         Section 44 ............................................................................................................................ 4
         Section 45 ............................................................................................................................ 5
         Section 47 ............................................................................................................................ 6
         Section 51 ............................................................................................................................ 7
      Reviews since 1901 ............................................................................................................... 8
      Issues and uncertainties ........................................................................................................ 8
      Administrative and legislative options ................................................................................. 9
      Structure of the report ........................................................................................................... 10
      Conduct of the inquiry .......................................................................................................... 11

2 The history and interpretation of section 44 ................................................................. 13
Overview ............................................................................................................. 13
The original Constitutional debates ................................................................. 13
Twentieth century proposed reforms ................................................................. 17

Committee on Constitutional and Legal Affairs–1981 ................................. 18
House of Representatives Legal and Constitutional Affairs
Committee–1997 .................................................................................................. 19
Electoral Matters Committee–2000 ................................................................. 20

High Court consideration of section 44 ......................................................... 22
Crittenden v Anderson (1950) ......................................................................... 22
Re Webster (1975) ............................................................................................ 23
Sykes v Cleary (1992) .................................................................................... 24
Sue v Hill (1999) ............................................................................................... 26
Re Day [No. 2] 2017 ....................................................................................... 26
Re Culleton [No. 2] (2017) ............................................................................ 26
Re Canavan; Re Ludlam; Re Waters; Re Roberts [No. 2]; Re Joyce; Re Nash;
Re Xenophon (2017) ....................................................................................... 27
Re Gallagher .................................................................................................... 28

3 Parliamentary qualifications and disqualifications ...................................... 31
Overview .............................................................................................................. 31
Qualifications in section 34 .............................................................................. 31
Disqualifications in section 44 .......................................................................... 33

Additional disqualifications in section 45 ....................................................... 35
Additional disqualifications already in the Electoral Act ............................... 36

What problems does section 44 cause? ......................................................... 36

Difficulty establishing compliance ................................................................. 36
Government employment ................................................................................. 38
Instability and uncertainty .............................................................................. 39
Issues specific to section 44(i) ......................................................................... 42
The timing of disqualification ................................................................. 44
The process of disqualification ............................................................. 47
Court of Disputed Returns ................................................................. 47
Common informers ........................................................................... 48
How many Australians are potentially affected? .................................. 48
Two scenarios .................................................................................... 50
The impact on future elections ........................................................... 52
Other parliaments in Australia and overseas ........................................ 53
Australian States and Territories ......................................................... 53
New Zealand ...................................................................................... 56
Canada .................................................................................................. 56
United Kingdom .................................................................................. 57
United States ....................................................................................... 57
Comparison ......................................................................................... 58

4 Reform options .................................................................................. 59
Overview .............................................................................................. 59
Early measures .................................................................................... 60
Full disclosure at time of nomination ................................................. 60
Parliament to agree to limit its referrals for potential breaches .......... 60
    Allegations of breaches arising from publicly disclosed information 61
    Allegations of breaches that were not publicly disclosed, or arise after nomination ................................................................. 61
Option 1–No constitutional change ..................................................... 61
    ‘Reasonable steps’ exception .......................................................... 63
    No unfairness or injustice .............................................................. 64
Option 2–Administrative reforms ......................................................... 65
    Due diligence prior to nomination ................................................ 66
    Assistance and advice from the Australian Electoral Commission 67
    Verifying candidate eligibility ....................................................... 69
Continuous disclosure on a register ................................................................. 71
Option 3–Legislative and procedural reforms ............................................... 73
A grace period or delayed High Court referral ........................................... 73
Reviving Parliament’s powers ......................................................................... 77
Simplifying High Court referral .................................................................... 78
Increasing the penalties to improve compliance ........................................... 79
Legislation for the automatic renunciation of foreign citizenship ............... 80
Establish a federal integrity commission...................................................... 82
Option 4–Amend s. 44 to allow the Parliament to set the rules for disqualification . 84
‘Until Parliament otherwise provides’ ............................................................ 85
Option 5–Repealing s. 44 .............................................................................. 86
Broader Constitutional amendments ............................................................. 89
The referendum process ................................................................................ 90
5 Committee view .......................................................................................... 95
Overview ........................................................................................................... 95
Underlying principles ..................................................................................... 96
Allegiance ......................................................................................................... 96
Financial conflicts of interest ....................................................................... 97
Requirement for constitutional change ......................................................... 98
Process of constitutional change ................................................................... 100
Without constitutional change ..................................................................... 101
Conclusion ....................................................................................................... 101
Recommendations .......................................................................................... 102
Appendix A. Understanding section 44.......................................................... 105
Appendix B. Extracts from the Constitution..................................................... 109
Appendix C. Senate citizenship register ........................................................ 113
Appendix D. House of Representatives citizenship register ............................ 117
Appendix E. The Court of Disputed Returns.................................................... 121
Appendix G. Further reading ........................................................................... 129
Appendix H. Submissions and Exhibits .............................................................. 131
Appendix I. Public hearings ............................................................................ 135
Minority report................................................................................................. 139
Chair's Foreword

The Australian Constitution is our nation’s guiding document and is the foundation for how our Democracy is to operate. It is our nation’s rulebook and can only be changed by Australian citizens.

Democracies, through their constitutions and founding documents, are a method of distributing and controlling power on behalf of all citizens, including determining who is qualified to nominate for election to represent them in Federal Parliament.

In 1901, Australia’s founders knew the circumstances and expectations of Australian society would change over time. To address this they ensured Australian citizens could amend the Constitution, via a referendum, to reflect contemporary expectations. But quite rightly it is not an easy process to change the rules all Australians must abide by.

The Australian Constitution provides both qualifications and disqualifications for citizens to nominate for election. Most Australians would agree there should be some basic qualifications to nominate for election to Federal Parliament and that all citizens should have an equal opportunity to nominate for election. Many would also agree the Parliament should be demographically representative of the broader Australian community.

The qualifications contained in s. 34 provide a short list of criteria required to nominate for election which include citizenship, age and an entitlement to vote. Significantly, the section allows the Parliament to update qualifications over time to meet contemporary community expectations, which it has done.

The disqualifications contained in s. 44 provide five wide-ranging categories of which, unlike s. 34, the Parliament has no ability to amend to reflect contemporary community expectations. This has led to the High Court being the only jurisdiction with the authority to interpret and adjudicate on these five disqualifications.
Problems with s. 44 are neither new nor unpredicted. 20 years of Parliamentary Committee reports and a Constitutional Convention have all predicted that without constitutional reform to parts or all of s. 44, challenges would occur to otherwise qualified and validly elected Members of Parliament.

Problems with the operation of s. 44 have come to public attention over the past year as a result of the high number of citizenship issues dealt with by the High Court. While public focus has been on the citizenship cases (s. 44(i)), two other sub-sections (s. 44(ii) and s. 44(iv)) were also the subject of High Court consideration.

In addition to the previously identified problems with s. 44, recent High Court decisions have also created new uncertainties and future opportunities to manipulate election results. Recent High Court decisions on the interpretation of s. 44 are very clear. To nominate as a candidate, all steps must be taken prior to nomination to ensure candidates are not disqualified to be on the ballot paper. These are the strict constitutional rules to be followed to ‘get the paperwork right’. The question whether or not the application of these rules meets contemporary Australian expectations is a different matter altogether.

This report summarises the significant and consistent evidence received by the Committee and provides an assessment of the range of options available to Australians on options to mitigate or fix the problems caused by s. 44. Few today would argue with the intent of s. 44, but it is the impact that is at issue.

Australian dual citizens can sit on the High Court or fight and die for our nation – but not nominate as a candidate.

One of the most important decisions for Australia to discuss is at what point should disqualifications apply – on nomination, or after election.

While the Committee recommends a referendum to once and for all fix the problems with s. 44, we acknowledge the preconditions for success will take time to achieve. Therefore, the Committee has recommended that the Government and the Parliament implement early mitigation measures to reduce the possibility of High Court referrals after the upcoming by-elections and the next general election.

The Committee makes no judgement on the dual citizenship issue itself. We believe it is one for Australians to determine as part of a wider debate in what qualities we want in our candidates standing for election and for those who are elected to serve in Parliament.

On behalf of the Committee I thank all submitters and witnesses for their significant and considered submissions to this inquiry. We also sincerely thank the talented and dedicated secretariat staff of the Joint Standing Committee on
Electoral Matters who supported the production of this report - Lynley Ducker, Siobhan Leyne, Nathan Fewkes, Danton Leary and Kelly Burt.

My sincere thanks to Mr Andrew Giles, deputy Chair of JSCEM, and all committee members for their shared commitment to work together to ensure Australia has the strongest possible democratic institutions.

This Parliamentary Committee has performed its role. It is now over to the Australian people and our elected representatives to discuss and then determine if s. 44 is still fit for purpose in contemporary Australian society.
Terms of Reference

On 28 November 2017, the Prime Minister referred the following matters for inquiry and report:

Australians must be assured that all members of the Australian Parliament are constitutionally eligible to serve. Recent High Court decisions have resulted in a number of serving Members and Senators being disqualified.

Many of these cases have involved the application of section 44(i) of the Australian Constitution to a Member or Senator who is also a citizen of another country, often without their knowledge, and as a consequence of a foreign law conferring that foreign citizenship on them by reason of their ancestry.

Australia is the most successful multicultural society in the world, and around a half of our citizens were either born overseas or have a parent born overseas. These Australians may be citizens of another country and, as we have seen with several Members and Senators, not be aware of it.

Other Senators, Members and candidates have been disqualified, or had their eligibility questioned, on the basis that they hold an "office of profit under the Crown" (section 44(iv)) or have a "direct or indirect pecuniary interest" in an "agreement with the Public Service of the Commonwealth" (section 44(v)). Many Australians who wish to serve in the Parliament may be at risk of disqualification under these provisions, and may be discouraged from participating in the electoral process.

Accordingly, the following matters are referred to the JSCEM:

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);

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);

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);

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

E. Any related matters.

The Committee is requested to report to Parliament with respect to section 44(i) by 23 March 2018, and with respect to any other provisions of section 44 by 30 June 2018.
Members

Chair
Senator Linda Reynolds LP, WA

Deputy Chair
Mr Andrew Giles MP Scullin, VIC

Members
Senator Carol Brown ALP, TAS
Mr Scott Buchholz MP Wright, QLD
Mr Milton Dick MP Oxley, QLD
Senator Chris Ketter ALP, QLD
Mr Ben Morton MP Tangney, WA
Senator Barry O’Sullivan Nationals, QLD
Senator Lee Rhiannon Australian Greens, NSW
Mrs Lucy Wicks MP Robertson, NSW
Participating members for the inquiry

From 7 December 2017 –
Senator David Leyonhjelm

From 5 February 2018 –
Senator Andrew Bartlett
Senator Richard Di Natale
Senator Lucy Gichuhi
Senator Sarah Hanson-Young
Senator Nick McKim
Senator Jim Molan AO, DSC
Senator Janet Rice
Senator Rachel Siewert
Senator Jordan Steele-John
Senator Peter Whish-Wilson
Secretariat

Secretary  Ms Lynley Ducker
Inquiry Secretary  Mr Nathan Fewkes
                  Ms Siobhán Leyne
Research Officer  Mr Danton Leary
Administration Officer  Ms Kelly Burt
List of Recommendations

Recommendation 1

5.45 The Committee recommends that the Australian Government prepare a proposed referendum question to either:

- repeal sections 44 and 45 of the Constitution; or
- insert into sections 44 and 45 the words: ‘Until the Parliament otherwise provides…’

Recommendation 2

5.46 If the referendum passes, the Committee further recommends that the Australian Government further engages with the Australian community to determine contemporary expectations of standards in order to address all matters of qualification and disqualification for Parliament through legislation under section 34 of the Constitution.

Recommendation 3

5.47 In the event that a referendum does not proceed or does not pass, that the Australian Government consider strategies to mitigate the impact of section 44 as outlined in this report.

Recommendation 4

5.48 The Committee recommends that the Government consider the implications of this report in the context of the upcoming by-elections, in particular the options outlined in Chapter 4.
Executive Summary

In 2017, s. 44 of the *Australian Constitution* became the subject of national attention when a number of Senators and Members were either found by the High Court to be ineligible to sit, or resigned due to factors relating to potential ineligibility. As a consequence, three by-elections have been held, four more are scheduled to fill seats in the House of Representatives, nine Senators have been replaced, and a vacancy now exists for a senator for the ACT.

**Impact of section 44**

Until this time, there have been few High Court cases concerning s. 44 meaning recent judgments have provided the best understanding of the Court’s interpretation of its operation. We now know that:

- A person who has a criminal conviction which is later quashed can be ineligible.
- A person who holds or is eligible for dual citizenship cannot nominate as a candidate and serve in Parliament. With eligibility for foreign citizenship subject to the laws of other countries, the eligibility of elected members of the Australian Parliament is therefore subject to foreign laws.
- An employee in the public sector must resign their employment to nominate for election.
- A person who holds or gains Commonwealth employment after the election has been declared, may not be eligible for a vacancy that arises in the Parliamentary term.

- While public commentary has focussed on whether dual citizens should be allowed to serve in our national Parliament, the consequence of the
Court’s recent rulings is that many ordinary Australians are now ineligible to stand for election by virtue of their citizenship status or employment as a public official (including nurses, firefighters and teachers). This debate reaches far beyond the focus of public commentary to date, that members of the 45th Parliament ‘should have got their paperwork right’.

**Impact on individuals**

- Below are some examples to highlight the problems and barriers addressed in the report. Most are based on real situations.

**Lack of records—44(i)**

Liz has no records of her father’s birth or childhood. Her father himself told various, contradictory stories about where he came from, including a suggestion that he changed his name as a teenager. Her father died over a decade ago and, despite searching, Liz has not been able to find any further records. She is having second thoughts about running for Parliament, knowing that she would be under constant threat of someone uncovering information about her father that might lead to her disqualification under s. 44.

**Stolen generation—44(i)**

Christine, a Gadigal woman, has won a position in the Senate. Her mother was part of the stolen generation and has no records of her, or her parent’s birth. There is a family rumour that Christine’s grandfather is Irish, but nobody really knows for sure. Although Christine has no disqualifications that she knows about, and had been a Senator for three years, she is in constant jeopardy that the identity of her grandfather will be discovered and she will be disqualified.

**Government employment—44(iv)**

Matthew is employed by the Federal government in an ATO call centre. He resigned to contest the Senate election, but wasn’t successful and the expense cost him and his family significantly in lost income and associated benefits. Under the *Public Service Act*, Matthew has the right to return to his work. However he knows that if he does return to work, he will not be able to fill any vacancy in the Senate that might come up in the next six years. He has to choose between a secure job and the chance of a Senate seat.

**Children—44(i)**
Emily is a young woman who aims to make a career out of politics. She was born overseas and came to Australia as a toddler. Emily is passionate about Australia and committed to building links with the community of her country of origin. She is initially happy to give up her foreign citizenship in order to enter Parliament, but then she realises that it will also take away foreign citizenship by descent for her future children. She is not sure that she should make that choice for them simply because she has nominated as a candidate and is unlikely to be successful.

**Local businesses—44(v)**

Adam has a courier business in a regional town, including several contracts with the local offices of the State and Commonwealth government. Adam wants to nominate for Parliament in an unexpected by-election, but only has eight weeks to rearrange his business affairs. He could cancel the contracts or sell his business; but both would mean serious financial loss. Adam considers ‘selling’ the business to his brother, but knows that every action he takes could later end up in the High Court, having devastating consequences for his family finances.

**Political expediency—44(i)**

An incoming government has a large majority in the House of Representatives, and a majority of one in the Senate. The new government is undertaking a sweeping program of major reforms when it is discovered that the British citizenship renunciation of one of the government Senators did not take effect until a month after the nomination. This is clearly a breach of s. 44, but the Senate votes down a referral to the High Court on the grounds that Australia urgently needs the major reforms.

**Foreign interference?—44(i)**

Jessica has applied to renounce her foreign citizenship well in advance of the next federal election. She has filled in her forms, and supplied all the documentation. The foreign bureaucracy has asked for more particulars, including the reason for requesting renunciation. Jessica has complied with every request made by the foreign bureaucracy and followed up the progress of her application regularly. It has already taken over a year and many thousands of dollars which she has taken out a loan to pay. However, her application is still ‘awaiting decision’. She wonders if this could have anything to do with several articles she wrote in her local paper criticising some of the country’s policies.

**Helping out—44(v)**
Jack has been involved in his local community for decades. He is currently on the boards of several government-funded organisations; including a school and a nursing home. Jack receives money for expenses from some of these organisations. He does not know whether this is the kind of ‘pecuniary interest’ that would breach s. 44 of the Constitution. He seeks legal advice and help from his political party but the advice is not conclusive. He hears that ‘no-one knows what the High Court will do’ if this was challenged after the election. He decides not to take the risk.

**Criminal conviction—44(ii)**

Gary is a popular local community leader and has been convicted of destroying property (a fence) as a result of a neighbourhood dispute. This carries a possible term of imprisonment of up to five years in NSW, but Gary is unlikely to go to prison. Gary is waiting for a sentencing date. He can’t nominate if he is ‘subject to being sentenced’ at the time without the risk of breaching s. 44(ii). He thinks his ability to stand for Parliament shouldn’t rely on court scheduling – he wants the voters to decide if he is suitable as he believes his local community understands the circumstances of his dispute.

**Failed businesses—44(iii)**

Erin is a young entrepreneur who has attempted several start-ups, both successful and unsuccessful. Two years ago she declared bankruptcy and will have discharged her obligations before the election. She doesn’t think that one unsuccessful business venture should prevent her from nominating for Parliament as she has learnt a great deal from the experience.

**Historical context**

- The report also examines the history of s. 44, its insertion in the original Constitution and the many calls for its change by successive Constitutional Conventions and parliamentary committees. When considering this history, it is clear that s. 44 impedes our democracy, in ways never contemplated by our founders.

- In contrast, s. 34, which provides the qualifications of parliamentarians, includes the clause ‘until the Parliament otherwise provides’. This clause has allowed the Parliament to deem the original qualifications set out in s. 34 in 1901; that he be 21 years old and a subject of the Queen (Victoria), naturalised under the law of the United Kingdom, or a
colony, should more appropriately be any Australian citizen who has reached the age of 18 and is an eligible elector.

- The absence of this clause in s. 44 means that it remains a reflection of the societal standards established in 1901, under Queen Victoria’s rule. The report finds that ss. 44 and 45 should be either repealed or amended to insert the clause ‘until the Parliament otherwise provides’.

- The Constitution was written at a time when Australian citizenship did not exist and when the ‘foreign power’ referred to in s. 44(i) meant those foreign powers beyond the borders of the British Empire. In many ways this meant allegiance required of Parliamentarians then was much broader than contemporary expectations. It was allegiance to the Empire.

- It is also clear from historical evidence drafters of the Constitution originally considered framing s. 44(i) to only apply when there had been active steps taken to acquire foreign allegiance or citizenship. This was then amended without debate to allow disqualification to occur through the passive conferral of citizenship. This potentially allows foreign governments to determine who is disqualified for the Australian Parliament.

- There is no evidence that our founders intended s. 44 to apply to those seeking to nominate as well as those elected to Parliament.

- Evidence suggests s. 44 was drafted in haste, in the last day of the final session of the Constitutional Convention in 1898, and ‘accepted out of weariness.’ ¹ If this is the case, we as a nation, should not be unwilling to engage in a debate to challenge its operation to reflect the values of a modern Australia.

The way forward

¹ Dr Hal Colebatch, Submission 24, p. 4.
• The report makes no comment on what today should be the most appropriate qualifications and disqualifications for parliamentarians. This is a matter that should be decided after a national, and parliamentary, debate. It is for the Australian public to decide on the qualifications of their elected representatives.

• The report observes that, under the provisions of s. 44, and the High Court’s interpretation of s. 44, the Australian community, and the Australian Parliament, have no capacity to debate the appropriateness or inappropriateness of existing Parliamentary disqualifications.

• In the Committee’s view, this should be rectified.

• The rulings by the High Court have also exposed the electoral system to the risk of manipulation, where a successful candidate could have their election challenged on the basis of preference flows from an ineligible candidate. This raises the possibility of deliberate manipulation of disqualification rules to overturn an otherwise valid election. Even the suggestion of this type of manipulation is an unacceptable risk to our democratic process.

• Many commentators have suggested the Australian Electoral Commission (AEC) be required to vet candidates for eligibility under s. 44. This Committee believes this would expose the AEC to accusations of bias, which is untenable in a free and fair democracy. Having the organisation responsible for running elections decide the eligibility of candidates would undermine the independence of the AEC. We must be able to trust in the impartial delivery of our elections in order to trust election results.

• The Committee considers that ss. 44 and 45 should be either repealed or amended to insert the words ‘until the Parliament otherwise provides…’ This would allow the sections to be amended to reflect contemporary expectations of the Australian community, as is the case with similar sections in the Constitution.
The Committee believes that current, and future, generations should be able to debate and set the expectations of their Parliamentarians.

The Committee understands that the pre-conditions for a successful referendum on this issue will take time; time that is not available before the upcoming by-elections and the next general federal election. Therefore, the Committee has recommended a range of measures to mitigate the short-term impact of s. 44 on these pending by-elections, and the next federal election. These measures are designed to act as an interim solution until Australians have had the opportunity to discuss and debate who they want to be able to nominate for Federal Parliament, and how that can be achieved under our Constitution.

We, as Australians, should never be reluctant to test and debate the health of our democracy, particularly when an issue has created as much disruption as s. 44 has in the past year. We, as members of Parliament, should never be afraid of the debate and putting these questions to the Australian public.
1. Introduction

Overview

1.1 In this inquiry the Committee has investigated and reported on the impact of s. 44 of the Constitution. The Prime Minister referred this inquiry to the Committee after a number of serving Senators and Members of Parliament were disqualified under s. 44.

1.2 Although the potential for s. 44 to disqualify serving parliamentarians has been known for many decades, the impact on representative democracy in Australia is only now becoming clear.

1.3 The recent High Court decisions have clarified the breadth of scope of s. 44. It is now apparent that s. 44 is increasingly acting as a barrier to political participation for large sections of the Australian community.

1.4 This report sets out the historical background of s. 44, describes the current situation, explains the ramifications of taking no action, and explores options for reform.

1.5 It does not make any judgement as to the appropriateness of dual citizen–or any other currently disqualified persons–sitting in the Federal Parliament. However, it does conclude that under s. 44 as it currently stands, the Parliament and the Australian community more widely, have no capacity to debate the appropriateness or inappropriateness of existing Parliamentary disqualifications, and make any changes to reflect contemporary expectations.

1.6 The current debate has centred on disqualification for dual citizenship. The Constitution uses citizenship as a way of measuring a person’s allegiance to Australia. The Committee agrees that allegiance is essential; but considers it
is time to update this qualification for Parliament to reflect contemporary community standards.

1.7 The Committee has considered this inquiry along the same principles that it has applied to other electoral reform, namely does it enhance our democracy through:

- **clarity** about what is required and by whom;
- **consistency** of regulations to support a level playing field;
- **compliance** through enforceable regulations with minimal, practicable compliance burdens.

1.8 When considered in these terms, as is explored throughout the report, s. 44 imposes obligations on potentially half of all Australians which would prevent them from what should be their fundamental right in a democracy–nominating to stand for election. For those who can remove their disqualification—for example, renounce foreign citizenship—this process could take months or even years and many thousands of dollars to complete, and may be impractical to complete in time for an election.

1.9 The disqualifying provision of dual citizenship has been the focus of recent debate on s. 44. The Committee has made no findings on whether dual citizens should be able to sit in Parliament. However, the current wording of s. 44 does not allow this to be debated and updated. The Committee states quite clearly that the qualifications to enter Federal Parliament should meet contemporary expectations and that this, and future generations, should be able to debate and set those expectations.

**The Constitution**

1.10 Democracy is a method of distributing and controlling national power on behalf of all citizens. The Australian Constitution is the foundation document that provides the rules on how our democracy should operate. A fundamental democratic rule is that which determines who is qualified to represent other citizens in Federal Parliament.

1.11 The Constitution is Australia’s founding document and provides the basis for our democratic political system. Australia’s Constitution was drafted at a series of constitutional conventions in the 1890s and took effect on 1 January 1901, when Australia became a federated nation.
1.12 The Constitution is the legal framework for how Australia is governed. The Constitution is a supreme law overriding other laws\(^1\) and it can only be changed by referendum. Only the Australian people have the power to decide whether it should be amended, following support of the proposal by Parliament.

1.13 The Constitution was intended to be a living document that reflects who we were as a nation in 1901. Since its drafting, the Constitution has been debated at constitutional conventions and has been amended eight times—reflecting our evolving nation as we grew from our colonial past into a vibrant, modern, multicultural nation.

1.14 The Constitution was drafted during a series of constitutional conventions in the 1890s. Although some aspects of s. 44 were debated, some of the most problematic—for example removing the limit on disqualification to only those who take positive steps to obtain foreign citizenship—were introduced at the last minute and without debate.\(^2\)

1.15 More information on the Constitutional debates is in Chapter 2.

**Section 34**

1.16 Section 34 of the Constitution provides for the qualifications necessary to be a Member of the House of Representatives or a Senator. In the Constitution, it states the these qualifications are:

   he must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such an elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen;

   he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become a or becomes a State, or of the Commonwealth or of a State.

1.17 Unlike s. 44, these qualifications only apply ‘until the Parliament otherwise provides’. This phrase exists in many clauses of the Constitution, and recognises that, as time passes, Parliament should be able to legislate to

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amend and update the wording in the Constitution to reflect community standards.

1.18 Parliament has legislated to change the qualifications in s. 34 through the *Commonwealth Electoral Act 1918*. This is discussed further in Chapter 3.

**Section 44**

1.19 Unlike the constitutions of many other democracies, in addition to qualifications, the Australian Constitution also has a section on disqualifications. Section 44 sets out who is disqualified to stand as a candidate or serve as a Member of Parliament. More information about the separate subsections is in Appendix A ‘Understanding Section 44’.

1.20 Section 44 works in conjunction with s. 45, which includes two additional disqualifications that only apply to Parliamentarians once they are elected.

1.21 Considering s. 44 in conjunction with recent High Court rulings, it becomes clear that this is more than just a matter of ‘paperwork’. Large sections of the Australian community are disqualified from nominating for election, despite being eligible under s. 34. Some of those automatically disqualified from nominating under s. 44 may be able to address the reasons for disqualification by quitting their public sector job or successfully renouncing a foreign citizenship before nomination, but many will never be able to. With the changing demographic of our nation, s. 44 will increasingly disenfranchise more and more citizens from nominating.

1.22 Ironically, while the reason in 1901 for disqualifying dual citizens was to prevent foreign allegiance, in practice s. 44(i) today effectively outsources eligibility to nominate to the citizenship laws of foreign nations. This permits foreign laws to determine who is capable of nominating for and sitting in the Australian national Parliament. Any country can amend its citizenship laws and unknowingly make Australians ineligible to put themselves forward for election, in some cases without their knowledge.

1.23 This restriction on dual citizens does not apply to other public roles in the Commonwealth; for example judges, senior military officers or heads of public service departments.

1.24 The High Court has held that a person who takes ‘reasonable steps’ to renounce his or her foreign citizenship can comply with s. 44. This is a

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3 As otherwise provided for under s. 163 of the *Commonwealth Electoral Act 1918*.

sensible modification of the strict requirements of s. 44, particularly in cases where foreign countries do not allow renunciation. The High Court gave further clarification of what are ‘reasonable steps’ in the recent judgement in Re Gallagher.

1.25 Section 44 also disqualifies persons who have been convicted of an offence punishable by more than one year’s imprisonment, and persons who are an undischarged bankrupt or insolvent—denying the right of electors to assess the worthiness of a candidate.

1.26 It also disqualifies those who hold an ‘office for profit under the Crown’, accepts a ‘pension’ from the Crown or has a pecuniary interest in agreement with the Public Service. The finances of the Commonwealth spread far further in 2018 than they did in 1901. Section 44 disqualifies teachers, nurses, firefighters and anyone with a Commonwealth contract—unless they quit their job simply to nominate and have a go.

1.27 For reasons lost to time, unlike s. 34, s. 44 does not contain the words ‘until the Parliament otherwise provides’. Parliament therefore cannot legislate to override s. 44. As discussed in Chapter 3, this entrenchment of parliamentary qualifications is unusual in a western democracy, including within the States and Territories of Australia.

1.28 Under the existing interpretation of the words of s. 44 by the High Court, a person must be qualified at the time of nomination, not election. The requirement that a candidate rearrange their affairs at nomination—regardless of the chance of success—places an additional barrier to Australians who may wish to participate in the political process.

1.29 In practice, the Constitution, as written and interpreted by the High Court, diminishes the range of candidates available to serve in the democratically elected federal Parliament at the very time many argue that the Parliament should be more, not less, representative.

Section 45

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5 See Chapter 3 for explanation of this term.

6 The Defence (Parliamentary Candidates) Act 1969 and the Public Service Act 1999 provide that defence force personnel and public servants have a right of return to employment if they resigned specifically to contest an election in which they were unsuccessful. It has not been tested in the High Court whether the implied continuation of employment in these legislative provisions would be in breach of s. 44(iv).
1.30 Section 45 provides for the creation of a vacancy if any Senator or Member of the House of Representatives becomes disqualified under s. 44, or if a Senator or Member:

- takes the benefit of bankruptcy laws - s. 45 paragraph (ii).
- takes a fee or honorarium for services rendered to the Commonwealth - s. 45 paragraph (iii).

1.31 Section 45 is dependent on s. 44 for the operation of subsection 45(i). The Committee has therefore included both s. 44 and s. 45 in its inquiry and final recommendations.

**Section 47**

1.32 Section 47 gives the power to either House of Parliament to determine the question of the qualification of its members, ‘until the Parliament otherwise provides’. The Parliament has ‘otherwise provided’ in Part XXII of the *Commonwealth Electoral Act 1918*. This Part sets out a process to refer questions respecting the qualifications of Members and Senators to the Court of Disputed Returns for decision.

1.33 A referral under s. 47 may be made by a motion of either House at any time that the Houses become aware that one of its members has become subject to any of the ‘disabilities’ (disqualifications) in s. 44. This is contrast to the process under the Electoral Act, which has a limitation of 40 days for the filing of a petition to the Court of Disputed Returns.

1.34 Motions to refer Members or Senators under s. 47 have been defeated in the House and the Senate. For example, the House of Representatives took the position not to make a s. 47 referral in the case of the Member for Leichhardt after a suggestion that he may be ineligible under s. 44(v).

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7 The Constitution, s. 45.
8 See Appendix B for full wording of this section.
9 As set out at ss. 376-381 of the Electoral Act.
10 Which can be made by any candidate or qualified voter.
11 No details are known on the times that motions to refer were not put, however motions to refer have been negatived on three separate occasions and reversed on one occasion in the House, and negatived on one occasion in the Senate. In total, 13 Members and one senator were the subject of these motions.
1.35 There have also been occasions when motions to refer were called for in debate, but not formally put.

1.36 In the case of the Member for Leichhardt, the House relied on advice given to the Attorney General by the acting Solicitor-General. The advice stated that, in his opinion, the Member for Leichhardt was eligible due to the High Court’s previous ruling in *Re Webster* (see Chapter 3).

1.37 Similar advice was reportedly provided by the Solicitor-General in 2017 regarding the eligibility of the Member for New England and used as the basis for the House initially refusing to refer him under s. 47. The Member was later referred by the House, and the High Court found him ineligible under s. 44(i).

1.38 There is no way to challenge a decision of the Houses to refer or not to refer. Indeed, when ruling on the motion to refer the Member for Leichhardt, the Speaker took the view that he could not take decisions that limit the rights or powers of the House and that it should be ‘a master of its own destiny.’

1.39 The Constitution also establishes the right of each House to determine its own powers, privileges and immunities (section 49) and confers the absolute right to make rules for how it conducts its business (section 50). These are fundamental principles of the separation of powers in the Westminster system.

1.40 The Houses may restrict themselves in how and when referrals are made under s. 47, however restrictions cannot be imposed by the Executive or the High Court. Any moves by the Houses to restrict or diminish their rights in this regard would have to be considered cautiously.

**Section 51**

1.41 Section 51 of the Constitution sets out the legislative powers of the Commonwealth Parliament, often referred to as the ‘heads of power’. Section 51 (xxxvi) gives the Commonwealth Parliament the power to legislate for ‘matters in respect of which this Constitution makes provision until the Parliament otherwise provides.’

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14 *House of Representatives Practice* 6th Edn, p. 192.

15 Although they may not create a new privilege.

16 Emphasis added.
1.42 In including this clause throughout the Constitution, the original drafters recognised that the Constitution had to be a living document. Ten of the 60 clauses in Chapter 1- The Parliament contain this clause and without it the Constitution would still require our elected parliamentarians to be men over the age of 21.

1.43 It is unknown why s. 44 omits this clause, although—as will be discussed in Chapter 2—s. 44 was a last-minute addition to the draft Constitution.

**Reviews since 1901**

1.44 Section 44 has been the subject of several inquiries and reviews, including:

- A 1981 inquiry by the Senate Standing Committee on Constitutional and Legal Affairs;
- The 1976, 1983 and 1985 sessions of the Constitutional Convention;
- The 1988 final report of the Constitutional Commission; and
- A 1997 inquiry by the House of Representatives Legal and Constitutional Affairs Committee.

1.45 Most of these reports recommended significant changes to s. 44, including complete repeal. All the inquiries heard evidence on the increasing number of Australians who would be disenfranchised by s. 44, and the future problems that would be caused by the breadth of the provision and the inability to amend it.

1.46 These inquiries show that the current problems caused by s. 44 were not unforeseen, and will certainly re-occur if nothing is done.

1.47 These inquiries and reviews are discussed in more detail in Chapter 3.

**Issues and uncertainties**

1.48 In this report, the Committee has identified a number of issues with the operation of s. 44 that have been known for decades. However, the recent decisions by the High Court, and the increased focus on these issues, have presented new challenges and uncertainties, many of which will only be clarified on referral to the High Court.

1.49 These uncertainties exist for both voters and candidates. Many issues have not been tested and will need to be examined by constitutional and parliamentary law experts. For example:

- Can a political party manipulate an election by deliberately nominating an ineligible candidate and then contesting the successful candidate on
the basis of preferences? Could a foreign government support a
candidate to do the same?

- Could Parliament refer a member under s. 47 for a disputed election on
  the grounds of preference flows from an ineligible candidate, even if the
  member themselves was not disqualified?
- Will the increasing extent of ‘invisible’ investments such as
  superannuation schemes result in more exposure to pecuniary interests
  under s. 44(v)?
- Could decisions to refer, or not refer, under s. 47 result in increased
  reputational damage to the Parliament? How would the public perceive
  inconsistent decisions made by the House and the Senate, or by different
  Parliaments over time?
- What if the House or the Senate decides not to refer a person under s. 47
  on the grounds that they do not believe he or she is disqualified, but the
  matter is taken to the High Court under the Electoral Act on the same
  grounds after a subsequent election? What are the legal, reputational
  and constitutional implications of two different decisions on the same
  facts?
- Could a foreign government deliberately use s. 44(i) to
  extend
citizenship to destabilise the federal Parliament?
- After the decision in Re Gallagher, can a person avoid disqualification
  because their renunciation is impossible for personal, rather than legal,
  reasons; for example, if the relevant paperwork does not exist by reason
  of being part of the stolen generations, or a refugee, or adopted?
- Will the increased focus on s. 44 result in an increased number of
  disputes and referrals to the High Court, and a consequent delay in
  decisions? How will that uncertainty affect confidence in Australian
  democratic processes?

Administrative and legislative options

1.50 The Committee inquired into all possible options to resolve the problems
caused by ss. 44 and 45. Although some measures may ameliorate the
impact of these sections, it is the Committee’s view that Australia should
start afresh with a new, modern, scheme for determining the qualifications
of federal Parliamentarians.

1.51 In particular, the Committee looked carefully at the frequently-made
suggestion of asking the Australian Electoral Commission (AEC) to vet
candidates before an election. The Committee does not support this
proposal. It is vital to our democracy that the body responsible for running
elections is not involved in any process of vetting or clearing candidates that could result in the perception that the AEC is deciding who nominates for an election. This is further addressed in Chapter 4.

1.52 The Committee has also considered the urgency of s. 44 in relation to the five upcoming by-elections for the House of Representatives, and the general election. The Committee has recommended that the Government take specific early measures to improve compliance with s. 44 in these elections.

1.53 These measures would improve trust and confidence in the electoral process and provide additional certainty for the electoral outcomes. They would also provide the Australian community with more time and opportunity to have a wide-ranging debate before any referendum to amend the Constitution is put.

Structure of the report

1.54 Chapter 2 provides historical context to the drafting and inclusion of s. 44 in the Constitution. It also gives an overview of the relevant High Court cases that result in the effect s. 44 has today.

1.55 Chapter 3 moves to more technical matters and discusses the qualification and disqualifications to stand for federal Parliament. The chapter sets out the problems caused by s. 44 and gives two scenarios that show the potential impact. The chapter also includes a comparative analysis of qualifications for Parliament in other jurisdictions—both in Australia and overseas—showing that the Constitution has comparatively onerous and unusual requirements.

1.56 Chapter 4 discusses the options for reform examined in this inquiry. The majority of witnesses favoured amending s. 44 through a referendum. This raises further issues:

- What questions could be proposed at a referendum?
- Could a referendum propose amendments to other sections of the Constitution related to parliamentary qualifications?
- Could a referendum succeed?
- How might the form of the question affect its success at referendum?

1.57 Several witnesses and submissions did not support amending the Constitution. The inquiry terms of reference asked the Committee to consider options that do not require constitutional change; for example, improvements to process or amending legislation. All these options are set out in Chapter 4.
1.58 Chapter 5 outlines the Committee’s position on s. 44 and the next steps following this inquiry.

1.59 To assist readers, much of the technical information has been taken out of the body of the report and put in the following appendices:

- A Understanding Section 44
- B Extracts from the Constitution
- C Senate citizenship register
- D House of Representatives citizenship register
- E The Court of Disputed Returns
- F Extracts from the 1976, 1983 and 1985 Constitutional Conventions
- G Further reading

Conduct of the inquiry

1.60 The terms of reference required the Committee to report with respect to s. 44(i) by 23 March 2018, and with respect to any other provisions of s. 44 by 30 June 2018. The Committee decided to address all aspects of s. 44 in a single inquiry and report.

1.61 The Committee held six public hearings in Canberra, Melbourne, Sydney, Adelaide and Perth. It received 71 submissions from constitutional law experts, community organisations and interested members of the public. Participants in the inquiry are listed in appendices H and I.
2. The history and interpretation of section 44

Overview

2.1 In considering s. 44, it is important to understand why it was included in the Constitution, and the intent of the drafters. This Chapter:

- gives a brief overview of the relevant constitutional debates and historical context;
- discusses the clause ‘until the Parliament otherwise provides’ and its omission from s. 44;
- provides an overview of reviews of s. 44; and
- outlines the High Court cases that have resulted in the current interpretation of s. 44.

2.2 The historical debates are set out in some detail, as they show that the original intent was for s. 44(i) to only apply if an individual took active steps to obtain foreign citizenship. There is also no evidence it was meant to apply to candidates as well as elected members and Senators. Instead, last minute amendments resulted in the current clause, which also includes citizenship gained passively. As discussed in Chapter 3, this means that foreign governments can determine disqualification for the Australian Parliament through their citizenship laws.

2.3 Further reading relevant to this Chapter is at Appendices A and F.

The original Constitutional debates

2.4 The Constitution was drafted and debated during a series of constitutional conventions in the 1890s and finalised in Melbourne in early 1898.
Establishing both the qualifications and disqualifications of members of Parliament was a contested proposition. In the end, s. 44 was agreed in the final session of the convention.

2.5 Delegates considered an amendment to include the words ‘until Parliament otherwise provides’ in s. 44 for disqualifications, as they had for qualifications in s. 34. This amendment would have allowed Parliament to determine the grounds for both qualifications and disqualifications at a later time; however, for reasons not clear to the Committee today, it was defeated 26 votes to 8.

2.6 The convention debates show that delegates were confident that s. 44 would never need changing as it provided a basic safeguard to parliamentary integrity and national sovereignty.1 Their assumption, at a time when Australian citizenship did not exist, appears to be that societal expectation of its qualifications would not change. In evidence to the Committee, Dr Hal Colebatch commented that the debate had a ‘very primitive anti-foreigner sentiment running through it’.2

2.7 Mr Patrick Glynn—who moved the amendment to s. 44 to include ‘until Parliament otherwise decides’—suggested the federal Parliament would always endorse the same general principles and saw no harm in allowing flexibility. He argued that s. 44 had a temporary purpose, ‘to cover the gap between the adoption of the constitution and the passing of special legislation by the federal parliament.’

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2.8 Mr Glynn also added that the Australian colonies had different legal
definitions of who is a bankrupt or a criminal (relevant to ss. 44(ii) and (iii)):
‘I say that this is a matter for the federal parliament, and that it ought not to
be fixed perpetually in the constitution.’ He said the meaning of words
could change and that this would ‘put it in the power of the state
parliaments to either extend or diminish the qualification’.
The Hon Sir Edmund Barton (who later became Australia’s first prime
minister) did not agree and argued:

These limitations having been put in all constitutions of the Australian
colonies, and having worked well, and prevented the entry of undesirable
persons into parliament, they may well be continued in the constitution we are
now framing.

2.9 Sir Edmund Barton continued:

This is not merely a case of preserving the freedom of the electors, but of
preventing them from being imposed upon by persons who otherwise might
creep into parliament... who were under other conditions of which they
should rid themselves before they offered themselves for election to any
legislative assembly.

2.10 Mr Glynn and, in similar terms, the Hon Sir Adye Douglas, countered that
the federal Parliament should be trusted to alter or repeal the section as
required. Mr Glynn noted that the federal constitution would be more
difficult to amend than the colonial constitutions:

In most of them an amendment can be made, if it is carried by a two-thirds
majority of the houses, and a resolution is passed asking for the royal assent to
it. ... I think, the fact that we have similar provisions in our constitutions
should not determine our decision in regard to this matter.

2.11 Foreign infiltration was also discussed. The Hon Sir Simon Fraser said:

A foreigner might get into our parliament, and sell our defence secrets to a
foreign power. We must look forward to the time when we will be a powerful
nation... Would a foreign country allow a Britisher to go into its parliament?
There would not be the slightest chance, and their laws will scarcely allow a
foreigner to travel through their country.

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3 For further detail on this point, see Professor George Williams AO, Dr Sangeetha Pillai and Mr
2.12 This perspective reflected British law at the time. The 1893 edition of Erskine May’s manual on parliamentary practice in the House of Commons stated:

An alien is disqualified to be a member of either House of Parliament. The Act 12 & 13 Will. III c. 2, declared that ‘no persons born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalised or made a denizen, except such as are born of English parents) shall be capable to be of the privy council, or a member of either House of Parliament.’

2.13 It is worth noting that the concept of ‘foreign country’ at the time of the original constitutional debates referred to those countries not within the British Empire. Today we hold a much narrower concept of ‘foreign country’ meaning any country that is not Australia. It is unlikely that any person would now follow the example of Sir George Reid; who, as a citizen of the British Empire, was the fourth Prime Minister of Australia (1901-04) before being elected to the United Kingdom House of Commons in 1916.

2.14 While Mr Glynn’s amendment to include ‘until Parliament otherwise decides’ failed to pass, Sir Edmund Barton successfully initiated a subsequent amendment to s. 44(i), among a suite of 400 other changes to the draft Constitution dealt with on the second-last day of the final session in Melbourne in 1898.

2.15 This amendment included changing 44(i) from the previous version, where only active steps in taking foreign citizenship would trigger the disqualification provision. In the final version, any citizenship or foreign allegiance whether sought or unsought would be caught by s. 44(i). This meant that no active steps needed to be taken.

2.16 In a joint submission to this inquiry, Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs (private capacities) commented that the late change made s. 44(i) distinct from other British Commonwealth constitutions, which ‘tended to disqualify a person from Parliament only where they had taken positive steps to acquire a foreign citizenship or

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4 Sir Thomas Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (10ed), Butterworths, London, 1893, p. 27. Several witnesses noted that the UK Parliament has since dispensed with this requirement and only requires its members to be Commonwealth citizens.

5 Dr Hal Colebatch, *Supplementary Submission 24.2*, p. 7.
allegiance.’ Dr Colebatch said there was ‘no explanation’ for changing the text and ‘the whole clause was just waived through.’ He submitted:

That there was a new text was not acknowledged, and it was not debated, but was taken on trust, the delegates relying on Barton’s assurance that it was simply a clarification of their intentions.

2.17 In an attachment to his submission Dr Colebatch further observes:

After four days of drafting, Barton presented the convention, on its second-last day, with 400 amendments. He proposed a three-hour break for the delegates to study them, after which they could be put to the vote en bloc.

Barton assured the convention that there was only one amendment of substance—to s. 44(ii). What he did not say was that s. 44(i) had been completely rewritten, changing it from an active voice (“done any act whereby”) to a passive voice (“is a subject or citizen … or is entitled to”).

No attention was drawn to this change, there was no explanation of it, and there was no time for debate on any clause unless someone objected to it. The constitutional text that proved so significant more than a century later was a last-minute change, drafted in private and accepted out of weariness.

Twentieth century proposed reforms

2.18 The operation of s. 44 did not garner much attention in Australian political and constitutional discourse until after the creation of Australian citizenship in 1949. Until that point, all Australians remained citizens of the British Empire. Since 1949, s. 44 has been the subject of several inquiries and reviews.

2.19 These reviews all identified problems with the operation of s. 44 and accurately predicted an increased number of future disqualifications.

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6 Professor George Williams AO, Dr Sangeetha Pilliai and Mr Harry Hobbs, Submission 36, p. 2. As examples, the submission cited the British North America Acts of 1840 and 1867 and the New Zealand Constitution Act of 1852.

7 Dr Hal Colebatch, Committee Hansard, Perth, 20 February 2018, p. 17.

8 Dr Hal Colebatch, Supplementary Submission 24.1, p. 3.

9 Dr Hal Colebatch, ‘How the Australian Constitution, and its Custodians, Ended Up So Wrong on Dual Citizenship’, the Conversation, 6 February 2018, at <theconversation.com/how-the-australian-constitution-and-its-custodians-ended-up-so-wrong-on-dual-citizenship-91148>, viewed 19 April 2018. See also Dr Hal Colebatch, Submission 24, p. 4.
Despite this, no action was taken on the three parliamentary committee inquiries recommending reform.

**Committee on Constitutional and Legal Affairs–1981**

2.20 In 1981 the Senate Standing Committee on Constitutional and Legal Affairs made recommendations that included the following:

- s. 44(i) and (iii) be deleted;
- s. 44(ii) be amended to cover treason only;
- s. 44(iv) be amended to clarify the types of employment covered by the clause and include the proviso that those covered by the clause ‘shall be deemed to have ceased such employment or resigned such membership at the date he or she becomes entitled to an allowance under s. 48 of this Constitution’;
- s. 44(v) be deleted and replaced with a clause allowing Parliament to legislate on members’ interests and whether these are improper; and
- Amending ss. 34 and 45 to ensure consistency with changes proposed to s. 44.10

2.21 The report observed that the concept of dual nationality would affect large numbers of Australian citizens.11 The report stated:

...Australian citizens with unsought dual nationality should be free to participate in the highest levels of political life in the Australian democratic system. To deny them this right of citizenship on the basis of a determination by a foreign system of law... would be most invidious.12

2.22 The 1981 report also found that the meaning of an ‘office of profit under the Crown’ is too vague and the text should be discarded and replaced with a ‘clear and detailed statutory statement... so that public office-holders... will be able readily to ascertain their position.’13


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Reform of parliamentary qualifications and disqualifications was also discussed during the 1976, 1983 and 1985 sessions of the Constitutional Convention. The conventions debated the issues without coming to a firm conclusion (see Appendix G). In 1988 the Final Report of the Constitutional Commission effectively recommended that s. 44 be deleted, by recommending that:

- s. 44(i) and (iii) and s. 45(ii) be deleted;
- s. 44(ii) be amended to cover treason only;
- the remainder of s. 44 be replaced by other provisions.\(^\text{14}\)

**House of Representatives Legal and Constitutional Affairs Committee—1997**

In 1997, the House of Representatives Legal and Constitutional Affairs Committee also recommended that some or all of s. 44 be deleted. Its recommendations included the following:

- s. 44(i) be deleted;
- a new provision be inserted requiring candidates and members to be Australian citizens;
- Parliament legislate to determine disqualification in relation to foreign allegiance;
- s. 44(iv) be deleted and replaced with other provisions requiring the Parliament to legislate providing that the occupants of certain positions are deemed to resign from those positions before they begin to receive a parliamentary allowance; and
- A new provision be inserted requiring judicial officer-holders to resign before nomination at an election.\(^\text{15}\)

In its response to the report in December 1997, the Government supported the Committee’s recommendations.\(^\text{16}\)


2.26 The report noted that ‘many Australian citizens are unaware that they are dual citizens’ and that s. 44(i) is a ‘significant problem’. The report stated:

A large number of Australians… are quite probably unaware that they are disqualified from… parliament by the provision. Second, the steps that are necessary for the purpose of divesting foreign citizenship are unclear in many cases and whether or not any steps taken are effective can only be finally determined by the High Court.

2.27 Professor James Jupp gave evidence at the 1997 inquiry and told this Committee:

What has happened over the years… is that there are now increasing numbers of people who are becoming ineligible to sit in parliament unless they do something about their qualifications.

2.28 In relation to holding an office of profit under the Crown, the report found this to be ‘unfair and discriminatory’ and the language of the rule to be ‘quite uncertain’.

Electoral Matters Committee–2000

2.29 In June 2000, the Electoral Matters Committee recommended a referendum to extinguish foreign allegiances at the point of nomination, whereby:

…the act of nomination by a candidate for the House of Representatives or Senate be recognised as immediately extinguishing any allegiance to a foreign country provided the candidate is also an Australian citizen.


20 Professor James Jupp, Committee Hansard, Canberra, 31 January 2018, p .5.


2.30 The Government agreed with this recommendation, subject to a ‘clear indication of widespread support for the measure being proposed.’ It was not progressed.

Table 2.1  Past proposed reforms to s. 44

<table>
<thead>
<tr>
<th></th>
<th>1981 Senate Committee</th>
<th>1988 Constitutional Convention</th>
<th>1997 House Committee</th>
</tr>
</thead>
<tbody>
<tr>
<td>s. 44(i) foreign citizenship</td>
<td>Delete</td>
<td>Delete</td>
<td>Amend so Australian citizenship is minimum requirement</td>
</tr>
<tr>
<td>s. 44(ii) treason and offences</td>
<td>Amend and limit to treason only</td>
<td>Amend to allow Parliament to set rules</td>
<td>(Outside scope of inquiry)</td>
</tr>
<tr>
<td>s. 44(iii) Bankruptcy</td>
<td>Delete</td>
<td>Delete</td>
<td>(Outside scope of inquiry)</td>
</tr>
<tr>
<td>s. 44(iv) office of profit</td>
<td>Amend so employment deemed to cease</td>
<td>Amend so only specified offices are disqualified</td>
<td>Amend so only specified offices are disqualified</td>
</tr>
<tr>
<td>s. 44(v) pecuniary interests</td>
<td>Amend to allow Parliament to set rules</td>
<td>Amend to allow Parliament to set rules</td>
<td>(Outside scope of inquiry)</td>
</tr>
<tr>
<td>Other</td>
<td>Amend ss. 34, 43 and 45</td>
<td>Amend ss. 34 and 45</td>
<td>Disqualify anyone with an ‘unsound mind’</td>
</tr>
</tbody>
</table>


24 The Committee’s terms of reference limited its inquiry to s. 44(i) and (iv).
High Court consideration of section 44

2.31 The Constitution gives the role of interpreting s. 44 to the High Court. The High Court has jurisdiction over ‘any matter… arising under this Constitution, or involving its interpretation’. This means that the High Court hears and determines questions regarding the potential disqualification of Senators and Members. (Further information can be found at Appendix E.)

2.32 In the twentieth century there were few High Court cases about s. 44. This meant that the potential problems of s. 44, and how far it extended, were largely untested.

2.33 The recent cases have made the extent and implications of s. 44 much clearer, and have demonstrated how prescient previous reviews were about the implications of s. 44 to our democracy and impacts on our electoral system. The most significant limitation to emerge is who is eligible to nominate and serve in federal Parliament. For example:

- a person who has their criminal conviction quashed can be ineligible;
- a person who unknowingly holds dual citizenship cannot nominate or serve in Parliament;
- a person who holds Commonwealth employment after nomination, and even after the election itself, may not be eligible for a vacancy that arises in the parliamentary term.

2.34 The most significant cases are summarised below.

Crittenden v Anderson (1950)

2.35 The 1949 election of Mr Gordon Anderson in the electorate of Kingsford-Smith was challenged on the grounds that Mr Anderson was a member of the Roman Catholic Church and—by extension—therefore obedient or allegiance to the Papal State. Justice Fullagar did not allow the challenge, finding that it was s. 116 and not s. 44(i) of our Constitution which is

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25 Constitution, s. 76; see also the *Judiciary Act 1903* (Cth), s.30. See also the discussion of the High Court’s jurisdiction among Professors Rosalind Dixon, Helen Irving and Anthony Blackshield in *Committee Hansard*, Sydney, 2 February 2018, p. 10.

26 Section 116 of the Constitution prohibits the Commonwealth from imposing a religious test ‘as a qualification for any office or public trust under the Commonwealth’.
‘relevant when the right of a member of any religious body to sit in Parliament is challenged on the ground of his religion’.  

**Re Webster (1975)**

2.36 At the time of his election to the Senate in 1974, James Webster was a manager and shareholder of a company supplying timber to the Department of Housing and Construction. The Senate referred his case to the Court of Disputed Returns to determine whether a disqualifying pecuniary interest existed. Chief Justice Barwick held that Mr Webster was not ineligible because ‘an agreement must have currency for a substantial period of time’ and the pecuniary interest must be of a nature that ‘the person who is said to be disqualified could conceivably be influenced by the Crown in relation to Parliamentary affairs’.  

2.37 In their joint submission to this inquiry Associate Professor Gabrielle Appleby, Professor Rosalind Dixon and Mr Lachlan Peake observed that Chief Justice Barwick had ‘confined the operation of the provision to formal agreements between the executive government and parliamentarians, on the basis that the provision was directed to secure the independence of Parliament from the Crown’.  

**Nile v Wood (1988-1989)**

2.38 The 1987 election of Mr William Wood as a senator was challenged on multiple grounds: criminality, insolvency and protest actions against the vessels of a friendly nation that allegedly indicated an allegiance to a foreign power. Justices Brennan, Deane and Toohey dismissed the petition challenging Mr Wood on technical grounds, but made several observations relating to s. 44.

*Section 44(i)—foreign citizenship and allegiances*

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27 Unreported High Court of Australia Judgement of 23 August 1950, noted in (1977) 51 ALJ 171. In his submission, Mr Les Warfe suggests that the diplomatic and legal status of the Vatican City has changed since this decision and is ‘indisputably a foreign power’; see Submission 65, pp. 4-11.


29 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peake, *Submission 44*, p. 5.

2.39 The Court held that ‘...it would seem that s. 44(i) relates only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgement.’

Section 44(ii)–treason and punishable offences

2.40 The Court stated: ‘It is not conviction of an offence per se of which s. 44(ii) of the Constitution speaks. The disqualification operates on a person who has been convicted of an offence punishable by imprisonment for one year or more and is under sentence or subject to be sentenced for that offence.’

Section 44(iii)–bankruptcy and insolvency:

2.41 The Court held that ‘...insolvent is not adjectival and merely describing a person who cannot pay his debts as they fall due. It is...part of a composite reference to the status of a person who has been declared bankrupt or insolvent and who has not been discharged from that condition.’

Sykes v Cleary (1992)

2.42 In an April 1992 by-election, Mr Philip Cleary was elected to the House of Representatives. Mr Cleary’s election was challenged on the grounds that he held an ‘office of profit under the Crown’ as a school teacher permanently employed by the Education Department of Victoria.

2.43 The petition also alleged that two other unsuccessful candidates were dual citizens and therefore also disqualified.

Section 44(iv)–pecuniary interests

2.44 The Court held that the taking of leave without pay does ‘not alter the character of the office held’, an office of profit can include a State office and the disqualification ‘must be understood as embracing a least those persons who are permanently employed by government’.

2.45 Professor Cheryl Saunders commented:

You can quibble about whether schoolteachers have offices at all, but to the extent that they do, it’s an office of profit under the state crown. Someone like that running for the Commonwealth parliament can’t possibly endanger the

31 Nile v Wood [1988] 167 CLR 133, 139.
integrity of the Commonwealth parliament because the Commonwealth executive is capturing his or her vote.’

Section 44(i)-foreign citizenship and allegiances

2.46 The Court held that an Australian citizen who holds citizenship of another country is not disqualified ‘if he has taken all steps that can reasonably be taken to renounce that foreign nationality or citizenship’. Furthermore, a ‘unilateral declaration’ renouncing foreign citizenship is insufficient to release a person from disqualification if ‘a further step can reasonably be taken which will be effective under the relevant foreign law to release him from the duty of allegiance or obedience’.

2.47 Submissions made reference to the implications of this case. For example, Associate Professor Gabrielle Appleby, Professor Rosalind Dixon and Mr Lachlan Peake noted that the High Court had made no distinction ‘between higher-level office holders and lower-level government employees such as teachers or nurses in public hospitals.’ While supporting the intention of the clause to ensure an impartial bureaucracy, they submitted that the clause ‘is only of real consequence at senior levels of the public services.’ The submission also discussed the interpretation of s. 44(i):

Neither a mental ingredient, such as actual allegiance, acquiescence or knowledge, nor a positive act to obtain or retain the rights and privileges of a foreign citizen, were adopted as requirements for disqualification under s. 44(i). This interpretation cuts a potentially wide swathe through parliamentary candidates.

2.48 Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs commented that satisfying ‘reasonable steps’ lacks clarity. In contrast,
Mr Michael C Douglas submitted that the reasonable steps exception is clear and understood.\(^{39}\)

**Sue v Hill (1999)**

2.49 Ms Heather Hill was elected as a senator in 1998. A challenge followed because Ms Hill was a dual citizen of Australia and the United Kingdom at the time of her nomination. Chief Justice Gleeson and Justices Gummow and Hayne held that ‘a citizen of the United Kingdom was a subject or citizen of a foreign power within the meaning of s 44(i) of the Constitution and therefore incapable of being chosen as a senator.’\(^{40}\)

**Re Day [No. 2] 2017**

2.50 Mr Bob Day was returned as a senator at the 2016 federal election. In November 2016, the Senate referred Mr Day to Court of Disputed Returns due to a potential pecuniary interest with the Commonwealth. In particular, the question concerned a lease between the Commonwealth and Fullarton Investments, a trustee of the Day Family Trust to which Mr Day was a beneficiary. The Trust owned the property Mr Day was using as his electoral office. The High Court held that ‘Mr Day had an indirect pecuniary interest in the lease between Fullarton Investments and the Commonwealth, which disqualified him from being chosen or from sitting as a senator.’\(^{41}\)

2.51 A joint submission from Associate Professor Gabrielle Appleby, Professor Rosalind Dixon and Mr Lachlan Peake noted that the ruling overturned the earlier decision of Re Webster, by taking a broad view of a person’s interest in agreements with the Commonwealth. Their submission added that despite this ruling, ‘there remains significant uncertainty’ concerning s. 44(v) and pecuniary interests.\(^{42}\)

**Re Culleton [No. 2] (2017)**

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\(^{40}\) *Sue v Hill* [1999] 199 CLR 462, 463; see also Professor Reilly, *Committee Hansard*, Adelaide, 19 February 2018, p. 2.

\(^{41}\) *Re Day [No. 2] [2017]* 91 ALJR 518, 559; see also Day, *Submission 66*.

\(^{42}\) Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peake, *Submission 44*, p. 5. See also Professor Anne Twomey, *Committee Hansard*, Canberra, 8 December 2018, p. 5; Ms Lorraine Finlay, *Submission 51*, p. 10.
2.52 Mr Rodney Culleton was returned as a senator at the 2016 federal election. Prior to nomination, Mr Culleton had been convicted, in his absence, on a charge of larceny and was liable to sentenced to up to two years imprisonment. While this charge was subsequently annulled, the Senate had already referred the matter to the Court of Disputed Returns.

2.53 Justices Keifel, Bell, Gageler and Keane held that at the time of the election, Mr Culleton was ‘a person who had been convicted and was subject to be sentenced for an offence punishable by imprisonment for one year or longer. That was so both as a matter of fact and as a matter of law. The subsequent annulment of the conviction had no effect on that state of affairs and it followed from s 44(ii) that Mr Culleton was ‘incapable of being chosen’ as a Senator. 43

2.54 Professor Anne Twomey submitted that this case suggests consideration should be given to ‘how to deal with appeals or the subsequent quashing of a sentence.’ 44 Professor Jeremy Gans said that s. 44(ii) is affected by the criminal laws in State and Territory jurisdictions and the related procedures for initiating prosecutions and administering sentences. 45 He said:

The High Court has ruled, for example, in New South Wales that annulments don’t retrospectively restore a conviction, but, at the same time, appeals do — and that’s going to be a different ruling for every jurisdiction in Australia. 46

2.55 He added that criminal matters—for example, a matter involving contempt of a State court—‘could happen in a very politicised context.’ 47

2.56 Professor Twomey noted that some sentences involve no term of imprisonment. 48 She added sentences can be very short; however, if the maximum sentence is 12 months or longer, the person is disqualified. 49

Re Canavan; Re Ludlam; Re Waters; Re Roberts [No. 2]; Re Joyce; Re Nash; Re Xenophon (2017)

43 Re Culleton [No. 2] [2017] 91 ALJR 311, 312.
44 Professor Anne Twomey, Submission 34, p. 4.
45 Professor Jeremy Gans, Committee Hansard, Melbourne, 1 February 2018, p. 10.
46 Professor Jeremy Gans, Committee Hansard, Melbourne, 1 February 2018, p. 10. See also Professor Anne Twomey, Submission 34, p. 4.
47 Professor Jeremy Gans, Committee Hansard, Melbourne, 1 February 2018, p. 10.
48 Professor Anne Twomey, Submission 34, p. 4.
49 Professor Anne Twomey, Committee Hansard, Canberra, 8 December 2017, p. 10.
2.57 In July 2016, six Senators and one member of the House of Representatives were referred to the Court of Disputed Returns, to determine their eligibility for Parliament under s. 44(i) of the Constitution. The Court found that all except two of the referred Senators were ineligible to sit in the Parliament owing to their dual citizenship. The Court followed previous rulings in *Sykes v Cleary* (1992) and *Sue v Hill* (1999).

2.58 Ms Hollie Hughes, an unsuccessful candidate for the Senate at the 2016 election, was ascertained by a special count to be eligible to be elected to the Senate place vacated by Ms Fiona Nash as a result of this decision. This determination, however, raised the question of Ms Hughes’ qualification under s. 44(iv).

2.59 Following the 2016 election, Ms Hughes was appointed to a position on the Administrative Appeals Tribunal, an ‘office of profit under the Crown’ within the meaning of s. 44(iv). She resigned this position following the High Courts’ ruling on Ms Nash’s disqualification and the resulting vacancy in the representation of New South Wales in the Senate.

2.60 The High Court found Ms Hughes also to be disqualified because she:

…held an office of profit under the Crown during a period in which the disqualification of Ms Nash from being validly returned as elected meant that the process of choice prescribed by the Parliament for the purpose of s. 7 of the Constitution remained incomplete.\(^50\)

2.61 Professor George Williams informed the Committee in relation to this decision that:

The effect of the Hughes decision in the High Court means that any unsuccessful Senate candidate now must remain on notice for the full six-year period before the current incumbent ends up exhausting their time. But that person remains on notice and cannot take up any position that might give rise to a disqualification. It means disadvantaging police officers, firefighters or people who work as schoolteachers—a whole of professionals quite dramatically affected by that decision and generally by section 44.\(^51\)

**Re Gallagher**

2.62 Senator Katy Gallagher lodged her nomination as a candidate for election to the Senate on 31 May 2016, and was returned as a senator on 2 August 2016.

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\(^50\) *Re Nash* [No. 2] [2017], HCA 52.

\(^51\) Professor George Williams, *Committee Hansard*, Canberra, 8 December 2017, p. 25.
Ms Gallagher was a British citizen by descent until 16 August 2016. Ms Gallagher had applied for renunciation of her British citizenship prior to nomination. On 1 July 2016 further documents were requested by the United Kingdom Home Office, and provided by Ms Gallagher.

2.63 Ms Gallagher argued that she had taken ‘all reasonable steps’ to renounce her citizenship and therefore fell within the exception to the requirements of s. 44(i) established by *Sykes v Cleary*.

2.64 The High Court held that the exception to s. 44(i) requires two preconditions; first, that the foreign law operates ‘irremediably to prevent an Australian citizen from participation’, and secondly, that the person has taken all steps reasonably required by the foreign law to free him or herself of the foreign nationality.\(^{52}\)

2.65 In Ms Gallagher’s case, the foreign law of Britain did not operate to irremediably prevent an Australian citizen from ever achieving renunciation of citizenship. Therefore the constitutional imperative that gave rise to the implicit qualification in s. 44(i) was not engaged. The High Court held that Ms Gallagher was disqualified under s. 44(i).

\(^{52}\) *Re Gallagher* [2018] HCA 17, 8.
3. Parliamentary qualifications and disqualifications

Overview

3.1 The previous Chapter sets out the historical and judicial background to s. 44. This Chapter considers the operation of the provision in more detail, and describes the impacts of s. 44.

3.2 The disqualifications in s. 44 were introduced into the Constitution to act as a safeguard to parliamentary integrity and national sovereignty. The Committee heard evidence that although the requirements for these safeguards continue, there have been significant and ongoing concerns for 20 years on the operation of, and potential impacts of the operation of, s. 44; concerns that have now come to pass.

3.3 The Committee finds persuasive the concerns expressed by witnesses about s. 44, and its adverse consequences for Australian democracy. This is discussed further in Chapter 5.

Qualifications in section 34

3.4 Section 34 and s. 44 of the Constitution are inextricably linked, but drafted very differently. Section 34 prescribes the qualifications necessary to be a Member of the House of Representatives or a Senator. Section 34 records the requirement to be over 21 years old and a subject of the Queen.
Section 34 of the Constitution

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

(i) he must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen;

(ii) he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

3.5 However unlike s. 44, s. 34 provides that the requirements only apply ‘until the Parliament otherwise provides’. This was to allow Parliament to legislate on the qualifications for candidates to ensure that they remained consistent with Australian community standards.

3.6 Parliament has done so in the Commonwealth Electoral Act 1918 (‘the Electoral Act’), which states that a person aged 18 years, who is an Australian citizen and is entitled or qualified to vote can nominate as a candidate for federal elections. These are qualifications that reflect current Australian community standards instead of the dated qualifications in s. 34.
Section 163 (1) of the Commonwealth Electoral Act 1918: Qualifications for nomination

1 A person who:
   a. has reached the age of 18 years;
   b. is an Australian citizen; and
   c. is either:
      i. an elector entitled to vote at a House of Representatives election; or
      ii. a person qualified to become such an elector;

is qualified to be elected as a Senator or a member of the House of Representatives.

Disqualifications in section 44

3.7 Section 44 of the Constitution provides the rules for disqualification from Parliament. Any person who fulfils the grounds set out in s. 44 is disqualified from ‘being chosen or of sitting’ in Parliament.

Section 44 of the Constitution

Any person who:

   iii. 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

   iv. 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

   v. is an undischarged bankrupt or insolvent; or

   vi. holds any office of profit under the Crown, or any pension² payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

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² Professor Anne Twomey noted that the wording in s. 44(iv) gives an impression that any person receiving a government pension is ineligible. She said a ‘pension’ refers to discretionary grants
vii. 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.

3.8 The intent of s. 44 is to protect the integrity of the Parliament by disqualifying any person who is (or could be) at risk of allowing conflicts of loyalty or undue external influence to affect their performance as Senators and Members of the House of Representatives.³

3.9 Unlike other sections of the Constitution on the operation of the Parliament, there is no ability for Parliament to alter the grounds for disqualification in s. 44. Australian citizens are the only ones with the power to amend this section. A referendum (a national vote) would be required.⁴

3.10 In summary, s. 44 has five grounds for being disqualified from Parliament:

- s. 44 paragraph (i): foreign citizenship and allegiances;
- s. 44 paragraph (ii): treason and punishable offences;
- s. 44 paragraph (iii): bankruptcy and insolvency;
- s. 44 paragraph (iv): holding an office of profit under the Crown; and
- s. 44 paragraph (v): having a pecuniary interest with the Commonwealth Public Service.⁵
### Table 3.1 The purpose of section 44 disqualifications

| **Foreign citizenship and allegiances** | A person having an allegiance to a foreign power could be unduly influenced by that power.  
National security; ensuring allegiance and undivided loyalty to Australia. |
|----------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------|
| **Treason and punishable offences**    | A person under sentence for an offence is subject to the control of the executive government.  
Ensuring parliamentarians are beyond moral reproach. |
| **Bankruptcy**                         | An undischarged bankrupt or insolvent is subject to the control of creditors or the courts.  
Ensuring parliamentarians are beyond moral reproach. |
| **Holding an office of profit under the Crown** | A person holding an executive government position could be subject to undue influence by the executive government.  
Protecting the principle of ministerial responsibility. |
| **Having a pecuniary interest with the Commonwealth Public Service** | A person having an interest in an agreement with the Commonwealth could be subject to such undue influence and could also be influenced by a personal interest in performing their legislative duties. |

*Source: Adapted from Odgers’ Australian Senate Practice (14ed) p.166; Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs, Submission 36, p.1.*

### Additional disqualifications in section 45

3.11 Section 45(i) of the Constitution provides that if a Senator or Member is ‘subject to any of the disabilities’ in s. 44, their place ‘shall thereupon become vacant’. Section 45 specifies two additional grounds for a vacancy to occur:

- s. 45 paragraph (ii): taking the benefit of bankruptcy laws.
- s. 45 paragraph (iii): taking a fee or honorarium for services rendered to the Commonwealth.\(^6\)

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\(^6\) Constitution, s. 45.
3.12 Unlike s. 44, the operation of s. 45 only affects elected Senators and Members, not candidates.

**Additional disqualifications already in the Electoral Act**

3.13 The Electoral Act contains three additional restrictions that disqualify a person from sitting in the federal Parliament:

- Being a member of a State Parliament or a Territory Legislative Assembly.\(^7\)
- Being convicted of certain offences relating to bribery and undue influence (for two years following the conviction).\(^8\)
- Having an ‘unsound mind’.\(^9\)

**What problems does section 44 cause?**

3.14 The wording of s. 44 and its interpretation by the High Court create a number of ongoing challenges for Australian democracy. Evidence to the Committee about the implications of s. 44 fell into three main areas of concern:

- Discouraging political participation where candidates would have difficulty establishing compliance with s. 44.
- Discouraging political participation by requiring candidates to relinquish government employment.
- Instability and uncertainty in declared election results, with potential impact on declared seats.\(^10\)

**Difficulty establishing compliance**

3.15 During the inquiry, the Committee heard evidence that candidates could be deterred from contesting elections because compliance with s. 44 is too onerous and expensive and, for many Australians, ultimately unachievable.

3.16 A joint submission from Professor Rosalind Dixon, Associate Professor Appleby and Mr Lachlan Peake stated:

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\(7\) Electoral Act, s. 164.

\(8\) Electoral Act, s. 386.

\(9\) Electoral Act, s. 93(8); s. 163.

\(10\) For example, an eligible candidate who successfully wins a seat on preference votes could be challenged, if the disqualification of an ineligible and unsuccessful candidate causes the overall result to change.
Despite some important clarification provided by the Court, we believe that many aspects of the operation of s 44 remain uncertain, potentially over-inclusive, and discriminatory in their operation in such a way that points to the benefits of reform in this area. The provision is… insufficiently tailored to, and therefore not sufficiently effective in, meeting its objective of promoting values of loyalty and integrity among members of Parliament.\textsuperscript{11}

3.17 Professor Alex Reilly said that if s. 44 remains in its current form, this would be a ‘strong disincentive’ to stand as a candidate, with a significant proportion of the population having to divest themselves of a foreign citizenship.\textsuperscript{12}

3.18 Mr Nicholas Hudson submitted:

A law designed to make sure that all Parliamentarians are loyal Australians is not only ineffective; it causes many totally loyal Australians to be excluded.\textsuperscript{13}

3.19 In their joint submission, Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs noted that comprehensively assessing a candidate’s potential disqualification under s. 44 could be ‘difficult, often expensive, and sometimes impossible’.\textsuperscript{14} The submission further described s. 44 as a barrier to political participation, particularly for independent candidates and minor parties.\textsuperscript{15}

3.20 Professor Helen Irving said that although some people believe parliamentarians ‘got what they deserved’,\textsuperscript{16} she described the High Court’s interpretation of s. 44 as having negative consequences for Australian democracy:

… unfair to individuals who genuinely do not know about their citizenship status, as well as cumbersome and expensive in necessitating by-elections, and for some people it is also inconsistent with Australia’s multicultural character and values.\textsuperscript{17}

\textsuperscript{11} Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peake, \textit{Submission 44}, p. 2.

\textsuperscript{12} Professor Alex Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, \textit{Committee Hansard}, Adelaide, 19 February 2018, p. 1.

\textsuperscript{13} Mr Nick Hudson, \textit{Submission 5}, p. 3.

\textsuperscript{14} Professor George Williams AO, Dr Sangeetha Pillai and Mr Harry Hobbs, \textit{Submission 36}, p. 3.

\textsuperscript{15} Professor George Williams AO, Dr Sangeetha Pillai and Mr Harry Hobbs, \textit{Submission 36}, p. 3.

\textsuperscript{16} Professor Helen Irving, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 1.

\textsuperscript{17} Professor Helen Irving, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 1.
3.21 Today, in all other aspects of Australian life, multiple citizenship is allowed, if not celebrated. In 2002, the law changed to allow Australians to actively acquire foreign citizenship without losing their Australian citizenship. Dr Anthony Moran’s submission noted that the number of dual citizens was estimated to be 4.4 million. Dr Moran commented that this ‘just reflects the reality of a much more globally open world’.

3.22 Emeritus Professor Andrew Jakubowicz said that some people perceive a ‘fundamental irrationality and discrimination’ in the Australian Constitution which has ‘significant consequences for how they feel about being Australian.’ Hamilton Stone consulting submitted that ‘a migrant nation should not have a xenophobic constitution’.

3.23 Professor Kim Rubenstein said critics would argue that a dual citizen’s commitment to Australia could be doubted. She commented that ‘renouncing another citizenship doesn’t necessarily mean that there is any change in a person’s emotional connection and attachment to that other country.’ She added that there are inconsistencies; for example, a non-citizen who has resided in Australia for six months could be conscripted for national service but could not be elected to the federal Parliament.

3.24 There is no requirement for single citizenship in other aspects of public life. For example, High Court judges and members of the Australian Defence Force can hold dual citizenship. It is only members of the Federal Parliament that face restrictions. As noted below, most State and Territory Parliaments do not have a disqualification for dual citizenship.

**Government employment**

3.25 Some witnesses and submissions were concerned that public servants are required to quit their job and risk their personal financial position to stand

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18 Dr Anthony Moran, *Submission 40*, p. 2. The submission also noted that Census data is not collected on dual citizenship.

19 Dr Anthony Moran, *Submission 40*, p. 2. See also Associate Professor Elisa Arcioni, *Committee Hansard*, Sydney, 2 February 2018, p. 7.


21 Mr Hamilton Stone, *Submission 6*, p. 2.

22 Professor Kim Rubenstein, *Committee Hansard*, Melbourne, 1 February 2018, p. 29. See also Dr Anthony Moran, *Committee Hansard*, Melbourne, 1 February 2018, p. 36.

23 Professor Kim Rubenstein, *Committee Hansard*, Melbourne, 1 February 2018, p. 32.
as a candidate. This requirement extends to serving members of the Australian Defence Force. Mr Neil Cotter submitted:

There is no good reason to exclude public teachers, nurses, social workers, police and public servants, or potentially university lecturers or so many others... If anything these are more likely to be the kind of people we would want in parliament beyond the current disproportionate representation of lawyers, union officials, electorate officers, graziers, business executives and lobbyists.

3.26 Professor Anne Twomey gave an example of a situation that would not currently be allowed under the High Court’s interpretation of s. 44; saying:

If you were on leave without pay during that period and you then resigned the office after polling day but before the return of the writs, that seems to me perfectly reasonable.

3.27 Professor Graeme Orr said the states have restrictions in place for a handful of sensitive offices where you cannot nominate, such as a judge or being an ombudsman. He said for other public servants, there is ‘an automatic termination provision’ that applies at a time after ‘someone knows they’re likely to be elected, and so they don’t have to forfeit their family’s security.’

3.28 As noted in Chapter 1, Defence Force personnel and those employed under the Commonwealth Public Service Act also have a right to re-employment in the event of unsuccessful candidacy. It has not been tested in the High Court whether the implied continuation of employment in these legislative provisions would be in breach of s. 44(iv).

Instability and uncertainty

3.29 Through the course of the inquiry it became evident that there is also a significant, but previously unexamined, aspect to s. 44 and its interpretation by the High Court. This may lead to an avenue to manipulate an election. Any otherwise eligible Senators and Members who are elected on preference

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24 Mr Matthew Ellis, Submission 2, p. 1; Ms Margaret Hurle, Submission 21, p. 1; Mr Rick Sarre, Submission 39, pp. 1-2; Mr Brendan Whyte, Submission 41, p. 4.
26 Mr Neil Cotter, Submission 48, p. 2.
27 Professor Anne Twomey, Committee Hansard, 8 December 2017, p. 12.
28 Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 22.
flows could have their position challenged, if they relied upon the preferences of an ineligible candidate. This has the serious potential to affect the overall result after the election has concluded, at any point during the term of Parliament:

- When unsuccessful Candidate C is challenged or found to be disqualified, the eligible and successfully elected Candidate A, who relied on Candidate C’s preference votes, could be in an uncertain position.
- If votes for Candidate C are excluded from the count and preference votes re-distributed, Candidate A may not now have the most votes; the revised result could show that Candidate B or D should have been duly elected.

3.30 Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs stated in their joint submission:

While... 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.

3.31 Associate Professor Luke Beck submitted that there is a ‘potential to unseat parliamentarians who are not themselves disqualified.’ He explained:

The winning politician may in fact be perfectly qualified, but the people from whom they get their preference might be disqualified—the No. 2 or No. 3 candidate on the ballot paper.

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29 Associate Professor Luke Beck, Submission 16, p. 2; Professor George Williams AO, Dr Sangeetha Pillai and Mr Harry Hobbs, Submission 36, p. 4.

30 For information on counting House of Representatives preference votes, see the Australian Electoral Commission’s (AEC) website at <aec.gov.au/Voting/counting/hor_count.htm>, viewed 19 April 2018. There is information on counting Senate preferences at <aec.gov.au/Voting/counting/senate_count.htm>, viewed 19 April 2018.

31 Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs, Submission 36, p. 4 and Professor George Williams, Committee Hansard, Canberra, 8 December 2017, p. 24.

32 Associate Professor Luke Beck, Submission 16, p. 2. See also Dr Joe McIntyre, Committee Hansard, Adelaide, 19 February 2018, p. 18; Professor George Williams, Committee Hansard, Canberra, 8 December 2017, pp. 26-27.

33 Associate Professor Luke Beck, Committee Hansard, Melbourne, 1 February 2018, p. 17.
3.32 He said that with the exception of candidates who won on first preferences or achieved their own quota, this could lead to a succession of challenges:

Because if you challenge person A and then you do the redistribution of the preference flows and get somebody else in but then you go back and challenge person B, you get a different outcome again. You could keep going on and on.\(^{34}\)

3.33 Prof. Graeme Orr has argued that the effect of the preferences of an unqualified, but unelected, candidate has not been adequately tested:

In \textit{re Wood}, the Court reasoned that since the second and later preferences of each elector who did not spoil her ballot were known, there was no injustice in ignoring the unqualified candidature. In doing so it rejected an earlier, lower court finding from the Northern Territory that an unqualified candidate could upset an election under full preferential voting.\(^{35}\)

3.34 The judgment in \textit{Re Wood} states ‘it is unreal to suggest that the presence of Senator Wood’s name on the ballot paper has falsified the declared choice of the people of the State for any of the first eleven candidates.’\(^{36}\) (For more information on this case see Chapter 2).

3.35 The complications of unqualified candidates on the ballot paper were considered in the Tasmanian Senate recount. Dr Kevin Bonham notes:

…the argument could be run that [Senator] McKim’s election by a very narrow margin was a product of the presence in the count of a candidate who was ineligible to stand and that McCulloch [an unsuccessful candidate] had been unfairly denied victory by the presence of this ineligible candidate.\(^{37}\)

3.36 While noting the High Court’s findings in \textit{re. Wood}, Dr Bonham further states:

The differences in this case are firstly that it is very real to suggest the presence of Senator Parry’s name on the ballot paper has at least raised a question over the declared choice, and secondly that this is a less common case in which the unqualified status of a candidate can be shown to lead to a different outcome based on the results as cast. However, since we already know that seven

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\(^{34}\) Associate Professor Luke Beck, \textit{Committee Hansard}, Melbourne, 1 February 2018, p. 17.


\(^{36}\) \textit{Re Wood} [1988] HCA 22.

people who were elected at the 2016 election were ineligible to stand, it stands to reason that there would be many unelected candidates who are also ineligible.38

3.37 Professor Blackshield said that in general, ‘there are many complications in this that have not been fully explored.’39 Professor Dixon said that ‘if it were a matter of who was able to form government it would be extremely destabilising.’40

**Counting preference votes for House of Representatives elections**

A House of Representatives candidate is elected if they gain more than 50 per cent of the formal vote.

First, all of the number '1' votes are counted for each candidate. If a candidate gets more than half the total first preference votes, that candidate will be elected.

If no candidate has more than half of the votes, the candidate with the fewest votes is excluded. This candidate's votes are transferred to the other candidates according to the second preferences of voters on the ballot papers for the excluded candidate. If still no candidate has more than half the votes, the candidate who now has the fewest votes is excluded and the votes are transferred according to the next preference shown. This process continues until one candidate has more than half the total number of formal votes and is elected.

A distribution of preferences takes place in every division, even where a candidate already has an absolute majority of first preference votes.41

**Issues specific to section 44(i)**

3.38 The terms of reference require the Committee to look more carefully at subsection 44(i)–the disqualification for foreign citizenship. Although all the


problems above also apply to s. 44(i), there are an additional set of considerations created by the historical context of the Constitution.

3.39 As discussed above, s. 44(i) is intended to prevent conflict of interest created by allegiance to a foreign power. The Committee heard evidence that while the principles remain relevant, the language used in s. 44 reflected the state of the world in the 1890s, and no longer conforms to societal norms or voter expectations.\(^{42}\) It also does not address the existence of Australian citizenship.

3.40 The Constitution was framed in the context of the British Empire, when dual citizenship was uncommon. Dr Sangeetha Pillai said:

\[
\ldots \text{most migration to Australia came from within the British Empire, and British subject status, which captured everybody who was a citizen of any country in the empire, denoted the fullest form of formal membership in Australia, and dual citizenship was also far less common than it is today.}\(^{43}\)
\]

3.41 Dr Pillai added that the British Empire is now dissolved and the situation has changed,\(^{44}\) leading to unintended outcomes:

\[
\text{In 1901 we were very happy with British subject status. ... And even in 1949, when we made our own status of citizenship, it was put on equal footing with British subject status. ... Then, when we got to 1986, when we had the Australia Act and legal independence, we started to have cases...where it was established that the UK was a foreign power.}\(^{45}\)
\]

3.42 Citizenship is no longer the most important single marker of allegiance. Professor Rubenstein said this created a ‘disjuncture’ between legislation--

\(^{42}\) Associate Professor Luke Beck, *Submission 16*, p. 2; Professor Kim Rubenstein, *Submission 20*, p. 2; Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs, *Submission 36*, p. 1; Associate Professor Matthew Stubbs and Dr Adam Webster, *Submission 37*, p.1; Dr Anthony Moran, *Submission 40*, p. 1; Dr Gabrielle Appleby, Professor Rosalind Dixon and Mr Lachlan Peake, *Submission 44*, p. 2.

\(^{43}\) Dr Sangeetha Pillai, *Committee Hansard*, Melbourne, 1 February 2018, p. 21. See also Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs, *Submission 36*, p. 3; Mr Brendan Whyte, *Submission 41*, p. 5.

\(^{44}\) Dr Sangeetha Pillai, *Committee Hansard*, Melbourne, 1 February 2018, p. 21. See also Emeritus Professor Andrew Jakubowicz, *Committee Hansard*, Sydney, 2 February 2018, p. 7, where he observed that in 1901, ‘we lived in a world of empires, not nations.’

\(^{45}\) Dr Sangeetha Pillai, *Committee Hansard*, Melbourne, 1 February 2018, p. 24.
which permits dual citizenship—and s. 44 of the Constitution—which does not permit dual citizens to serve in Parliament.46

3.43 Hamilton Stone consulting submitted that dual citizenship should not be discouraged:

A migrant nation should not have a xenophobic constitution. The pledge required as part of becoming a citizen is enough… Beyond this, it should be up to voters to decide whether a person is fit to represent them.47

3.44 It is clear that the link between citizenship and allegiance was stronger and much less complicated in 1901 than it is in 2018. The Committee also considers that these questions will only continue to become more complex into the future. The Committee agrees with the submitters who suggested ‘future-proofing’ disqualifications to allow for flexibility and change.

The timing of disqualification

3.45 The Committee heard further evidence about the problems caused by candidates having to ensure that they are not disqualified at the time when they nominate for election. This applies to all candidates whether or not they are ultimately elected.

3.46 The requirement stems from the High Court’s interpretation of the words ‘being chosen’. Section 44 disqualifies a person from ‘being chosen or of sitting’ in Parliament. The phrase ‘being chosen’ is taken to include the election period when candidates nominate, campaign and electors cast their votes.

3.47 For unsuccessful Senate candidates, ‘being chosen’ extends for potentially six years after the election, as casual vacancies in the Senate are filled through recounts. In the time intervening between the election and a recount, candidates remain in a state of ‘being chosen’ and could be disqualified years after a general election has concluded.

3.48 A number of witnesses said the broad legal meaning of ‘being chosen’ is excessive and causes complications for Parliament and candidates.

46 Professor Kim Rubenstein, Committee Hansard, Melbourne, 1 February 2018, p. 28. See also Dr Anthony Moran, Submission 40, p. 2; Professor Alex Reilly, Committee Hansard, Adelaide, 19 February 2018, p.2.

47 Mr Hamilton Stone, Submission 6, pp. 2-3.
3.49 Professor Kim Rubenstein said that the timing disqualification from the point of nomination may deter people from standing as candidates. Professor Anne Twomey said:

There have been all sorts of timing problems... the word ‘chosen’ in s. 44 refers to a period of time that starts at nomination and concludes when the election has finally, validly, chosen a person.

3.50 Professor Graeme Orr said this means a candidate for a Senate election ‘remains a candidate for in excess of six years’ and sends the High Court ‘back in a time machine to undo elections up to five or six years after the event.’ Professor Williams said:

The High Court has taken a really inconvenient approach in extending it here, not just back to the point of nomination but also now, for unsuccessful senators, to the point after the declaration of the poll. That’s a clear unanimous decision of the court. That’s not going to shift. The only way of altering that is by a referendum.

3.51 Professor Twomey said that it would be ‘better to change it so that there is a specific date upon which a person is disqualified from being chosen.’ She suggested this could be at the return of the writs:

That would allow anyone who was likely to have been elected to have a period of time to resolve any other kind of disqualification issues before the writs are returned, and it would give more certainty.

3.52 Associate Professor Luke Beck said:

...there are eminently good reasons to make the disqualification attached to being elected and sitting in parliament, not the process of nominating and

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48 Professor Kim Rubenstein, Committee Hansard, Melbourne, 1 February 2018, p. 30.
49 Professor Anne Twomey, Committee Hansard, Canberra, 8 December 2017, p. 10. See also Professor John Williams, Committee Hansard, Adelaide, 19 February 2018, p. 6.
50 Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 16; Professor George Williams, Committee Hansard, Canberra, 8 December 2017, p. 25.
51 Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 16.
52 Professor George Williams, Committee Hansard, Canberra, 8 December 2017, p. 25.
53 Professor Anne Twomey, Committee Hansard, Canberra, 8 December 2017, p. 10.
54 Professor Anne Twomey, Committee Hansard, Canberra, 8 December 2017, p. 10.
being chosen. The current situation is just an effect of the language of the current section.\textsuperscript{55}

3.53 As an example, Associate Professor Beck said this would allow public servants to take leave while campaigning and resign only if successfully elected.\textsuperscript{56}

### Election dates and the parliamentary term

8 May 2016: A general election is announced. Due to disagreement over legislation, in this instance both Houses of Parliament are dissolved and there was a ‘double dissolution’ election.

9 June 2016: Candidate nominations closed. Candidates are now ‘being chosen’ and are liable to be disqualified from this point onwards.

14 June 2016: Early voting commences.

2 July 2016: Election day.

26 July to 5 August 2016: declaration of the polls for the Senate.

20 July to 5 August 2016: declaration of the polls for the House of Representatives.

8 August 2016: The return of the writs to formally confirm elected candidates. Within 40 days of the return of the writs, the law allows for any person to initiate a legal challenge to the election of a Senator or Member (notionally 17 September 2016).

30 August 2016: The 45th Parliament is opened and Senators and Members are sworn to office and are now ‘sitting’. The House of Representatives continues for three years from the date of its first meeting and then expires, unless an election is called at an earlier date. The terms of Senators are deemed to commence on the first day of July (1 July 2016) that precedes a double dissolution election.

30 June 2019: The terms of Senators elected for three years expire.


\textsuperscript{56} Associate Professor Luke Beck, \textit{Proof Committee Hansard}, Melbourne, 1 February 2018, p. 15.
The process of disqualification

3.54 There are three ways to challenge the eligibility of a Senator or Member. Any method can be used to mount a challenge for one of the disqualifications in s. 44, although there are limitations on who can challenge and when.

3.55 The position is less clear in the case of a challenge to the eligibility of an unsuccessful candidate. It is likely that this would be limited to the first mechanism—disputing the election by lodging a petition to the Court of Disputed Returns within 40 days.

3.56 The three pathways are: 57

1 Any person can lodge a petition addressed to the Court of Disputed Returns within 40 days of writs being returned for an election, 58 asking the Court to examine the case.

2 The House or Senate may refer the question to the Court of Disputed Returns using processes in s. 376 of the Electoral Act. 59 The Senate or House can pass a resolution referring a Senator or Member to Court of Disputed Returns. Section 377 of the Electoral Act explains that the Senate President or the Speaker of the House should write to the Court stating the terms of the referral and may provide additional information.

3 Senate rules allow for a petition to be lodged by any person with the Clerk, within 40 days of the writs being returned, for the Senate’s consideration.

Court of Disputed Returns

57 Odgers’ Australian Senate Practice (13th edn), pp.164-166; House of Representatives Practice (6th edn) pp. 103-104 & p. 135; Mr Mike Maley, Submission 35, p. 3; Mr David Lewis, Acting General Counsel (Constitutional), Attorney-General’s Department, and Mr Jeff Murphy, Principal Legal Officer, Attorney-General’s Department, Committee Hansard, Canberra, 8 December 2017, p. 35.

58 A ‘writ’ is a type of order. House of Representatives Practice (6th edn) p.100 states that: ‘A writ is both the authority for an election to be held and the authority by which the successful candidate is declared elected.’

59 The Houses of Parliament may retain a power to solely determine whether one of their members is disqualified under section 47 of the Constitution; however, in practice, cases are referred to the Court for review.
Regardless of which pathway is used, the actual determination of qualification is made by the Court of Disputed Returns. The Court of the Disputed Returns is the High Court of Australia, although the High Court does have the power to refer petitions under the Electoral Act to the Federal Court for trial.\(^{60}\)

The Court of Disputed Returns is required to act in a particular way in making its decisions. For example, the Court must make its decision on a petition as quickly as is reasonable,\(^{61}\) and has to be guided by the substantial merits of each case without regard to legal forms.\(^{62}\)

Although the powers of the Court and the potential outcomes are the same in each case, it is worth noting that under a petition made within 40 days of the election, the Court is determining a dispute about the validity of an election or return. Under a referral from a House of Parliament, the Court is determining a question on the qualification of a particular Senator or Member.

**Common informers**

A case under the *Common Informers (Parliamentary Disqualifications) Act 1975* (the Common Informers Act) has recently been used to challenge the qualifications of a sitting Member. This Act allows anyone to bring a common informer action against a sitting Member or Senator to recover money for each day that Member or Senator sat in Parliament while disqualified.

In the recent decision of *Alley v Gillespie*,\(^{63}\) the High Court decided that the Common Informers Act does not give it the authority to determine whether a Member or Senator is disqualified. That question can only be decided by the Houses of Parliament themselves under s. 47 of the Constitution, by the High Court after a referral under s. 376 of the Electoral Act, or by a petition by any person within 40 days of the writs being returned. This decision has limited the scope of common informers actions.

**How many Australians are potentially affected?**

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\(^{60}\) Electoral Act, s. 354.

\(^{61}\) Electoral Act, s. 363A.

\(^{62}\) Electoral Act, s. 364.

\(^{63}\) *Alley v Gillespie* [2018] HCA 11
3.62 Statistical data indicates that over half of all Australians today would have barriers to nomination under s. 44. These citizens would not be able to nominate for federal Parliament until they have taken steps to address these barriers. In practice, some may never be able to overcome these barriers and nominate.

3.63 Australian Electoral Commission statistics show that 16,076,433 million Australians are currently enrolled to vote.64 This figure is the total pool of Australians potentially eligible to nominate for election. The following paragraphs break down how many, out of this pool of over sixteen million people potentially qualified to nominate, may be potentially disqualified under each subsection of s. 44.

3.64 Section 44 paragraph (i): foreign citizenship and allegiances: In Australia, around 10,779,230 million people (46 per cent of the population) were born overseas or have one or more parents who were born overseas.65 The percentage is around 52 per cent when confined to Australians who are eligible to vote. This figure does not include data on the birthplace of grandparents, great-grandparent or spouses which may also affect a person’s citizenship status.

3.65 Section 44 paragraph (ii): treason and punishable offences: Reliable statistics on the number of persons affected by this clause at any given time are unavailable. In addition, sentencing regimes for similar crimes vary among Australian jurisdictions. The Committee expects that very few people would be affected by a treason conviction.

3.66 Section 44 paragraph (iii): bankruptcy and insolvency: according to the Australian Financial and Security Authority, there were a total of 16,320 cases of bankruptcy and 30,161 cases of insolvency for the financial year 2016-17.

3.67 Section 44 paragraph (iv): holding an office of profit under the Crown: According to Australian Bureau of Statistics data, as at June 2017, there is an aggregate of 1,956,800 employees in the Commonwealth, state, and local

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64 Figure current as at 31 December 2017. There are 611,323 people estimated to be missing from the electoral roll. AEC, ‘Enrolment Statistics’, at <aec.gov.au/Enrolling_to_vote/Enrolment_stats/>, viewed 19 April 2018.


public sectors—approximately 8 per cent of the Australian population. This figure comprises 239,800 employees in the Commonwealth; 1,527,600 employees at the state level; and 189,500 employees in the local government public sectors. These figures do not separately identify citizens, dual citizens and non-citizens.

3.68 Section 44 paragraph (v): **having a pecuniary interest with the Commonwealth Public Service:** No figures are available on the number of people who have direct or indirect pecuniary interest in the Australian Public Service. According to Department of Finance figures, the Commonwealth entered into 64,092 procurement contracts amounting to a value of AU $47 billion in the 2016-17 financial year, of which 60 per cent went to small and medium-sized businesses. The range of these contracts is vast; from commercial and military vehicle components, management and administrative services, to laboratory and testing equipment and drugs and pharmaceutical products.

3.69 In short, it is impossible to determine how many exactly how many Australians may be ineligible, or would have to take measures to become eligible. However it is likely to be greater than 50%, leaving only eight million Australians eligible to nominate for election without having to take additional measures, and losing something they may not be able to afford to lose. Many Australians may in ineligible on the basis of at least two sections.

**Two scenarios**

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67 Australian Bureau of Statistics coverage of the public sector includes ‘Commonwealth and state/territory government organisations, local government authorities, public corporations, universities, non-profit institutions controlled by the government, government marketing boards, legislative courts, municipal authorities and other statutory authorities. Organisations are classified to Level of Government by determining the institutional unit (i.e. Commonwealth, state or local government) deemed to exercise control.’


69 The High Court recently considered the eligibility of Mr Steve Martin, then Mayor of Devonport, for appointment to the Senate. The High Court held that a position as Mayor is not an office of profit under the Crown for the purposes of s. 44(iv): *Re Lambie* [2018] HCA 6.

70 Department of Finance, ‘Statistics on Australian Government Procurement Contracts,’ <finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>, viewed 19 April 2018. These figures do not include contracts entered into by government-owned corporations and omit details of contracts exempt from notification by the Chief Executive of a government agency.
3.70 The issues discussed above have a practical impact on parliamentary eligibility.

3.71 The impact of s. 44(i) is demonstrated through the following scenario.

A representative group of Australian citizens from all walks of life is assembled to learn how to run as a candidate for Parliament. They are all qualified to nominate for Federal Parliament in accordance with s163 of the Electoral Act (through s34 of the Constitution).

They are all asked to stand up. As a group they are then asked a series of questions relating to s44 disqualifications. If they answer yes to any questions, they are instructed to sit down.

Anybody who sits down is ineligible to automatically stand as a candidate.

These nine questions are asked:

1. Were you or your spouse born overseas?
2. Do you have, or do you know if you are entitled to one or more additional citizenships - even though under Australian law you are entitled to multiple citizenships?
3. Was one or both of your parents or grandparents born overseas?
4. Were you, a parent or grandparent adopted or a member of the ‘stolen’ or ‘forgotten generations’ and do not have a full family history?
5. Did you, your parents or grandparents emigrate from a war zone from a country whose borders have subsequently changed, citizenship is unclear and/or official records destroyed?
6. Do you work for federal, state, maybe local, governments or agencies, including nurses, firefighters or serving in the Australian Defence Force?
7. Have you been convicted or are subject to be convicted of any offence punishable by one year or longer imprisonment?
8. Are you an undischarged bankrupt or insolvent?
9. Do you have any direct or indirect pecuniary interest in any agreement with the Commonwealth? If you are a builder with a Commonwealth contract for example, you might want to sit down until you get some legal advice.

The latest census shows that close to 50% of the group will by now be sitting down.
By now, over 60% of the group are likely to be seated, and all will be bemused by the meaning of question 9.

The 40% or so still standing will be advised they have no potential s. 44 disqualifications and can all go straight into the candidate nomination express lane. They have no barriers to nomination and nothing to lose or renounce to nominate. They have:

- fully documented multi-generational Australian family lineage;
- they work in the private sector; and
- they are not otherwise disqualified.

The remaining group will need to take active measures to overcome all of these barriers before nominating. These measures may include:

- If you work for any level of Australian government or agency, including the military, you will have to resign your job.\(^{71}\)
- If you know you have dual or multiple citizenships, you will have to successfully renounce them all before you nominate. As the renunciation laws of the other 194 nations are all different, this could be very time consuming and expensive, and ultimately unsuccessful.
- If you don’t know your full family history - perhaps you or your parents were adopted, were members of the ‘stolen’ or ‘forgotten’ generations, or migrated from any number of war zones - you may find it impossible to ever nominate.

There are three possible outcomes for the 60% group.

- Firstly, those who clear all disqualification barriers before the election can decide to nominate. If you can’t do that in time you will need to wait another three years before you can run, if you can afford to do so if you’ve had to give up your job.
- Secondly, those unsuccessful in clearing all disqualification barriers will forever remain ineligible to nominate.
- Thirdly, many of you may well decide not to go through the process of clearing disqualification barriers as it may be too hard, too expensive or too great a sacrifice for you and your family.

This scenario shows how s. 44 diminishes the pool of diverse candidates and is profoundly undemocratic.

The impact on future elections

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71 Noting the right to re-employment as outlined in previous Chapters.
3.73 The second major problem caused by s. 44 is the potential to disrupt the outcome of future elections due to candidates knowingly or unknowingly being ineligible.

3.74 As the events of 2017 have highlighted, following the disqualification of some Senators, unsuccessful candidates have been further found to be disqualified. In one case, this was a result of a job the candidate took after the election, despite being eligible when nominating for election. As the ‘successful’ candidate was then disqualified, the High Court found that the election continued until a qualified candidate was found.

3.75 The impact of this is demonstrated through the following scenario.

A number of candidates nominate for election to the Senate, either aware or unaware that they are disqualified under s. 44.

The election result is close; with the Government holding a one-seat majority in the Senate, or the Opposition and crossbench hold a one-seat majority.

A qualified and elected candidate is challenged, on the grounds that she was elected on the basis of preferences from unsuccessful disqualified candidates. Because the disqualification applies at the time of nomination, votes cast and preferences gained from that candidate may not be able to be applied in the way the voter intended.

This scenario has not been addressed by the High Court and the outcome is unknown. It could take months to be determined. In the event of a close election it could well impact on the ability to form government, trigger a House of Representatives election and delay the confirmation of State and Territory Senate teams.

Other parliaments in Australia and overseas

3.76 The qualifications and disqualifications in Australian and selected overseas jurisdictions are summarised below.73

Australian States and Territories

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72 A vacancy in the House of Representatives is filled through a by-election.

73 This information is based on candidate handbooks, electoral legislation and the constitutions of each State and Territory. There may be additional legislative or procedural requirements, such as taking oaths. The relevant legislation may also be subject to judicial interpretation, legal precedent and the practices of electoral authorities.
Generally, candidates must be enrolled to vote to be eligible to stand as a candidate. Being enrolled to vote is also an indirect way of imposing a minimum age requirement. Candidate qualifications are outlined below.

### Table 3.2 State and Territory candidate qualifications

<table>
<thead>
<tr>
<th></th>
<th>Enrolled or entitled to vote</th>
<th>Resided for time prior to nomination</th>
<th>Australian citizenship</th>
<th>18 years or older</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Victoria</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Queensland</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>South Australia</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

The factors could potentially lead to disqualification from the State parliaments or Territory legislative assemblies are outlined below.

In most cases, disqualification for holding an office of profit is supplemented with exceptions (such as taking unpaid leave) or a procedure for deeming a public servant to have resigned. In some jurisdictions, the judiciary are expressly disqualified.

### Table 3.3 State and Territory potential disqualifications
3.80 Additional disqualifications are outlined below. A failure to attend the parliamentary sittings, for example, is an indirect way of disqualifying a person who is in prison.

**Table 3.4 Additional State and Territory potential disqualifications**
<table>
<thead>
<tr>
<th></th>
<th>Acquiring foreign citizenship</th>
<th>Failing to attend Parliament</th>
<th>Member of the other House</th>
<th>Member of another Parliament</th>
<th>Having an ‘unsound mind’</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Victoria</td>
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<td>Yes</td>
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<td>Queensland</td>
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<td>Yes</td>
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<td>No</td>
<td>No</td>
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<tr>
<td>Western Australia</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>South Australia</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Tasmania</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

**New Zealand**

3.81 The following factors may lead to disqualification from Parliament or affect eligibility to stand as a candidate:

- A person must be enrolled to vote and a New Zealand citizen. A citizen who has resided outside New Zealand for the last three years may not be eligible.
- A person born overseas is required to provide evidence of their New Zealand citizenship.
- Public servants are required to take a leave of absence. If elected, a public servant is deemed to have resigned.
- Prisoners serving sentences are disqualified.

3.82 There is no rule against bankrupts standing as candidates or serving in the Parliament.

**Canada**
3.83 The following factors may lead to disqualification from Parliament or affect eligibility to stand as a candidate:

- A person must be at least 18 years old, enrolled to vote and a Canadian citizen.
- Members of Provincial legislative assemblies are ineligible.
- A person imprisoned in a correctional institution is ineligible.
- Prescribed office-holders are ineligible; for example, judges, a Provincial sheriff and election officers.

**United Kingdom**

3.84 The following factors may lead to disqualification from Parliament or affect eligibility to stand as a candidate:

- A person must be at least 18 years old and a British citizen, a citizen of the Republic of Ireland or an eligible Commonwealth citizen.
- Prisoners who are being detained for more than one year are ineligible.
- Members of the European Parliament are ineligible.
- Public servants are ineligible; this includes police, soldiers, judges and government-nominated directors of commercial companies.
- Bankruptcy may lead to disqualification, depending on the status of legal proceedings.
- A person convicted or found guilty of corrupt or illegal electoral practices is ineligible.

3.85 There is no requirement to be enrolled to vote in the United Kingdom. The UK does not have a written constitution and the Parliament can determine eligibility requirements in legislation.

**United States**

3.86 The US Constitution states that each House of Congress ‘shall be the judge of the elections, returns and qualifications of its own members’. Minimum requirements are embedded in the US Constitution:

- For the Senate: a person must be at least 30 years old, have been a US citizen for nine years and an inhabitant of the State for which they will be chosen.
- For the House: a person must be at least 25 years old, have been a US citizen for seven years and an inhabitant of the State for which they will be chosen.
- Eligibility for a candidate to be listed on the ballot paper is determined at State level and may vary.
– An individual can seek the nomination of a state-recognised political party.
– An individual can run as an independent. Independent candidates often must petition in order to have their names printed on the general election ballot.
– An individual can run as a write-in candidate.

3.87 The states may set additional requirements for election to Congress, but the Constitution gives each house the power to determine the qualifications of its members.

Comparison

3.88 Examining the qualifications of other Parliaments shows that the Australian Constitution, through the operation of ss. 44 and 45, imposes unusually stringent disqualification requirements. Within Australia, only two of the State and Territory Parliaments consider foreign citizenship a barrier to entering Parliament.

3.89 There is also significant variation in how qualifications and disqualifications are created. The two foreign Parliaments with the greatest similarity to Australia’s–New Zealand and the United Kingdom–are able to set their own qualifications and disqualifications to reflect their country’s contemporary community standards.
4. Reform options

Overview

4.1 This chapter discusses options for administrative and constitutional reform. The terms of reference suggested three approaches:

1. Improving the administration of electoral laws, so the risks of inadvertent ineligibility are minimised.
2. Making legislative changes to the disqualification process.
3. Amending the Constitution.

4.2 During the inquiry, the following additional reform options were also canvassed:

- Administrative changes, such as increased scrutiny and diligence when candidates nominate to stand for Parliament.
- Legislative and procedural changes to the way matters are referred to the Court of Disputed Returns.
- Constitutional amendments:
  - Amend s. 44 by inserting the words ‘until Parliament otherwise provides’ and subsequently legislating the grounds for disqualification.
  - Repeal s. 44 and place greater reliance on s. 34 and subsequently legislate to expand qualification requirements.
  - Amend s. 44 among a package of reforms to related sections of the Constitution; for example, ss. 16, 34, 42, 45, 46 and 47.
- No change.
- A combination of Constitutional and legislative reform.
4.3 The Committee carefully considered all options gathered in the evidence and in accordance with the terms of reference. All the options are discussed further below, with a summary of the evidence the Committee heard. These options are not mutually exclusive.

4.4 After consideration, the Committee is of the view that s. 44 as it stands should be repealed in its entirety, or the words added ‘until the Parliament otherwise provides’. Section 45, which is both dependent on and closely related to s. 44, should also be repealed or have the words added ‘until the Parliament otherwise provides’. Through the operation of s. 34, Parliament would then be able to legislate for both the qualifications and disqualifications of Members and Senators. The Committee’s view is set out further in Chapter 5.

**Early measures**

4.5 Before discussing the options for reform in detail, the Committee notes that none of the larger reform options will be able to be in place in time for several forthcoming by-elections.

4.6 The Committee therefore suggests that the Government implement measures to improve the compliance with s. 44 before these elections. This will also improve public trust and confidence in the election results, and increase certainty of the outcome for both the public and the Parliament.

4.7 The Committee notes that these measures will require bi-partisan support to implement. However the Committee considers that some early measures are necessary to restore public confidence and provide greater support to potential candidates.

**Full disclosure at time of nomination**

4.8 The Committee recommends that all candidates for election be required to make a public disclosure of family citizenship history at time of nomination. This disclosure would be in the same format as that required by the citizenship registers of current Members of Parliament.

4.9 Candidates would also be required to disclose any information relevant to the remaining parts of s. 44; for example bankruptcy, criminal convictions and contracts with the Commonwealth government.

**Parliament to agree to limit its referrals for potential breaches**
4.10 These measures require Parliament to agree in advance what action it will take in relation to alleged breaches of s. 44. This could be done by amendments to the Standing Orders.

**Allegations of breaches arising from publicly disclosed information**

4.11 If a breach arises from information that was publicly disclosed, the Committee recommends that Parliament preserve the current option for a person to challenge the election result by way of election petition filed within 40 days of the return of the writ. A person’s eligibility should not be able to be questioned in any other way.

4.12 Preserving the 40 day time limit balances the need for compliance with the need for certainty. It gives a window of opportunity to raise matters that were the subject of public disclosure, but then provides the certainty that it cannot be raised again during the life of the Parliament.

**Allegations of breaches that were not publicly disclosed, or arise after nomination**

4.13 If a breach arises that was either not publicly disclosed, or occurred after the candidate nominated, the Committee recommends that that matter go firstly to the Privileges Committee of the relevant house. This is a bi-partisan committee that has specific responsibility for the privileges of the Parliament.

4.14 The Privileges Committee will then recommend to the relevant House, on the basis of an inquiry into whether s. 44 has been breached, whether the relevant House should refer the matter to the Court of Disputed Returns (the High Court).

4.15 The Committee suggests that the Privilege Committee does not recommend a referral to the High Court where the only question or issue is one of foreign law; that is, where the issue of citizenship relies on a consideration or interpretation of foreign citizenship laws.

**Option 1–No constitutional change**

4.16 Several submissions and witnesses argued that s. 44 of the Constitution is working as intended—either in its entirety or at least in relation to s. 44(i) and
foreign citizenship. Therefore the Constitution does not need amending and no other substantive reform action is required.¹

4.17 A submission from Mr Michael C Douglas made five observations on s. 44(i) and foreign citizenship:

- s. 44(i) is clear.
- The reasonable steps exception is clear. (In relation to s. 44(i), a person with dual citizenship may be eligible to serve in Parliament if they have taken ‘all reasonable steps’ to divest their conflicting allegiance.)
- The reasonable steps exception is not unusual.
- s. 44(i) is not procedurally unfair.
- s. 44(i) is not otherwise unjust.²

4.18 Mr Les Yule and Mr Colin Lynch submitted that the Constitution’s requirements are clearly stated.³ Mr Douglas submitted:

In my view, the recent criticism that has been directed towards s. 44(i) would be better directed towards the politicians who, while seeking to draft legislation for a living, failed to come to terms with the plain language of our Constitution prior to seeking election.⁴

4.19 Mr Simon Cowan (Centre for Independent Studies) disagreed with the notion of s. 44 being inadequate or old-fashioned.⁵ He said:

For democracy to function as intended, the public must believe that politicians are acting in the public’s best interest... The appearance of a conflict of interest, even if it does not actually influence the behaviour of an individual, undermines that trust and confidence. The theme of s. 44 is to disqualify persons in certain circumstances where conflicts of interest can be identified.⁶

4.20 Professor Anne Twomey submitted:

My personal view is that there is no necessity to amend s 44(i) of the Constitution. The current problem was not caused by a matter of principle, but

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¹ For example, Mr Tony Magrathea, Submission 1, p. 1; Ms Paula Hall, Submission 3, p. 2; Mr Allan Laws, Submission 26, p. 2.
² Mr Michael Douglas, Submission 49, pp. 1–7.
³ Mr Les Yule, Submission 15, p. 1; Mr Colin Lynch, Submission 61, p. 1.
⁴ Mr Michael Douglas, Submission 49, p. 7; see also Ms Madonna Waugh, Submission 14, p. 1.
⁵ Mr Simon Cowan, Research Manager, The Centre for Independent Studies, Committee Hansard, Sydney, 2 February 2018, p. 4.
⁶ Mr Simon Cowan, Committee Hansard, Sydney, 2 February 2018, p. 4.
rather by the fact that some Members and Senators did not make the effort to inquire into their circumstances and take the necessary steps at the appropriate time to avoid disqualification.  

4.21 Professor Twomey added that since there is now greater awareness, candidates and political parties are likely to be more diligent in future to avoid disqualification. However, she commented that s. 44(iv) and (v) involve ‘far greater uncertainties’ than s. 44(i) and may require amendment.

‘Reasonable steps’ exception

4.22 Some witnesses to the inquiry argued that the ‘reasonable steps’ exception is widely known and compliance with s. 44(i) is therefore readily achievable. Since the Committee heard this evidence, the High Court has further confirmed the scope of the exception in Re Gallagher, which is discussed in more detail in Chapter 2.

4.23 In his submission, Mr Douglas outlined how the reasonable steps exception has been known for 15 years. Professor Twomey submitted:

While in some circumstances it may be difficult to renounce a foreign citizenship and problems may arise when documentary evidence has been lost due to war and displacement, such circumstances are likely to fall within the ‘reasonable steps’ exception acknowledged by the High Court.

4.24 Professor Tony Blackshield (who favours repealing s. 44) said the reasonable steps exception has a narrow application:

But the Court will not defer absolutely to the foreign law; it will do so only if the operation of the foreign law is compatible with the reasonable expectations of our Constitution. So the point is not whether the actions of an individual member of Parliament have been reasonable, but whether the requirements of the foreign law are unreasonable.

4.25 He continued:

If the foreign country makes it impossible to renounce its citizenship, or imposes such onerous requirements or conditions that we find the

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7 Professor Anne Twomey, Submission 34, p. 2.
8 Professor Anne Twomey, Submission 34, p. 2.
9 Mr Michael Douglas, Submission 49, p. 2.
10 Professor Anne Twomey, Submission 34, p. 2.
11 Professor Anthony Blackshield, Submission 25, p. 4.
unreasonable, then a person who has done everything within their power to 
effect a renunciation will be thought to have done enough. But ‘everything 
within their power’ may still be a much more onerous test than talk about 
‘reasonable steps’ might suggest.\(^\text{12}\)

4.26 A joint submission from Professor George Williams, Dr Sangeetha Pillai and 
Mr Harry Hobbs noted that ‘what constitutes ‘reasonable steps’ may vary 
from country to country, and depending on broader circumstances.’\(^\text{13}\)

4.27 Dr Joe McIntyre said that reasonable steps can be a ‘high bar’ to overcome. 
He added that there is a ‘belief... I can jump online, renounce and move 
on... that’s simply not what is happening.’\(^\text{14}\) The Committee notes that the 
recent decision in \textit{Re Gallagher} makes it clear that the exception will only 
apply in cases where the foreign country has ‘irremediably’ prevented an 
Australian from renouncing the foreign citizenship.

\textbf{No unfairness or injustice}

4.28 Dr John Cameron said there is an impression that parliamentarians believe 
they are ‘above the law and the law does not apply to them.’\(^\text{15}\) In his 
submission, Mr Douglas commented that checking citizenship status is a 
reasonable inconvenience. He submitted:

\begin{quote}
This may require some effort and time; it may prevent last-minute 
nominations for election. But there is nothing wrong with that—in my view, 
this is desirable. We should not want lazy people making law and governing.\(^\text{16}\)
\end{quote}

4.29 Mr Douglas added:

\begin{quote}
For the most part, the plain English meaning of the section aligns to its legal 
meaning, ... If you were to ask a non-lawyer, ‘How do you find out whether 
you are a citizen of the United Kingdom?’, they would probably say, ‘You 
should contact the UK Government’.\(^\text{17}\)
\end{quote}

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\(^\text{12}\) Professor Anthony Blackshield, \textit{Submission 25}, p. 4.

\(^\text{13}\) Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs, \textit{Submission 36}, p. 5.

\(^\text{14}\) Dr Joe McIntyre, \textit{Committee Hansard}, Adelaide, 19 February 2018, p. 17.


\(^\text{16}\) Mr Michael Douglas, \textit{Submission 49}, p. 5.

4.30 Where a parliamentarian cannot determine their citizenship status after extensively checking their background, Mr Douglas said the ‘reasonable steps exception would cover those kinds of candidates.’\[^{18}\]

4.31 However, the question remains—is it reasonable for Australians to have to go to the time and expense of extensive background checks simply to nominate for Parliament?

4.32 Mr Simon Cowan (Centre for Independent Studies) said that s. 44 does not indefinitely prevent dual citizens from serving in Parliament or being Prime Minister—provided they first ‘shed the potential conflict of interest’. He said:

> The obligations of s. 44, in my view, are not an onerous burden for the vast majority of the population, and having such a provision in our Constitution sends the message very clearly that politicians should have unequivocal and undivided loyalty to Australia and its people. This is neither too great a price to pay nor an outdated idea.\[^{19}\]

4.33 A submission from NSW Young Lawyers (Public Law and Governance Committee) stated:

> The Federal Parliament has continued to be made up of a range of talented and committed individuals who have been elected as members of Parliament from different backgrounds and with different skills. The words of s. 44 do not restrict this from continuing to occur, and the PLGC recommends that there be no changes to the wording of s. 44.\[^{20}\]

4.34 Mr Greg Northover submitted that loyalty to Australia should be the key consideration and ‘any attempt to dilute this singular and primal qualification must be vigorously opposed.’\[^{21}\]

**Option 2–Administrative reforms**

4.35 Administrative-level reforms proposed in the evidence included the following:

- Increased diligence and candidate awareness prior to nomination.
- Assistance and advice from the Australian Electoral Commission (AEC).
- Verifying candidate eligibility.

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\[^{19}\] Mr Simon Cowan, *Committee Hansard*, Sydney, 2 February 2018, p. 5.

\[^{20}\] NSW Young Lawyers Public Law and Government Committee, *Submission 53*, p. 5.

Continuous disclosure of eligibility on a register.

**Due diligence prior to nomination**

4.36 Several submissions commented that candidates and political parties should take greater responsibility for due diligence and checking their own personal backgrounds. This could include tendering documentary evidence when nominating to stand as a candidate. Mr Simon Cowan (Centre for Independent Studies) said:

They are asking the public to vote for them. They are assuring the public and the AEC that they are eligible. It’s up to them, to a certain extent, to prove it or at least be certain that that’s true.

4.37 Mr Tom Rogers (Commissioner, Australian Electoral Commission) said:

…the AEC already provides a wide range of resources on our website, including guides, handbooks and electoral backgrounders that outline very clearly information for potential candidates on the eligibility requirements set by s. 44.

4.38 The AEC also offers briefings to candidates and political parties. Mr Rogers noted that ‘compliance with s. 44 is the responsibility of the candidate—and the candidate alone.’

4.39 A joint submission from Dr Joe McIntyre, Ms Sue Milne and Professor Wendy Lacy observed:

Even if major parties put in flawless vetting processes for their candidates, it is unlikely that these will filter through to smaller parties. …we will continue to have periodic episodes of disqualifications.

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22 Ms Paul Hall, Submission 3, p. 2; Mr Greg Northover, Submission 18, p. 2; Mr Robert Bourke, Submission 23, p. 2; Ms Nerissa Ngadjon, Submission 47, pp. 3-4; Ms Liz Burton, Submission 55, p. 2.

23 Mr Tony Magrathea, Submission 1, p. 1; Mr Allan Laws, Submission 26, p. 1; Safe Communities Australia, Submission 32, p. 5.

24 Mr Simon Cowan, Committee Hansard, Sydney, 2 February 2018, p. 13.

25 Mr Tom Rogers, Commissioner, and Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission (AEC) Committee Hansard, 8 December 2017, Canberra, p.1, 7.

26 AEC, Submission 8, p. 1.

27 Mr Tom Rogers, Commissioner, and Mr Paul Pirani, Chief Legal Officer, AEC, Committee Hansard, Canberra, 8 December 2017, p. 1.

28 Dr Joe McIntyre, Ms Sue Milne and Professor Wendy Lacey, Submission 62, p. 8.
4.40 Professor Graeme Orr observed that the High Court had shown ‘relatively little regard’ for the practical challenges for minor party candidates contending with ‘uncertain federal election dates and without access to constitutional or citizenship lawyers.’

4.41 A submission from Arjuna Dibley submitted that the AEC ‘should evaluate how potential candidates are in fact engaging with AEC processes.’ A number of submissions suggested the nomination process could include checklists, questions or guidance to ensure candidates reflect more carefully on their circumstances and family background. The NSW Young Lawyers Public Law and Governance Committee suggested including a statutory declaration in the nomination form.

**Assistance and advice from the Australian Electoral Commission**

4.42 The AEC advised ‘it may be possible’ to develop an online self-assessment process to assist prospective candidates, in cooperation with relevant Commonwealth agencies. The AEC submitted:

> We would anticipate that the online self-assessment checklist would be available on the AEC website for potential candidates to use at any time, not just in the lead up to an election. This would allow potential candidates to make relevant inquires and, if necessary, take remedial action to ensure that they are not disqualified… prior to lodging a candidate nomination with the AEC during an election period.

4.43 The AEC added that it is ‘not currently funded to develop this online facility.’ Professor Cheryl Saunders supported the idea, but noted it would not be foolproof. A submission from Ms Lorraine Finlay noted the risks.

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29 Professor Graeme Orr, *Committee Hansard*, Canberra, 8 December 2017, p. 16.


31 Professor Kim Rubenstein, *Submission 20*, p. 1; Professor Anne Twomey, *Submission 34*, p. 1. See also Dr Anthony Moran, *Submission 40*, p. 4; NSW Young Lawyers Public Law and Government Committee, *Submission 53*, p. 8; Professor George Williams AO, Dr Sangeetha Pillai and Mr Harry Hobbs, *Submission 36*, p. 6; Mr John Gilly, *Submission 50*, p. 2.

32 NSW Young Lawyers Public Law and Government Committee, *Submission 53*, pp. 8–10. See also Mr Graham Rayner, *Submission 54*, p.3.

33 AEC, *Submission 8*, p. 2.

34 AEC, *Submission 8*, p. 3.

35 AEC, *Submission 8*, p. 3. See also Professor Anne Twomey, *Submission 34*, p.1.

36 Professor Cheryl Anne Saunders, *Committee Hansard*, Melbourne, 1 February 2018, p. 2.
involved if the AEC were drawn into providing incorrect advice as part of a vetting process.  

4.44 Professor Helen Irving noted that while the AEC is not a judicial body in a position to interpret the Constitution, she said it could refer candidates to expert advice on foreign citizenship law. A joint submission from Dr Joe McIntyre, Ms Sue Milne and Professor Wendy Lacy noted that there can be ‘little agreement amongst legal academics and practitioners’ on how the High Court may resolve certain s. 44 questions. The submission added:

The current tranche of referrals and potential referrals to the Court on s. 44 include a number of cases that would have appeared clearly safe under the prior law.

4.45 Professor Graeme Orr characterised the High Court’s decisions as being rushed:

The court hears these cases occasionally and under great time pressure. Over several decades the High Court has shown no consistent interpretive method in developing s. 44.

4.46 Professor Orr also observed that it is very hard to prove a negative. Even if the case law provided certainty, Associate Professor Luke Beck said investigating citizenship would pose challenges and involves an ‘extraordinarily large number’ of individuals. He said a person could ‘inherit citizenship from their parents or grandparents or might gain it upon marriage’ and this would ‘require an investigation into the citizenship of the spouse’s parents and grandparents’. Associate Professor Elisa Arcioni said that this would be impractical in the time available:

37 Ms Lorraine Finlay, Submission 51, p. 2. See also Ms Liz Burton, Submission 55, p. 3.
38 Professor Helen Irving, Submission 33, p. 2 and Committee Hansard, Sydney, 2 February 2018, p. 2.
39 Dr Joe McIntyre, Ms Sue Milne and Professor Wendy Lacy, Submission 62, p. 8. See also Mr Bob Day, Submission 66; Professor Jeremy Gans, Committee Hansard, Melbourne, 1 February 2018, p. 13; Dr Sangeetha Pillai, Committee Hansard, Melbourne, 1 February 2018, p. 22.
40 Dr Joe McIntyre, Ms Sue Milne and Professor Wendy Lacy, Submission 62, p. 8. See also Mr Bob Day, Submission 66.
41 Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 16.
42 Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 21.
43 Associate Professor Luke Beck, Submission 16, pp. 2-3.
There is Italian case law which shows that even as early as 1912 and back to 1860, there has been transferral of Italian citizenship. So the pragmatic difficulty of assessing citizenship of all candidates is beyond the capacity of any organisation within the time frame before a federal election.44

4.47 Mr Rogers noted that an AEC self-assessment regime might flag potential issues, but could not provide candidates with a positive assurance of their eligibility.45

Verifying candidate eligibility

4.48 It has widely been suggested that the Australian Electoral Commission (AEC) should have a role in vetting candidates for eligibility under s. 44 prior to elections.46 For legislative, practical, and reputational reasons this is a dangerous and unworkable suggestion. Most crucially, having the AEC both conduct elections and adjudicate on candidate disqualification would seriously corrupt the probity of Australia’s democracy. At his appearance before the Committee, Electoral Commissioner, Mr Tom Rogers, stated these reasons:

The AEC has a very limited power under the Electoral Act to reject nominations. The power to reject, such as it is, effectively relates to the lodging of forms with the AEC. It’s only where those forms have not been completed correctly that the AEC can reject a nomination, rather than based on some deficiency with the qualifications of an intending candidate under section 44.

Ensuring compliance with section 44 of the Constitution is practically complex. Under the Act there are legislative time frames that prescribe the close-of-nominations period that would, amongst a range of other issues, make it virtually impossible for the AEC to check all nominations to ensure compliance with section 44. To give you an idea of the challenge this would pose, at the 2016 federal election there were 1,625 candidates. Under section 175 of the Electoral Act the declaration of nominations must occur 24 hours after the close of nominations. Ballot papers are then finalised and printed almost immediately afterwards in order to allow for early voting that starts a couple of days later. That fact restricts the time available to conduct such checks to a matter of hours rather than days. Additionally, there is no reliable, complete and up to-date database available for the AEC to verify information relating to section 44. Accordingly, it wouldn’t be possible for us to conduct

44 Associate Professor Elisa Arcioni, Committee Hansard, Sydney, 2 February 2018, p. 11.
45 Mr Tom Rogers and Mr Paul Pirani, Committee Hansard, Canberra, 8 December 2017, p. 5.
46 See Mr Graham Rayner, Submission 54, pp. 3-4 and Mr Les Yule, Submission 15, p. 1.
comprehensive candidate eligibility vetting within the time frames that I’ve just outlined.47

4.49 Mr Rogers also stated:

the AEC should not be the arbiter of a candidate’s eligibility. The AEC’s reputation for conducting high-integrity federal elections is founded on its apolitical nature. If the AEC were given the power to veto a candidate’s nomination based on a determination of ineligibility under section 44, the AEC would risk perceptions of political partisanship. Additionally, it’s likely that candidates would seek to challenge an AEC determination of ineligibility in the courts.48

4.50 Professor Graeme Orr agreed that the AEC would be accused of partisanship, if it ‘refused someone’s nomination in any situation that wasn’t crystal clear, like a registry of bankruptcy.’49

4.51 Mr Rogers added:

If the AEC were given the power to veto a candidate’s nomination based on a determination of ineligibility under s. 44, the AEC would risk perceptions of political partisanship. Additionally… candidates would seek to challenge an AEC determination of ineligibility in the courts.50

4.52 Professor Rosalind Dixon commented that where a person’s ancestry is debatable or there are complex family situations, the only way to conclusively determine the question is ‘an affirmative determination by the High Court’.51

4.53 Ms Lorraine Finlay further highlighted the reputational and practical difficulties the AEC would face given a role in vetting potential candidates:

It is vitally important that the AEC is seen to be independent and impartial in the way it conducts elections, and there is a real risk that this could be undermined if they were asked to provide legal advice to candidates or to perform any type of vetting function. Similarly, there is a risk whenever legal advice is given that it could lead to subsequent legal challenges, or leave the AEC open to criticism were they to give in correct advice. This must be considered a real risk in these circumstances given the uncertainty that has

47 Mr Tom Rogers, Commissioner, AEC, Committee Hansard, Canberra, 8 December 2017, p. 1.
48 Mr Tom Rogers, Commissioner, AEC, Committee Hansard, Canberra, 8 December 2017, pp. 1-2.
49 Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 21.
50 Mr Tom Rogers Committee Hansard, Canberra, 8 December 2017, pp. 1-2.
51 Professor Rosalind Dixon, Committee Hansard, Sydney, 2 February 2018, p. 12.
recently surrounded the interpretation of s. 44. It would also be entirely impractical to ask the AEC to conduct ‘s. 44 checks’ on nominated candidates, given the sheer number of candidates and the short time-frame between the close of nominations and the subsequent steps in the election process.\textsuperscript{52}

4.54 Associate Professor Luke Beck commented that verification would be too onerous and complicated for any Commonwealth agency to complete.\textsuperscript{53} The Committee notes that additional resourcing would be required to set up a separate agency, or expand an existing government department. In addition, if an existing department were given this responsibility, there could be a perception that the department could be influenced by Ministerial or executive direction.

4.55 The High Court decision in \textit{Re Gallagher} made it clear that, unless the foreign citizenship laws effectively prevent renunciation, it is not sufficient to merely take steps towards renunciation before nomination. Any clearance process would therefore need to be completed well before the date of nomination, to allow a prospective candidate to complete any renunciation process before nomination. Particularly complex renunciation processes could take months or even years before renunciation is effective.

4.56 A vetting process would be impossible to complete in the time between the writs for an election being issued, and the close of nominations. It is also not clear who should bear the cost of vetting. If it is decided that the cost should be borne by candidates, it would discourage anyone but those with significant resources from standing for election.

\textbf{Continuous disclosure on a register}

4.57 In late-2017, the Senate and House of Representatives resolved to require Senators and Members to disclose information relevant to s. 44(i) to reveal any cases of potential foreign citizenship.\textsuperscript{54} Ms Lorraine Finlay submitted that the registers should become a standard feature in future and supplemented with an independent audit.\textsuperscript{55} Mr Tony Magrathea said

\begin{footnotes}
\item[52] Ms Lorraine Finlay, Submission 51, p. 2.
\item[53] Associate Professor Luke Beck, \textit{Submission 16}, p. 3.
\item[54] The Senate resolved on 13 November 2017 and the House of Representatives resolved on 4 December 2017.
\item[55] Ms Lorraine Finlay, \textit{Submission 51}, p. 3. See also Mr Mike Maley, \textit{Submission 35}, p. 4.
\end{footnotes}
Parliament should investigate all allegations relating to potential disqualifications.\(^{56}\)

4.58 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 (See Appendices D and E).

4.59 Professor Tony Blackshield observed:

One of the most distressing features of last December’s ‘Citizenship Register’ was the number of members who were genuinely unable to give details of the place and date of birth of their parents, grandparents and spouse; and particularly poignant was the number of people with Indigenous ancestry for whom that was wholly impossible. In those cases, the possibility of dual nationality cannot be conclusively excluded; but neither can it be conclusively proved.\(^{57}\)

4.60 A joint submission from Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs said the registers could be improved; for example:

- Parliamentarians are not currently required\(^{58}\) to disclose the citizenship of their parents, grandparents or spouses.
- The declarations ‘lack a supporting process’ or practical consequences for failing to provide documentary evidence.\(^{59}\)

4.61 Their submission also noted that there is no process for disclosing offices of profit or pecuniary interests. The submission added that administrative measures cannot overcome the absence of clarity in s. 44, something which ‘can only be achieved through constitutional change following a successful referendum.’\(^{60}\)

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56 Mr Tony Magrathea, Submission 1, p. 1.
57 Professor Anthony Blackshield, Submission 25, p. 4 and Committee Hansard, Sydney, 2 February 2018, p. 11.
58 The resolutions establishing the registers ask for this information on the basis of ‘so far as’ the Senator or Member is aware.
59 Professor George Williams AO, Dr Sangeetha Pillai and Mr Harry Hobbs, Submission 36, p. 6. See also Professor George Williams, Committee Hansard, Canberra, 8 December 2017, p. 24.
60 Professor George Williams AO, Dr Sangeetha Pillai and Mr Harry Hobbs, Submission 36, p. 5. See also Professor George Williams, Committee Hansard, Canberra, 8 December 2017, p. 27.
4.62 Professor Jeremy Gans said the registers included ‘curious cases’ where letters requesting citizenship renouncement were supplied—but not an authoritative letter or document to confirm the renunciation was ever granted.  

4.63 Mr Simon Cowan said there needs to be a contradictor to review the information in the registers. He said the Australian Electoral Commission is the ‘obvious choice’ in the first instance and should be given the power and resources to fulfil this role.

Option 3—Legislative and procedural reforms

4.64 Legislative and procedural options proposed or discussed in the evidence included the following:

- A grace period or delayed High Court referral for potentially disqualified parliamentarians.
- Avoiding High Court referral.
- Increasing the severity of penalties in legislation and improving compliance.
- Legislating to allow the automatic foreign citizenship renunciation.
- Establishing a federal integrity commission.

A grace period or delayed High Court referral

4.65 The decision to refer a Senator or Member to the Court of Disputed Returns ultimately rests with the House in which the question arises. Odgers’ Australian Senate Practice states:

Each House of the Parliament has the power to determine its own constitution, in so far as it is not determined by constitutional or statutory law.

4.66 House of Representatives Practice states:

Each House functions as a distinct and independent unit within the framework of the Parliament. The right inherent in each House to exclusive

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62 Mr Simon Cowan, Committee Hansard, Sydney, 2 February 2018, p. 5 and pp. 10-11. Mr Cowan clarified that he did not expect this process to include all nominated candidates.
63 Constitution, s. 47; Odgers’ Australian Senate Practice (14th edn), p. 17. See also p. 564.
64 Odgers’ Australian Senate Practice (14th edn), p. 77.
cognisance of matters arising within it has evolved through centuries of parliamentary history and is made clear in the provisions of the Constitution.65

4.67 A number of witnesses and submissions discussed whether the Senate and the House of Representatives could utilise s. 47 of the Constitution to retain firmer control over referrals to the High Court (sitting as the Court of Disputed Returns). This would involve Parliament deliberately delaying the referral of Senators or Members and giving anybody in doubt a chance to remedy their disqualification.

Section 47

Until the Parliament otherwise provides,66 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.

4.68 Associate Professor Luke Beck observed that the Electoral Act could be amended so that referrals from Parliament to the Court of Disputed Returns are less straightforward. For example, the presentation of legal advice to Parliament could be made a pre-condition of a referral to the Court.67

4.69 Professor Graeme Orr said that a ‘path of extreme compliance’ has led Parliament to outsource many cases to the High Court for a decision.68 He explained that parliamentary privilege could be utilised to allow amnesties or leniency:

How you use that ancient power is up to you. For instance… MPs who had acted reasonably and not deliberately taken on conflicts of interest, whether with another country or a public office, could have been given time to resolve the issue.69

4.70 Professor Orr commented that his proposal is potentially tenable in a legal sense, but added that he did not know if it might be a viable political

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65 House of Representatives Practice (6th edn), p. 36.
66 Parliament has ‘otherwise provided’ and established the Court of Disputed Returns in the Electoral Act.
68 Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 16.
69 Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 16.
option. Professor Orr said the focus should be on parliamentarians who have an ‘unresolvable continuing disqualification’.

### Petitioning the Court of Disputed Returns using the Commonwealth Electoral Act 1918

**353 Method of disputing elections**

(1) The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.

[...]  

**355 Requisites of petition**

...every petition disputing an election or return... shall:

(a) set out the facts relied on to invalidate the election or return;

[...]  

(e) be filed in the Registry of the High Court **within 40 days**...

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4.71 Mr Michael Maley PSM suggested Parliament could use powers in the Constitution and legislate to create a scheme ‘for getting qualification issues before the Court at the start of the Parliament, in a way which would not be open to accusations of partisan manipulation.’ He submitted that this would encourage candidates to complete due diligence before completing the nomination process, ‘thereby minimising the prospect of subsequent and ongoing disruption of the parliamentary process.’

4.72 Ms Lorraine Finlay submitted that scope exists to clarify the circumstances leading to referrals from the Parliament to the Court of Disputed Returns. Her submission explained:

It may be useful to consider whether providing internal referral guidelines, or even some independent mechanism to assess whether referral is warranted in an individual case, would provide for a more transparent process that ensures

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70 Professor Graeme Orr, *Committee Hansard*, Canberra, 8 December 2017, p. 18.  
71 Professor Graeme Orr, *Committee Hansard*, Canberra, 8 December 2017, p. 17.  
72 Mr Mike Maley, *Submission 35*, pp. 4-5.
Parliament focuses on the legal issues rather than political factors when considering referrals.\textsuperscript{73}

4.73 Professor Orr commented that Parliament could establish a tribunal or committee to make preliminary assessments on whether potentially ineligible Senators or Members should be referred to the Court of Disputed Returns.\textsuperscript{74}

4.74 It has recently been suggested that the establishment of such a tribunal may provide a legislative mechanism for Parliament to influence the interpretation of the Constitution, thus avoiding the need for formal Constitutional amendment. In relation to s. 44(i) she commented that ‘this could influence the Court’s understanding of what constitutes “reasonable steps” under the current test.’\textsuperscript{75} This assertion remains untested however, and ultimate jurisdiction to interpret the Constitution remains with the High Court.

4.75 The Senate appointed a committee for this purpose in the past, although this practice was discontinued.\textsuperscript{76}

4.76 A joint submission from Professor Rosalind Dixon, Associate Professor Appleby and Mr Lachlan Peake posed an option of amending s. 44 to allow a grace period:

\textquote[...language could also simply be added to end of s 44… so that it reads something like:]

‘… and does not within 3 months of being elected take all reasonable steps to renounce, discharge or discontinue this foreign citizenship; bankruptcy or insolvency; office of profit, pension, or pecuniary interest ... shall be incapable of taking their seat as a member of Parliament.’\textsuperscript{77}

\textsuperscript{73} Ms Lorraine Finlay, Submission 51, p. 4.

\textsuperscript{74} Professor Graeme Orr, Committee Hansard, Canberra, 8 December 2017, p. 17. See also NSW Young Lawyers Public Law and Government Committee, Submission 53, p. 9; Mr David Lewis, Acting General Counsel (Constitutional), Attorney-General’s Department, Mr Jeff Murphy, Principal Legal Officer, Attorney-General’s Department, Committee Hansard, Canberra, 8 December 2017, p. 36.


\textsuperscript{76} Odgers’ Australian Senate Practice (14\textsuperscript{th} edn), p. 173.

\textsuperscript{77} Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, Submission 44, p. 12.
Reviving Parliament’s powers

4.77 Several witnesses recognised that an option exists to revive Parliament’s powers in s. 47, but cautioned against pursing this course, mainly because it would not restore public confidence and could undermine trust in the political system.78 Professor Twomey submitted:

Any actions of the Houses… to limit access to the Court of Disputed Returns in order to protect and retain disqualified Members and Senators within the Parliament would be likely to bring the Parliament into disrepute. There is an obligation on all parliamentarians to maintain, and not thwart, the application of the Constitution.79

4.78 Professor Cheryl Saunders said utilising s. 47 would be a ‘very controversial’ option:

One of the reasons the parliament itself abandoned the practice at that stage was that it was being used in a partisan way. You can imagine that the potential to use it in a partisan way is there.80

4.79 Associate Professor Elisa Arcioni explained that Parliament could not change the law, as a matter of principle, to circumvent the High Court’s ability to interpret the Constitution. She suggested the Court may find ways to preserve its role.81 Professor Helen Irving said that legislation cannot be ‘amended in such a way as to deprive the High Court of its power to interpret the Constitution.’82 She said Parliament cannot rule on the meaning of the Constitution and noted the High Court’s view that s. 47 ‘must be construed in its constitutional setting.’83 Professor Irving said:

It would be implausible to repeal the relevant sections of the Judiciary Act in order to get around the issue of the High Court’s jurisdiction over eligibility

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78 See for example, Professor George Williams AO, Dr Sangeetha Pilliai and Mr Harry Hobbs, Submission 36, p. 7. See also Professor George Williams, Committee Hansard, Canberra, 8 December 2017, p. 28.
79 Professor Anne Twomey, Submission 34, p. 2.
80 Professor Cheryl Anne Saunders, Committee Hansard, Melbourne, 1 February 2018, p. 2.
81 Associate Professor Elisa Arcioni, Submission 38, p.2.
82 Professor Helen Irving, Committee Hansard, Sydney, 2 February 2018, p. 2.
83 Professor Helen Irving, Committee Hansard, Sydney, 2 February 2018, p. 2.
for parliament. ... It would be technically possible but politically outrageous...\textsuperscript{84}

4.80 Professor Tony Blackshield agreed that this would be an ‘outrageous thing to do, but it would be possible.’\textsuperscript{85}

4.81 Professor Matthew Stubbs cautioned against reducing the Court’s role:

I think that would be a mistake. The independent umpire in this process is a valuable one, and I don’t think that it would in fact serve the interests of the parliament or the people for parliament to be required to sit and determine these matters itself.\textsuperscript{86}

**Simplifying High Court referral**

4.82 In contrast to options to reduce referrals to the High Court and permit leniency, some submissions proposed amending legislation to allow a Senator or Member’s right to sit in Parliament to be more easily challenged. Mr Colin Lynch submitted:

Only the risk of suits from individual citizens will incent[ivise] parliamentarians to carefully respect the legal requirements of s. 44.\textsuperscript{87}

4.83 A private individual can lodge a petition with the Court of Disputed Returns within a 40-day time limit.\textsuperscript{88} Petitions are not limited to a candidate’s qualifications under the Constitution, and can be lodged on any matter that might invalidate an election or return. Outside of the 40 day time limit, referrals can be made to the Court from either the Senate or House of Representatives.\textsuperscript{89}

4.84 A person can also lodge a petition under the *Common Informers (Parliamentary Disqualifications)* Act 1975, on the grounds that a sitting Senator or Member is disqualified. As noted in Chapter 3, the recent decision by the High Court has restricted the scope of common informers actions.\textsuperscript{90} By deciding that the Common Informers Act did not confer jurisdiction on

\textsuperscript{84} Professor Helen Irving, *Committee Hansard*, Sydney, 2 February 2018, p. 10.

\textsuperscript{85} Professor Anthony Blackshield, *Committee Hansard*, Sydney, 2 February 2018, p. 10.


\textsuperscript{87} Mr Colin Lynch, *Submission 61*, p. 1.

\textsuperscript{88} Electoral Act, s. 355.

\textsuperscript{89} Electoral Act, s. 376.

\textsuperscript{90} *Alley v Gillespie* [2018] HCA 11.
the High Court to determine qualification under s. 44, this decision has removed the option for using this Act to bring questions of qualification before the High Court.

**Increasing the penalties to improve compliance**

4.85 Some submissions recommended increasing penalties for candidates falsely declaring eligibility at nomination or parliamentarians who receive a salary and allowances while ineligible.91 The Australian Monarchist League condemned the ‘cavalier disregard the political elite have shown towards the Constitution’ and recommended increasing the penalty in the Common Informers Act.92 The League also favoured amending the Constitution to ban an ineligible Senator or Member from sitting in Parliament for six years.93

4.86 Mr Allan Laws said ‘ignorance is no excuse’, falsifying nomination forms is criminal and the lack of prosecutions is a ‘disgrace’.94 Mr Brian Capamagian submitted that ‘life imprisonment would be a very strong deterrent.’95 Mr John Reeves Taylor submitted:

> Given that no previous candidate has been prosecuted and no agency is investigating or enforcing the penalties related to false statements and declarations it will always remain an option for the deceitful candidate to falsely declare that they are not rendered ineligible by s44 and slip under the radar as it were. We are all left to wonder how the lack of enforcement in the past may have contributed to our current situation.96

4.87 Dr John Cameron said that if a Senator or Member is potentially disqualified, they should be given two options:

- resigning and being replaced;
- having their case referred to the Court of Disputed Returns ‘at their own expense and paying the costs... if unsuccessful.’97

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91 Mr Tony Magrathea, *Submission 1*, p. 1; Ms Paula Hall, *Submission 3*, p. 2; Mr Les Yule, *Submission 15*, p. 1; Mr Wayne Halls, *Submission 17*, p. 4; Mr Allan Laws, *Submission 26*, p. 2; Safe Communities Australia, *Submission 32*, p. 7; Mr Brendan Whyte, *Submission 41*, p. 1.


95 Mr Brian Capamagian, *Submission 28*, p. 1.

96 Mr John Reeves Taylor, *Submission 57*, p. 3.

Dr Cameron said nomination forms should be promptly made public so the likelihood of a challenge can be ascertained before or immediately after a candidate is declared elected.98

**Legislation for the automatic renunciation of foreign citizenship**

In 2000, the Electoral Matters Committee recommended a constitutional amendment to make automatic renunciation possible. During the current inquiry, a number of submissions supported automatic renunciation.

Mr Greg Northover submitted that foreign citizenship renunciation could be automated with the candidate’s consent:

The Parliament is able to legislate to amend the Electoral Act so that candidate nominations include foreign citizenship screening. Automatic renunciation of any foreign citizenship should be a corollary of this and be built into the nomination system. An Australian unilateral Instrument of Renunciation should be developed in consultation through all diplomatic channels.99

Mr Northover added that the screening process would reduce the risk of a candidate with inherited foreign citizenship being elected.100 Ms Margaret Hurle submitted that Australia could ‘make its own law’ so allegiances could be repudiated prior to the declaration of the poll.101 Mr Allan Laws submitted:

This can easily be fixed by changes to the citizenship act and the nomination form. … Simple fix add a question to the nomination form listing all passports current and expired passports.102

Mr Graham Rayner submitted that there should be a standard procedure for renunciation. Some witnesses suggested Australia should negotiate with foreign governments to have these renunciations recognised as having precedence over their own laws.103

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98 Dr John Cameron, *Committee Hansard*, Perth, 20 February 2018, p. 3.
100 Mr Greg Northover, *Submission 18*, p. 6.
103 Professor Cheryl Anne Saunders, *Committee Hansard*, Melbourne, 1 February 2018, p. 2; Professor Jeremy Gans, *Committee Hansard*, Melbourne, 1 February 2018, p. 10; Mr Graham Rayner, *Submission 54*, p. 4.
A number of legal academics observed that an automated renunciation is not possible, because the procedure for renunciation depends on the operation of foreign laws.\textsuperscript{104}

Professor Helen Irving said the High Court had considered whether taking a naturalisation oath is sufficient to renounce foreign citizenship and ‘found that this was insufficient and did not amount to a renunciation.’\textsuperscript{105}

Associate Professor Luke Beck submitted:

...Parliament cannot legislate to reduce the risk of ineligibility. The High Court has made it very clear that whether a person is a citizen of a foreign country is a function of foreign law. The Australian Parliament cannot legislate to alter the law of foreign countries.\textsuperscript{106}

Professor Anne Twomey submitted:

Any attempt to deem foreign law as having a different effect or to deem renunciation as having occurred in certain circumstances, would appear to amount to the creation of a fiction to thwart the application of the Constitution and would therefore be unlikely to survive scrutiny by the High Court.\textsuperscript{107}

Professor Twomey added that if s. 44 were removed, ensuring sole allegiance to Australia could be achieved by amending s. 42 of the Constitution, so the oath or affirmation made at the commencement of a new parliament must include a renunciation. This procedure would only affect successful candidates—‘not all candidates prior to nomination.’\textsuperscript{108}

\textbf{Section 42}

Every senator and every member of the House of Representatives shall

\textsuperscript{104} Professor Kim Rubenstein, \textit{Submission 20}, p. 1; see also Professor George Williams AO, Dr Sangeetha Pillai and Mr Harry Hobbs, \textit{Submission 36}, p. 2 & p. 6; Associate Professor Elisa Arcioni, \textit{Submission 38}, p. 1.

\textsuperscript{105} Professor Helen Irving, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 2.

\textsuperscript{106} Associate Professor Luke Beck, \textit{Submission 16}, p. 2.

\textsuperscript{107} Professor Anne Twomey, \textit{Submission 34}, p. 1.

\textsuperscript{108} Professor Anne Twomey, \textit{Submission 34}, pp. 2-3. The amendment would read: ‘42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution and shall renounce any status as a citizen or subject of a foreign power or any allegiance, obedience or adherence to a foreign power.’ See also Professor Rosalind Dixon, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 18.
before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

4.98 Professor Twomey said that disqualification for taking active steps to acquire citizenship or rights would avoid unexpected disqualifications.\textsuperscript{109} Mr Victor Perton submitted:

I am the child of ‘stateless’ refugees who arrived in Australia. Their countries had been illegally incorporated into the Soviet Union. Under Soviet law, I was a citizen of the Soviet Union and this was not renounceable. I served 18 years in the Victorian Parliament and no one ever suggested that my patriotism nor my performance was affected by my entitlement to Soviet citizenship.\textsuperscript{110}

4.99 Two submissions suggested repealing laws allowing for Australians to be dual citizens.\textsuperscript{111} Professor Twomey cautioned that the implications of this change could be problematic:

If someone gets citizenship by descent does that automatically mean they’re not an Australian citizen? …then it would mean that a whole lot of people born here were never Australian citizens. It could be quite awkward.\textsuperscript{112}

4.100 Dr Anthony Moran said:

Critics of dual and multiple citizenship have argued that it’s dangerous for social cohesion and for national identity. I don’t think that such critics have been able to show this for either of those things. For example, even though Australia has a large number of dual citizens, Australia is widely regarded as a very socially cohesive country.\textsuperscript{113}

4.101 Dr Moran said this has been demonstrated in the Scanlon Foundation’s reports on mapping social cohesion.\textsuperscript{114}

Establish a federal integrity commission

\textsuperscript{109} Professor Anne Twomey, Committee Hansard, Canberra, 8 December 2017, p. 13.

\textsuperscript{110} Mr Victor Perton, Submission 42, p. 1. See also Professor Jeremy Gans, Committee Hansard, Melbourne, p.10; Emeritus Professor Andrew Jakubowicz, Committee Hansard, Sydney, 2 February 2018, p. 8.

\textsuperscript{111} Mr Wayne Halls, Submission 17 and Mr Robert Bourke, Submission 23.

\textsuperscript{112} Professor Anne Twomey, Committee Hansard, Canberra, 8 December 2017, p. 14.

\textsuperscript{113} Dr Anthony Moran, Committee Hansard, Melbourne, 1 February 2018, p. 36.

\textsuperscript{114} Dr Anthony Moran, Committee Hansard, Melbourne, 1 February 2018, p. 36.
4.102 Several submissions reasoned that the objectives in s. 44 could be addressed (at least in part) by establishing a federal integrity commission.\textsuperscript{115}

4.103 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon and Mr Lachlan Peake jointly submitted that s. 44 is intended to ‘reduce the probability that members of parliament will act in a corrupt manner’ and, in particular, ‘to reduce the possibility of a conflict of interest caused by holding another public office or a pecuniary interest.’\textsuperscript{116} Their submission stated:

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\text{…a federal integrity commission would have a number of advantages in dealing with conflicts of interest over the constitutionally entrenched disqualification mechanism…}\textsuperscript{117}
\]

4.104 These advantages included the ability of an integrity commission to investigate, detect serious corruption and obtain documents.\textsuperscript{118} Professor Tony Blackshield said s. 44 exists to regulate conflicts of interest, by identifying ‘categories of persons or situations’ where conflicts might be presumed. He said:

\[
\text{…the most effective way of assessing that kind of possibility is precisely through the kind of integrity commission that is now being proposed. So I would now say: let’s get rid of s. 44 altogether and have an integrity commission instead.}\textsuperscript{119}
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4.105 Professor Dixon said repealing s. 44 would lead to ‘calls for some kind of federal integrity body capable of dealing with concerns of that kind’. She said the work of an integrity body could be linked to the qualification requirements, so a person subject to an adverse finding may be prevented from sitting in Parliament.\textsuperscript{120}

\textsuperscript{115} See for example Emeritus Professor Andrew Jakubowicz, Submission 30, p. 3; Professor Anthony Blackshield, Submission 25, p. 2; Dr Hal Colebatch, Committee Hansard, Perth, 20 February 2018, p. 18.

\textsuperscript{116} Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, Submission 44, p. 6.

\textsuperscript{117} Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, Submission 44, p. 6.

\textsuperscript{118} Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, Submission 44, p. 6.

\textsuperscript{119} Professor Anthony Blackshield, Committee Hansard, Sydney, 2 February 2018, p. 6.

\textsuperscript{120} Professor Rosalind Dixon, Committee Hansard, Sydney, 2 February 2018, p. 4. Prof Dixon added that there could be a period where the outcome or findings of an integrity commission are open to challenge.
4.106 Mr Simon Cowan (Centre for Independent Studies) said allowing an integrity commission to control who is eligible, rather than the High Court, would create uncertainty and had other public policy implications. He said:

What we are basically doing is taking a circumstance which we don't think completely covers the ground, reinventing it in a completely different way, with a number of other negative consequences.\textsuperscript{121}

4.107 Others observed that s. 44 does not necessarily regulate all potential conflicts of interest or undue external influences in Australian politics. Professor Anne Twomey commented that ‘factors such as political donations and the like are of greater concern than citizenship of another country.’\textsuperscript{122} Professor Graeme Orr said:

I think when it comes to parliamentary ethics… you really should be focusing on actual real conflicts of interest dealing with money or substantive overseas ties, and so on.\textsuperscript{123}

4.108 Professor Alex Reilly said that foreign influence should not be confused with foreign citizenship. He said:

By its very nature, foreign citizenship poses no risk to the parliament and should not render a person ineligible to run for parliament. On the contrary, the relationship dual citizens have with other nations may be of benefit to the parliament and its deliberations.\textsuperscript{124}

4.109 Professor Rosalind Dixon said a person eligible to sit in Parliament could have ‘substantial conflicts of interest and integrity problems’ unrelated to the grounds for disqualification in s. 44.\textsuperscript{125}

Option 4–Amend s. 44 to allow the Parliament to set the rules for disqualification

4.110 A number of witnesses proposed Constitutional amendments combined with legislative change:

\begin{footnotesize}
\begin{enumerate}
\item Mr Simon Cowan, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 9.
\item Professor Anne Twomey, \textit{Committee Hansard}, Canberra, 8 December 2017, p. 12.
\item Professor Graeme Orr, \textit{Committee Hansard}, Canberra, 8 December 2017, p. 22.
\item Professor Alex Reilly, \textit{Committee Hansard}, Adelaide, 19 February 2018, p. 1.
\item Professor Rosalind Dixon, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 3.
\end{enumerate}
\end{footnotesize}
• Amend s. 44 by inserting the words ‘until Parliament otherwise provides’ and subsequently legislate the grounds for disqualification.
• Repeal s. 44 and place greater reliance on s.34 and subsequently legislate to expand qualification requirements.
• Amend s. 44 among a package of reforms to related sections of the Constitution; for example, ss. 16, 34, 42, 45, 46 and 47.

4.111 These proposals are discussed in the sections below. Some witnesses and submissions presented their preferred solution and supplemented this with secondary alternatives for the Committee to consider.

‘Until Parliament otherwise provides’

4.112 Section 44 could be amended by adding the words ‘until Parliament otherwise provides’. Associate Professor Luke Beck submitted:

The most convenient constitutional amendment is one that allows Parliament to legislate the grounds of disqualification rather than having the grounds of disqualification set in stone in the Constitution. s. 44 should be amended to insert the words ‘Until Parliament otherwise provides’ at the start of the provision.126

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126 Associate Professor Luke Beck, Submission 16, p. 1. See also Committee Hansard, Melbourne, 1 February 2018, p. 15.
4.113 A joint submission from Professor George Williams, Dr Sangeetha Pillai and Mr Harry Hobbs supported this approach:

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.\(^{127}\)

4.114 Dr Pillai said this would place s. 44 in line with the qualification criteria in s. 34.\(^{128}\) Dr Hal Colebatch supported such an amendment, submitting:

This would make the question clear: that the place for determining both qualifications and disqualifications should be the national parliament, not the High Court or foreign governments.\(^{129}\)

4.115 Professor Kim Rubenstein submitted:

The simplest way to remedy the s. and enable these matters to be debated fully by Parliament, is to seek a Constitutional change that introduces into s. 44 and s. 45 the words that begin s. 46 and 47–Until the Parliament otherwise provides.\(^{130}\)

Option 5—Repealing s. 44

4.116 Some submissions favoured repealing s. 44 to achieve a similar outcome.\(^{131}\) Professor Rosalind Dixon, Associate Professor Gabrielle Appleby and Mr Lachlan Peake proposed:

…repealing s. 44 in its entirety, and enacting a number of new disqualifications by way of ordinary legislation under s. 34 of the Constitution,

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\(^{127}\) Professor George Williams AO, Dr Sangeetha Pillai and Mr Harry Hobbs, *Submission 36*, p. 8; see also Professor George Williams, *Committee Hansard*, Canberra, 8 December 2017, pp. 25-26; Dr Sangeetha Pillai, *Committee Hansard*, Melbourne, 1 February 2018, p. 22. Professor Cheryl Saunders favoured the same approach for similar reasons; see *Committee Hansard*, Melbourne, 1 February 2018, pp. 2-3.

\(^{128}\) Dr Sangeetha Pillai, *Committee Hansard*, Melbourne 1 February 2018, p. 22. See also Professor Alex Reilly, *Committee Hansard*, Adelaide, 19 February 2018, p. 3.

\(^{129}\) Dr Hal Colebatch, *Submission 24*, p. 5.

\(^{130}\) Professor Kim Rubenstein, *Submission 20*, p. 3. See also Professor Kim Rubenstein, *Committee Hansard*, Melbourne, 1 February 2018, p. 30.

\(^{131}\) Mr Brendan Whyte, *Submission 41*, p. 1; Mr Neil Cotter, *Submission 48*, p. 1; Professor Alex Reilly, *Submission 58*, p. 8.
which allows for the Parliament to make laws affecting the qualifications of Members of Parliament.\textsuperscript{132}

4.117 The submission also supported:

- Repeal of the ‘ancillary provisions’ in ss. 45 and 46 and repeal of the Common Informers Act.\textsuperscript{133}
- Retention of the petitioner action in ss. 353 and 355 of the Commonwealth Electoral Act, although this could be amended ‘to allow for petitions to be brought outside the period of 40 days after the return of the writs in circumstances where the High Court has given leave.’\textsuperscript{134}

4.118 Professor Rosalind Dixon said that demonstrating loyalty should remain an important factor:

s.42 and the loyalty oath it requires would need to play a greater role in our public debate and imagination. We would need to emphasise that loyalty is a critical part of service in the parliament and that s.42 would be need to be given an amplified significance.\textsuperscript{135}

4.119 Associate Professor Matthew Stubbs and Dr Adam Webster supported repealing s. 44. Their submission stated:

the general principle should be that a person who is capable of voting is capable of being elected to the Parliament, subject to… the prospective inability of a candidate to attend Parliament.\textsuperscript{136}

4.120 The submission noted that imprisonment may be a reason for failing to attend Parliament and, accordingly, the Electoral Act could be amended to disqualify prisoners from nominating as candidates. The submission added that the Electoral Act could require broader candidate information to be disclosed, allowing voters to ‘take this into account in deciding how they wish to vote.’\textsuperscript{137}

\textsuperscript{132} Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, \textit{Submission 44}, p. 7.
\textsuperscript{133} Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, \textit{Submission 44}, p. 5, 9.
\textsuperscript{134} Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, \textit{Submission 44}, pp. 9-10.
\textsuperscript{135} Professor Rosalind Dixon, \textit{Proof Committee Hansard}, Sydney, 2 February 2018, p. 4.
\textsuperscript{136} Associate Professor Matthew Stubbs and Dr Adam Webster, \textit{Submission 37}, p. 4.
\textsuperscript{137} Associate Professor Matthew Stubbs and Dr Adam Webster, \textit{Submission 37}, p. 5. See also Professor Matthew Stubbs, \textit{Committee Hansard}, Adelaide, 19 February 2018, p. 7.
4.121 Professor Alex Reilly favoured the complete repeal of s. 44. He said:

Given that it has no sensible work to do, it should be easy to garner bipartisan support for its removal and to persuade the vast majority of the Australian people to vote in favour of its removal at a referendum.\textsuperscript{138}

4.122 Professor Tony Blackshield said s. 44 should be ‘simply struck out altogether’ or amended to include the words ‘until the Parliament otherwise decides’.\textsuperscript{139} He said:

…the concerns that are thought to warrant disqualification are so inherently subject to change that the regulatory structure should be flexible and therefore whatever provisions we make about qualification should be embodied in the Electoral Act rather than the Constitution so that they can be readily modified by the parliament from time to time.\textsuperscript{140}

4.123 Professor Blackshield added that in his view, ‘every Australian should be entitled to stand for parliament’ and the suitability of criminals and bankrupts ‘should be left to the electorate, rather than any rigid rule.’\textsuperscript{141} Mr Simon Cowan, who did not support amending s. 44, countered that this ‘assumes the electorate has perfect knowledge.’\textsuperscript{142}

4.124 Associate Professor Elisa Arcioni expressed views similar to Professor Blackshield. She noted that foreign citizenship is linked to security concerns, which is addressed in other laws:

Our citizenship legislation has always included a provision whereby persons who fight in a foreign-enemy military automatically lose their Australian citizenship and therefore are not eligible to be members of parliament. Amendments to our citizenship legislation in late 2015 have extended loss of citizenship to dual nationals who fight in a terrorist organisation or engage in other terrorist acts.\textsuperscript{143}

\textsuperscript{138} Professor Alex Reilly, \textit{Committee Hansard}, Adelaide, 19 February 2018, p. 2.

\textsuperscript{139} Professor Anthony Blackshield, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 5.

\textsuperscript{140} Professor Anthony Blackshield, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 5.

\textsuperscript{141} Professor Anthony Blackshield, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 5 & p. 16.

\textsuperscript{142} Mr Simon Cowan, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 16.

\textsuperscript{143} Associate Professor Elisa Arcioni, \textit{Committee Hansard}, Sydney, 2 February 2018, pp. 6-7.
4.125 Mrs Lorraine Finlay said that in its current form, s. 44 provides ‘certainty, consistency and stability’ and removes partisan considerations.\textsuperscript{144} She also noted that s. 44 relates to more than citizenship:

\textit{…it seems a little bit difficult to formulate an argument that, for example, someone should only be disqualified for treason until parliament otherwise provides.}\textsuperscript{145}

4.126 Mr Neil Cotter did not support this approach and cautioned against allowing Parliament writing its own rules. He submitted:

\textit{Watering down the paragraph will not address the fundamentally undemocratic nature of how it disqualifies citizens… Parliamentarians should not have any influence on who gets to stand for parliament, it is an inherent conflict of interest that should be avoided.}\textsuperscript{146}

4.127 Mr Simon Cowan cautioned that Australians may not favour allowing Parliament to determine the rules for eligibility. He said the ‘response to the treatment of expenses amongst parliamentarians’ could be indicative.\textsuperscript{147}

**Broader Constitutional amendments**

4.128 Professor Anne Twomey said that ss. 34, 44 and 45 could be reformed as a package. She submitted that there is ‘no necessity’ in her view to amend s. 44(i),\textsuperscript{148} but if a referendum were held:

\textit{…it would be wise to deal with the other anomalies in s 44 and, indeed, in s 45 and the qualification provision in s 34. In my view there are far greater uncertainties concerning s 44(iv) (office of profit under the Crown) and s 44(v) (government contractors) than there are in relation to s 44(i) (foreign allegiance).}\textsuperscript{149}

4.129 Professor Matthew Stubbs said ‘there should be no difference in principle between the qualifications to vote and the qualifications to be elected.’\textsuperscript{150}

\textsuperscript{144} Ms Lorraine Finlay, \textit{Committee Hansard}, Perth, 20 February 2018, p. 9.
\textsuperscript{145} Ms Lorraine Finlay, \textit{Committee Hansard}, Perth, 20 February 2018, p. 9.
\textsuperscript{146} Mr Neil Cotter, \textit{Submission 48}, p. 1. Mr Cotter’s submission explains that he would prefer s. 44 to be repealed rather than amended.
\textsuperscript{147} Mr Simon Cowan, \textit{Committee Hansard}, Sydney, 2 February 2018, p. 14.
\textsuperscript{148} Professor Anne Twomey, \textit{Submission 34}, p. 2.
\textsuperscript{149} Professor Anne Twomey, \textit{Submission 34}, p. 3.
\textsuperscript{150} Professor Matthew Stubbs, \textit{Committee Hansard}, Adelaide, 19 February 2018, p. 7.
4.130 A joint submission from Professor Rosalind Dixon, Associate Professor Appleby and Mr Lachlan Peake (who proposed repealing s. 44) outlined four broader reforms:

1. introduction of a statutory mechanism for ensuring integrity of parliamentarians in the form of a federal integrity/anti-corruption commission;

2. an expansion in the statutory grounds for disqualification under the Commonwealth Electoral Act 1918 (Cth);

3. a greater emphasis on and reliance on the loyalty requirements of s 42 of the Constitution; and

4. an amendment to the process for determining qualification, particularly in periods more than 40 days after the return of the writs.\(^{151}\)

4.131 Mr John Gilly submitted that s. 44 is symptomatic of the ‘many problems’ in the Constitution generally. He recommended re-writing the whole Constitution.\(^{152}\) Mr Rewi Lyall suggested that there should be ‘a thorough discussion about a new Constitution’ and focussing solely on s. 44 would ‘constitute a self-serving exercise by Australia’s political elite.’\(^{153}\)

**The referendum process**

4.132 If any part of the Constitution is amended or repealed, it must be done through the change process in the Constitution itself. This requires a referendum.

4.133 s.128 of the Constitution outlines the process for a referendum:

- Both the Senate and House of Representatives need to agree on the form of the question.
- The electors in a majority of States (four out of six States) must approve the proposal and a majority of overall electors who voted.\(^{154}\)

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151 Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, Submission 44, pp. 5-6.

152 Mr John Gilly, Submission 50, pp. 4-5.

153 Mr Rewi Lyall, Submission 4, pp. 1-2.

154 Constitution, s. 128.
Section 128

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives. …

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. …

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen’s assent. …

4.134 Many past referendum questions have failed to gain the necessary support. For a referendum to be defeated, the ‘No’ vote would need to be over 50 per cent in at least four of the six states. The sum of ‘No’ votes in the four smallest states is around 3.2 million people or 19.8 per cent of the Australians who are enrolled to vote.

4.135 Hamilton Stone consulting submitted that referendums have failed for being ‘poorly conceived’, but are more likely to pass when:

- There is bipartisan major-party support for the change;
- Most state premiers are either supportive of, or unconcerned by, the proposal (and, by implication, the proposal does not seek greater Commonwealth power at the expense of states);
- There is community understanding of the reason for change;
- The referendum question does not combine multiple changes in a single question; and
- There is not a highly organised, high-profile and credible force opposing the change.\(^{155}\)

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\(^{155}\) Mr Hamilton Stone, \textit{Submission 6}, p. 4. See also Dr Anthony Moran, \textit{Submission 40}, p. 6; Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, \textit{Submission 44}, pp. 10-11.
4.136 Dr Hal Colebatch submitted:

…few things would do more to restore the standing of parliament than to give it the opportunity to show its capacity to act resolutely to deal with a recognised problem.\(^{156}\)

4.137 Professor George Williams outlined the reasons referendums tend to fail:

In the main, they’re very often not sensible proposals; they’re seeking to shift power from the states to the Commonwealth, and so some states disagree. They’re often ill thought out and seemingly not responding to an important problem, so there’s no urgency connected to them; whereas, on this occasion, all of those factors are absent.\(^{157}\)

4.138 Professor Kim Rubenstein cautioned against amending the text within s. 44, saying there is ‘the danger, even if it is bipartisan, of there being different views about how it should be amended.’\(^{158}\) Professor Blackshield agreed that this approach would lead to disagreement over the desired language.\(^{159}\)

4.139 While favouring constitutional amendments, Professor Cheryl Saunders commented that critics would argue parliamentarians are only concerned with their own interests. She added that the ‘impression of self-interest will be heightened if priority is given to this issue while others, such as Indigenous recognition, are seen to be ignored.’\(^{160}\) She said a referendum stands a better chance when Australians know there is a ‘real problem’.\(^{161}\)

4.140 Professor Matthew Stubbs said the problems in s. 44 should be explained directly. He said there is a risk that constitutional amendment to include the words ‘until Parliament otherwise provides’ could be viewed as making a change ‘though the back door’.\(^{162}\)

4.141 Dr Anthony Moran said that as a first step, people need to understand the restrictions to parliamentary service. He said:

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\(^{156}\) Dr Hal Colebatch, *Submission 24*, p. 5.

\(^{157}\) Professor George Williams, *Committee Hansard*, Canberra, 8 December 2017, p. 26. See also Professor Alex Reilly, *Committee Hansard*, Adelaide, 19 February 2018, p. 4.

\(^{158}\) Professor Kim Rubenstein, *Committee Hansard*, Melbourne, 1 February 2018, p. 30.

\(^{159}\) Professor Anthony Blackshield, *Committee Hansard*, Sydney, 2 February 2018, p. 6.

\(^{160}\) Professor Rosalind Saunders, *Committee Hansard*, Melbourne, 1 February 2018, p. 2.

\(^{161}\) Professor Rosalind Saunders, *Committee Hansard*, Melbourne, 1 February 2018, p. 5. See also Dr Sangeetha Pillai, *Committee Hansard*, Melbourne, 1 February 2018, p. 23.

…I’m sure that a lot of people just wouldn’t even know about all those restrictions. No-one reads the Constitution; they just don’t. They probably might find out when they nominate to stand or they try to fill out the form. They might not even know then.  

4.142 Professor Alex Reilly said he expected the majority of people to recognise that s. 44 is ‘exclusionary’ and affects ‘our identity as Australians’.  

4.143 Mrs Lorraine Finlay cautioned that a referendum might not succeed. She said there is ‘a perception… that at least some of the responsibility for the current s. 44 issues lies in the hands of our politicians.’ Mrs Finlay added that a referendum campaign could enliven ‘questions of multiculturalism and diversity and the value that dual citizens bring to Australia.’ She said it could become ‘very political and lose sight of the constitutional significance of the issues.’  

4.144 Professor John Williams commented that amending s. 44 would have the effect of overturning the High Court’s decisions. He noted that the High Court is ‘an institution which is held in very high regard in Australia’.

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163 Dr Anthony Moran, Committee Hansard, Melbourne, 1 February 2018, p. 39.
164 Professor Alex Reilly, Committee Hansard, Adelaide, 19 February 2018, p. 4.
165 Ms Lorraine Finlay, Committee Hansard, Perth, 20 February 2018, p. 9.
166 Ms Lorraine Finlay, Committee Hansard, Perth, 20 February 2018, p. 15.
167 Professor J Williams, Committee Hansard, Adelaide, 19 February 2018, pp. 13-14.
5. Committee view

Overview

5.1 This inquiry has taken the Committee on a complex and challenging journey. The Committee now considers that the current problems caused by s. 44 are wide-ranging and have significant and detrimental implications for, and impact on, Australia’s democracy.

5.2 Australia has an inclusive and cohesive democracy with high levels of political participation. Today our parliamentarians have come from many walks of life to represent their fellow citizens in our unique Australian democracy.

5.3 A robust and well-functioning democracy requires that all qualified citizens are able to nominate for election on an equal basis - with as few barriers to nominating as possible. The Committee believes it should be up to voters themselves to determine the qualities they want to see in their elected representatives.

5.4 The Committee considers that s. 44, as it currently stands, prevents and discourages a significant percentage of Australian citizens from seeking elected office in our federal Parliament.

5.5 The Committee agrees with the intent of s. 44. At the time of drafting the Constitution, s. 44 was intended to protect parliamentary integrity and national sovereignty. The Committee’s view is that although these principles are equally important today as they were drafted in 1901, s. 44 no longer operates as intended.
5.6 Therefore the Committee believes that ss. 44 and 45\(^1\) should be repealed in their entirety, or amended to include ‘until the Parliament otherwise provides’. The Committee also believes that s. 34 of the Constitution should govern both qualifications and disqualifications for Parliament. In practice, this means the rules that govern who can and cannot be elected will be set out in contemporary legislation, capable of being updated and amended to reflect contemporary Australian community expectations and standards.

5.7 However, the Committee understands that the pre-conditions for a successful referendum on this issue will take time; time that is not available before the upcoming by-elections and the next general federal election. Therefore, the Committee also recommends that the Government take specific early measures to improve the compliance with s. 44 in these elections.

5.8 These measures, outlined under the heading ‘Early Measures’ in Chapter 4, include full disclosure of relevant information by candidates at the time of nomination, and Parliamentary agreement to limit the referral of the successful candidates if any future breaches are alleged.

### Underlying principles

5.9 Senators and Members must be free from any possibility of conflict of interest (or perceived conflict of interest) that may affect their legislative duties. The qualification requirements are one part of ensuring that Members and Senators will make decisions unaffected from their own financial interests or allegiances.

5.10 The Committee also considers that all citizens should have an equal opportunity to nominate for election. The Committee believes that candidates in elections should represent the diverse nature of Australian society. Segments of the population should not be unreasonably or unnecessarily excluded or discouraged from the nomination process.

5.11 The Committee further considers there should be requirements or qualifications for citizens to enter Federal Parliament that meet contemporary expectations and that this, and future generations, should be able to debate and set those expectations.

### Allegiance

\(^1\) Section 45 is dependent on s. 44 for its operation.
5.12 The Committee agrees that Federal Parliamentarians must be loyal to Australia and must make decisions that are in the best interests of Australia and no other country. Australian citizenship is an essential pre-condition of sitting in the Federal Parliament.

5.13 The Committee acknowledges the point of view that holding dual citizenship does not in and of itself result in a conflict of interest; and a citizen with sole Australian citizenship does not necessarily have sole allegiance to this country. After considering significant evidence for and against, the Committee does not form a conclusion as to whether dual citizenship is, in itself, a sign of conflicted allegiance.

5.14 What is clear is that the operation of s. 44(i) allows the laws of other countries to create dual citizenships without the knowledge or consent of Australian citizens, or any active steps being taken by Australian citizens to accept that conferral of citizenship. Section 44 creates an ongoing cloud of uncertainty over those who have parents, grandparents or spouses born overseas. This cloud also covers those who do not have documentation about their family, including Indigenous Australians.

5.15 Because foreign citizenship laws can and do change, the evidence before the Committee suggests that only those with documented generations of wholly Australian forebears can be completely assured of their citizenship status for the duration of their parliamentary term. This creates two classes of Australian citizens for the purposes of engaging in representative democracy. The Committee considers that this is an unacceptable situation for Australian democracy.

5.16 These concerns can be overcome by properly drafted legislation, under the auspices of s. 34, following public consultation. If Australians decide that dual citizenship is not suitable for federal Parliamentarians, then legislation can ensure that the barrier placed by the qualification is on election not nomination, is not unreasonable, and can specifically allow for difficult or unusual situations. If it is decided that dual citizenship is not a barrier, then future legislation can set out sensible alternative ways of ensuring allegiance. Ultimately it is about ensuring allegiance – and not about citizenship alone.

Financial conflicts of interest

5.17 The Committee agrees with the principle that a Parliamentarian must make decisions free from consideration of her or his own financial benefit. Parliament is both an oversight and a check on the power of the executive
government. It is important that Parliamentarians are not doing business with the executive and are not in its paid employment.

5.18 However the current provision requires any government employee–state, federal or local–to leave their job at the time of nominating for election. It also requires anyone who was unsuccessful for the Senate to decline government employment for the time they may be called upon to fill a vacancy in the Senate. For most Australians, denying themselves access to any public sector employment for up to six years is unreasonable and unfair.

5.19 The complexity and scale of Commonwealth government economic interests in 2017 were not foreseeable to the drafters of the Constitution in 1901. The Committee considers that modern legislation is needed, clearly setting out what are and are not acceptable pecuniary interests, to ensure the financial integrity of federal Parliamentarians. The Committee considers that this will give crucial guidance and certainty.

5.20 The Committee is also of the view that the requirement to divest a financial conflict of interest should be at a later point, such as the time of swearing in to Parliament, rather than at nomination. This would continue to prevent financial conflict of interest while elected; but would allow government employees or business owners to contest an election without unnecessarily rearranging their affairs.

5.21 Moving the qualification time would also remove any problems caused by potential disqualification of unsuccessful candidates. The Committee was concerned to hear evidence that a successful qualified candidate may have his or her election challenged on the grounds that preferences had come to that candidate from an unsuccessful unqualified candidate. Moving the qualification point from the point of nomination would mean there is no such thing as a ‘disqualified’ candidate, avoiding uncertainty and confusion.

5.22 Again, the Committee believes that this can be dealt with by further Parliamentary debate under s. 34.

**Requirement for constitutional change**

5.23 After carefully considering the issues, the Committee believes that there is no viable alternative other than amending the Constitution. The Committee considers that the most straightforward and effective way to address the issues identified by this inquiry into s. 44 is by repealing ss. 44 and 45, or by inserting the words ‘Until the Parliament otherwise provides’ into both sections. This would leave the Parliament to enact legislation—that reflects
modern community standards—governing both qualifications and disqualifications for Federal Parliament, under s. 34 of the Constitution.

5.24 The Committee accepts the argument that those standing for election have a responsibility to ensure that they are properly qualified to do so. The Committee considers that this responsibility has not always been taken sufficiently seriously in the past.

5.25 However the Committee does not believe that a sufficient solution is to put in place administrative assistance, such as using the AEC to assess the eligibility of potential candidates. The Committee considers this option would not be an effective use of public funds when any ‘clearance’ would continue to disadvantage people who do not have documentary family history, and would still be open to change by the citizenship laws of foreign powers. It would also still ultimately be open to challenge and final decision in the High Court.

5.26 The Committee is also unconvinced by the argument for unilateral blanket renunciation of foreign citizenships. While this solution is appealing, the Committee accepts the concerns given in evidence that it is unlikely to be effective due to the complexity of foreign citizenship laws, and the High Court’s statement that a unilateral declaration is not effective if other renunciation steps can reasonably be taken.2

5.27 The Committee has also considered the argument under s. 47 of the Constitution that Parliament is able to deal with questions of individual qualification without reference to the High Court. Regardless of whether this is a tenable legal argument, the Committee is of the view that it does not accord with the people’s expectations of Parliament. Using s. 47 to allow Parliament to determine whether a particular case falls within s. 44 may fall below the community’s expectations of independence and fairness in the application of the Constitution. But it is an option worth of future community discussion.

5.28 The Committee considers that the qualifications for Parliament should be clearly and simply set out in laws that are unambiguous and of universal application.

5.29 The point at which a person is disqualified from serving in Parliament should also be clearer. Currently, disqualification can occur from candidate

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2 Sykes v Cleary [1992] HCA 60
nomination. This could be changed to a later date, such as the time of swearing-in to Parliament.

5.30 An equally effective alternative to the repeal of ss. 44 and 45 would be to insert the words ‘Until the Parliament otherwise provides,’ to both sections. This would reflect the wording in a number of other sections, including s. 34–‘Qualifications of members’.

5.31 The Constitution’s drafters did not include this clause in ss. 44 and 45 when it is included in other, related, sections, and reflected in s. 51 (xxxvi) which reads:

> 51. Legislative powers of the Parliament
>
> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...
>
> (xxxvi) matters in respect of which this Constitution makes provisions until the Parliament otherwise provides; ...

5.32 Nonetheless, without amendment to s. 44, the Parliament is powerless to affect any change to its operation to reflect modern community standards.

5.33 By including the phrase ‘Until the Parliament otherwise provides’, the Constitution’s drafters clearly intended to allow Parliament to overwrite the rules in the Constitution.

5.34 Inserting the words ‘Until the Parliament otherwise provides’ would also reflect existing clauses in the Constitution and would remain in line with the intent of the original drafters.

**Process of constitutional change**

5.35 The Constitution can only be changed by a referendum. As discussed in Chapter 4, a successful referendum for change is challenging in Australia but is not impossible. Successful referendums have been characterised by the pre-conditions set out in Chapter 4. The Committee notes that many of these pre-conditions of change exist in this case. The Committee is of the view that the difficulty of constitutional change should not prevent a concerted effort to repeal s. 44 and s. 45.

5.36 The Committee emphasises that the problems created by s. 44 have had a demonstrable impact on our democracy; by limiting who can stand for
election and therefore who Australians can choose to represent them in Federal Parliament. From the evidence received by the Committee, these impacts will not only continue but will increase unless there is constitutional change.

5.37 Should a referendum be successful, it must then be followed by a public, and parliamentary, debate on what constitutes appropriate Parliamentary disqualifications. A referendum process should make clear to voters that the removal or amendment to ss.44 and 45 is a necessary prerequisite to that debate.

**Without constitutional change**

5.38 The Committee acknowledges that a referendum will not be positively received by Australians and the outcome of any referendum is uncertain. If constitutional change is not put or is unsuccessful, then the Committee recommends that administrative or legislative processes are put in place to mitigate the impact of s.44 on political participation in Australia.

5.39 Specifically, the Committee recommends that the government consider the following strategies:

- supporting the Australian Electoral Commission to develop on-line self-assessment tools;
- providing additional education and support on the requirements of section 44 to independents and minor parties;
- introducing an agreed preliminary step, for the purpose of gathering evidence or taking legal advice, before a referral by a House of Parliament to the High Court on disqualification issues;
- exploring the possibility with relevant foreign governments of expedited or automatic citizenship renunciation;
- providing further clarification and guidance on the meaning of ‘pecuniary interest’ in section 44;
- developing ways to ensure invalid candidates cannot ‘manipulate’ election outcomes.

5.40 As predicted in 20 years of reviews and reports, even if these measures are adopted, the significant issues with the operation of s. 44 will continue, and are likely to grow in significance and impact.

**Conclusion**
5.41 Section 44 is no longer operating to effectively ensure its principal intent of parliamentary integrity and national sovereignty. Challenges to sitting members will continue into future elections; disrupting electoral outcomes, causing uncertainty and confusion, and having the potential to undermine the authority of both Federal Parliament and the Constitution itself.

5.42 Equally importantly, s. 44 acts as a deterrent for many Australians who are considering actively participating in politics. To fully represent the diversity of those they represent in the Federal Parliament, Australians of all backgrounds must have an equal opportunity to nominate for election. As it stands, s. 44 means some Australians have to jump through more hoops than others to stand in an election—including hoops they do not know exist or hoops that can appear overnight.

5.43 Section 44 has been the subject of many inquiries and much debate over the past 20 years. The problems identified in the report have been long foreseen but remain unaddressed. They are not going away. These issues have to be fixed some time. The Committee considers that time is now.

Recommendations

5.44 The Committee recommends that ss. 44 and 45 are either repealed, or the words ‘Until the Parliament otherwise provides…’ are added into both sections.

Recommendation 1

5.45 The Committee recommends that the Australian Government prepare a proposed referendum question to either:

- repeal sections 44 and 45 of the Constitution; or

- insert into sections 44 and 45 the words: ‘Until the Parliament otherwise provides…’

Recommendation 2

5.46 If the referendum passes, the Committee further recommends that the Australian Government further engages with the Australian community to determine contemporary expectations of standards in order to address all matters of qualification and disqualification for Parliament through legislation under section 34 of the Constitution.
Recommendation 3

5.47 In the event that a referendum does not proceed or does not pass, that the Australian Government consider strategies to mitigate the impact of section 44 as outlined in this report.

Recommendation 4

5.48 The Committee recommends that the Government consider the implications of this report in the context of the upcoming by-elections, in particular the options outlined in Chapter 4.

Senator Linda Reynolds CSC
Chair
15 May 2018
## A. Understanding section 44

<table>
<thead>
<tr>
<th>Section 44 disqualifications</th>
<th>Meaning and consequences¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any person who:</td>
<td></td>
</tr>
<tr>
<td>(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</td>
<td>Foreign citizens and dual citizens cannot sit in Parliament. An Australian-born person with Australian citizenship who has acquired foreign citizenship without their own knowledge is disqualified. Citizenship can be acquired from family members who have migrated to Australia. Around half of Australians have a parent who was born overseas.</td>
</tr>
<tr>
<td>(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</td>
<td>Some criminals are disqualified, depending on the crime. If the crime that carries a potential punishment of one year (or longer) in gaol, the person is disqualified.</td>
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¹ This report is not intended to be used or relied upon as legal advice.
<table>
<thead>
<tr>
<th>Section 44 disqualifications</th>
<th>Meaning and consequences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any person who:</td>
<td></td>
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<tr>
<td>(iii) is an undischarged bankrupt or insolvent; or</td>
<td>A person who is unable to pay money to others is bankrupt and disqualified. The States and Territories have their own legal definition of who is a ‘bankrupt’.</td>
</tr>
<tr>
<td>(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</td>
<td>A person who works in the public service is disqualified. This can include teachers, police, nurses and soldiers. They have to resign to be a candidate, with no guarantee of being elected or finding a new job. A ‘pension’ in this context means a special payment from the Government, not social service payments. Government Ministers are exempted from the pension rule.</td>
</tr>
<tr>
<td>(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;</td>
<td>A ‘pecuniary interest’ means some form of financial benefit from doing business with the Commonwealth public service. The business needs to be ongoing and more than a once-off transaction. Many businesses have ongoing arrangements to supply goods and services to the Commonwealth. This could range from garden maintenance to military materiel.</td>
</tr>
<tr>
<td>shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.</td>
<td>Elected Senators and Members can be disqualified. However, disqualification can occur from the point of being chosen for Parliament, before anyone is elected. The process begins at the point someone</td>
</tr>
<tr>
<td>Section 44 disqualifications</td>
<td>Meaning and consequences</td>
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<tr>
<td>Any person who:</td>
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<td></td>
<td>nominates to be a candidate and ends when someone ceases to be a candidate. Senate vacancies are filled by recounting the last election result – so a person could be a candidate for many years after the election period.</td>
</tr>
</tbody>
</table>
B. Extracts from the Constitution

16. Qualifications of senators

The qualifications of a senator shall be the same as those of a member of the House of Representatives.

34. Qualifications of members

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:

(i) he must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen;

(ii) he must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

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.
C. Senate citizenship register

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.

1 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.
D. House of Representatives
citizenship register

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.
E. The Court of Disputed Returns

Extracted from the *Commonwealth Electoral Act 1918.*

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.
F. Extracts: 1976, 1983 and 1985
Constitutional Conventions

1976 Australian Constitutional Convention

Section 34:

This section should be repealed and some section along the lines that follow should be enacted in its place:

Until Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows: He must be 18 years of age, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such an elector, and must be an Australia citizen.¹

Sections 44 and 45:

A number of troublesome questions have arisen under these sections and others could arise. In general, uncertainties about the section have resulted in a cautious approach – perhaps over-cautious. Section 47 of the Constitution, and S. 203 of the Commonwealth Electoral Act enable concrete cases to be referred to the High Court but it could be important to have an advance view of the High Court, especially in relation to persons seeking election, rather than those already elected. For example, possession of dual nationality where the duality did not arise from a conscious act of a candidate might be held to disqualify him under s. 44(i) when the question was subsequently raised. A by-election in such a case could be avoided by an advance advisory opinion. Similarly, difficult questions arise under s. 44(iv) and (v) and s. 45 on which it

would be valuable to seek the court’s ruling. Webster’s Case quietened some fears but it was only a decision of a single justice and covered only part of the area.²

1983 Australian Constitutional Convention

There was general discussion of Section 44 and the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs. A motion was moved that the Convention refer the Committee’s recommendations to a sub-committee for inquiry and report.³

1985 Australian Constitutional Convention, Structure of Government Sub-Committee

Section 44(i):

RECOMMENDATION 3

Senate Standing Committee Recommendation concerning Foreign Nationality and Related Matters

The S.S.C. recommended the deletion of s. 44 (i) of the Constitution, and the insertion of a provision in the Commonwealth Electoral Act dealing with declarations by candidates as to non-Australian nationality (see Recommendation 4) at the time of nomination.

The Sub-Committee is in agreement with this Recommendation and the reasoning of the S.S.C., namely that a person should not be disqualified from becoming a Member of Parliament because of unsought dual nationality.

The Recommendation, however, does not deal with a Member who voluntarily acquires another nationality after election. (It is noted that s. 17 of the Australian Citizenship Act only partially deals with the problem). Thus, in order to overcome the situation of a member who voluntarily acquires a second nationality after election continuing to sit in Parliament, the Sub-Committee recommends that a constitutional disqualification be inserted in the Constitution providing for the vacation of a Member’s seat in the event


that he ceases to be an Australian citizen, with a general power in the Parliament to deal with other situations as they arise.4

1985 Australian Constitutional Convention

Section 44(i):

That this Convention—

(a) notes the report of the Structure of Government Sub-Committee on the Qualification of Members:

(b) supports in principle the enactment of a constitutional amendment to revise and modernise the provisions governing the qualifications of members of Parliament having regard to the recommendations of the Senate Standing Committee on Constitutional and Legal Affairs and the Structure of Government Sub-Committee; and

(c) expresses the view that a more appropriate formulation of Recommendation 3 of the Sub-Committee’s report could be as follows:

RECOMMENDATION 3

Amend section 44 (i.) of the Constitution so that the sub-section reads:

(i) By his own volition is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is voluntarily a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power and retains such rights, privileges and duties. Provided that this sub-section does not apply to a person who is vested with citizenship involuntarily and who has made all reasonable efforts to renounce a foreign citizenship of the allegiance, obedience, or adherence to a foreign power; or”

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G. Further reading

Legal resources

Australian Constitution:

Constitution convention debates:

‘Quick and Garran’:

Commonwealth Electoral Act 1918:

Parliamentary Library research papers

‘Dual Citizenship, Foreign Allegiance and s.44(i) of the Australian Constitution’, 1992:

‘Candidates, Members and the Constitution’ 2002:

‘Section 44 of the Constitution’, 2004:
https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/Section44
‘Crime and Candidacy’ 2003:
https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03CIB22

Committee reports

Senate Standing Committee on Legal and Constitutional Affairs, ‘The Constitutional Qualifications of Members of Parliament’, 1981:

House of Representatives Standing Committee on Legal and Constitutional Affairs, ‘Aspects of Section 44 of the Australian Constitution’, 1997:

Parliamentary procedure

Odgers’ Australian Senate Practice:

House of Representatives Practice:
H. Submissions and Exhibits

Submissions

1  Mr Tony Magrathea
2  Mr Matthew Ellis
3  Ms Paula Hall
4  Mr Rewi Lyall
5  Mr Nicholas Hudson
6  Hamilton Stone
7  Mr Adrian Jackson
8  Australian Electoral Commission
9  Mr Ronald Jelleff
10 Ms Anne Tan
11 Mr Andrew Farran
12 Mr Grant Wyeth
13 Mr Jim Catt
14 Ms Madonna Waugh
15 Mr Les Yule
16 Associate Professor Luke Beck
17 Mr Wayne Halls
18 Mr Greg Northover
19 Attorney-General’s Department
20 Professor Kim Rubenstein
   ▪ 20.1 Supplementary
21 Ms Margaret Hurle
22 Australian Monarchist League
23 Mr Robert Bourke
24 Dr Hal Colebatch
   ▪ 24.1 Supplementary
   ▪ 24.2 Supplementary
25 Professor Tony Blackshield
26 Mr Allan Laws
27 Mr James Noy
28 Mr Brian Capamagian
29 Mr William 'Bill' Tait
30 Em Prof Andrew Jakubowicz
31 Moreton Bay Safe Communities
32 Safe Communities Australia
33 Professor Helen Irving
34 Prof Anne Twomey
35 Mr Mike Maley
36 Professor George Williams AO, Dr Sangeetha Pillai and Harry Hobbs
37 A/Prof Matthew Stubbs, Dr Adam Webster
38 Dr Elisa Arcioni
39 Dr Rick Sarre
40 Dr Anthony Moran
41 Mr Brendan Whyte
42 Mr Victor Perton
43 Sunshine Coast Safe Communities Inc
44 Dr Gabrielle Appleby, Professor Rosalind Dixon, Lachlan Peake
45 Name Withheld
46 Name Withheld
47 Ms Nerissa Ngadjon
48 Mr Neil Cotter
49 Mr Michael Douglas
50 Mr John Gilly
51 Ms Lorraine Finlay
52 Arjuna Dibley
53 The Law Society of New South Wales’ Young Lawyers Public Law and Government Committee
54 Mr Graham Rayner
55 Ms Liz Burton
56 Name Withheld
57 Mr John Reeves Taylor
58 Professor Alex Reilly
59 Denys McKelson
60 Anne Keogh-Casey
61 Colin Lynch
62 Dr Joe McIntyre, Sue Milne and Professor Wendy Lacey
63 Dr John Cameron
64 Mr Mark Dickenson
65 Mr Len Warfe
66 Mr Bob Day
   • 66.1 Supplementary
67 Farida Fozdar
68 NSW Council for Civil Liberties
69 Ms Caroline Cavanagh
70 Ms Michelle Tesoriero
71 The New Democracy Foundation
Exhibits

1  Professor Cheryl Saunders AO
2  Dr Gabrielle Appleby
I. Public hearings

Friday, 8 December 2017
Parliament House Canberra

Australian Electoral Commission

- Mr Tom Rogers, Commissioner
- Mr Paul Pirani, Chief Legal Officer

Professor Anne Twomey, Private capacity

Professor Graeme Orr, Private capacity

Professor George Williams AO, Private capacity

Attorney-General’s Department

- Mr Jeff Murphy, Principal Legal Officer
- Mr David Lewis, Acting General Counsel (Constitutional)

Wednesday, 31 January 2018
Parliament House, Canberra

Adjunct Associate Professor James Jupp, Private capacity
Thursday, 1 February 2018
Parliament of Victoria, Melbourne
Professor Cheryl Anne Saunders (UMel), Private capacity
Professor Jeremy Gans (UMel), Private capacity
Associate Professor Luke Beck (Monash), Private capacity
Dr Sangeetha Pillai (UNSW), Private capacity
Professor Kim Rubenstein (ANU), Private capacity
Dr Anthony Francis Moran (La Trobe), Private capacity

Friday, 2 February 2018
Parliament of New South Wales, Sydney
Professor Helen Irving (USyd)
Dr Elisa Arcioni (USyd)
Professor Rosalind Dixon (UNSW)
Professor Tony Blackshield (Macquarie)
Mr Simon Cowan (Centre for Independent Studies)
Professor Andrew Jakubowicz (UTS)

Monday, 19 February 2018
South Australia Parliament House, Adelaide
Professor Alex Reilly, Private capacity
Professor Matthew Stubbs, Private capacity
Ms Sue Milne, Private capacity
Dr Joe McIntyre, Private capacity
Tuesday, 20 February 2018

Western Australian Parliament House, Perth

Ms Lorraine Finlay, Private capacity

Dr Hal Colebatch, Private capacity

Tuesday, 24 April 2018

Parliament House, Canberra

Mr Guy Reynolds SC, Private capacity
Minority report

Member for Tangney

1.1 Quite simply, all the resignations and vacancies of Members of Parliament as a result of holding dual citizenship during the 45th Parliament would have been absolutely avoidable if those Members of Parliament had taken action to investigate their own circumstances and free themselves of disqualifications under Section 44 of the Constitution prior to nomination as a candidate for election. The rules are clear and have not changed. However, while the rules are clear and have not changed, they have not been well understood or communicated. You cannot lay sole responsibility at the feet of those affected Members of Parliament. More needs to be done to support those individuals who seek elected office to fully understand what action they must take to ensure they are qualified under the Constitution.

1.2 Constitutional change is not required to achieve better understanding and compliance with the rules. A range of administrative mechanisms can be adopted to prevent the disqualification of Members of Parliament and to assist individuals prior to seeking nomination. The Committee’s report suggests that having to take certain action when considering candidacy for elected office is in some way an irremediable barrier. Yes, there are hurdles for some; there are arrangements that need to be investigated and actions taken to ensure compliance with the Constitution. However, those individuals are seeking to be elected to the Parliament of Australia, and are not, for example creating an iTunes account.

1.3 There are legislative and procedural options available that this Committee has identified as interim solutions. These deal with issues relating to the
referral of matters during the term of the Parliament and with disclosure requirements at the time of nomination. The Government and Parliament should consider these options as permanent options. Nonetheless, these alone may not be effective unless other administrative mechanisms are adopted and operate in conjunction. Support can be given to potential candidates to fully understand their obligations and to provide assistance to those seeking to remove any foreign citizenship.

1.4 Commentary, including in the Committee report, that as a result of Section 44(i) some Australian citizens would forever be prevented from being elected to public office is incorrect. The High Court has confirmed, ‘that an Australian citizen not be irremediably prevented by foreign law from participation in representative government.’

1.5 The Committee recommends that the Parliament delete from the Constitution the setting of disqualifications of Members of Parliament. On this point I fundamentally disagree. The Constitution is the correct place to deal with the disqualifications of Members of Parliament, and not the Parliament itself as proposed. By adopting this position, the Committee is effectively asking the Australian people to remove their direct say in who should be disqualified as a Members of Parliament and to give that determination to the politicians themselves. Not only should this not happen, it is extremely unlikely to pass in a referendum. The Committee acknowledges the difficulty in passing a referendum on this matter, yet its primary and permanent solution is to recommend significant constitutional change.

1.6 I believe that there has been no compelling argument to remove the requirement that Members of Parliament should only be Australian citizens and hold no other citizenship. Members of Parliament should only have citizenship of Australia and not hold citizenship of foreign countries. While international comparisons are useful they provide no justification for change.

1.7 Like many others, I will campaign against any constitutional change that attempts to remove from the Constitution the disqualification of dual citizens from being Members of Parliament. However, if the Government considers that administrative and procedural changes alone are not sufficient, then the only constitutional change that should be considered should be changing the point at which disqualification takes place. This

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1 Re Gallagher [2018] HCA 17, para 11.
could change from the point of nomination, to the point of being sworn in as a Member of Parliament. In this scenario only those actually elected would have a requirement to deal with potential disqualification, prior to being sworn in as a Member of Parliament. Such a change would resolve the issues identified by this Committee and retain important constitutional objectives.

1.8 The Committee should have recommended options that do not require constitutional change in the first instance and then a variety of constitutional change options for consideration by the Parliament and the wider Australian community, rather than making such a direct recommendation for constitutional changes as it has done. Both of the Committee’s constitutional amendment recommendations transfer the determination of qualifications from the Constitution and the people to the Parliament and politicians.

1.9 My report is outlined in the following themes:

- the consistency of the interpretation of the Australian Constitution;
- setting a higher standard for our elected representatives;
- the role of the Australian Constitution versus politicians in dealing with matters of disqualification;
- administrative reforms;
- referral procedural reforms; and
- minimal constitutional change that preserves the constitutional principles and can pass.

1.10 While our conclusions differ, I share the same love of our democracy as my Committee colleagues. The way parliamentarians from different parties, Houses and States have cooperated on this inquiry should instil great pride in our democracy. I thank in particular Committee Chair, Senator Reynolds, for whom I have great respect. I thank Senator Reynolds for her work in guiding the Committee though our deliberations.

The consistency of the interpretation of the Australian Constitution

1.11 In the simplest of terms, prior to nomination, candidates must complete any and all processes available to them to remove any constitutional disqualifications to their election.

1.12 Despite attempts by some to suggest that the High Court has in some way provided a new interpretation on what reasonable steps are required, the most recent Gallagher decision confirmed a consistent approach in *Sykes v Cleary* and *Re Canavan*.

The principal submission of the Commonwealth Attorney-General is that it is not enough for a candidate merely to have taken steps to renounce his or her
foreign citizenship. Unless the relevant foreign law imposes an irremediable impediment to an effective renunciation, it is necessary that a candidate actually have divested himself or herself of his or her status as a foreign citizen before the commencement of the process of being chosen to which s 44(i) applies.... The Attorney-General’s primary submission is clearly correct. It reflects the law stated in *Sykes v Cleary* and *Re Canavan*.

Senator Gallagher’s contention is that because she had done all that was required of her by British law and which was within her power to do, everything that occurred thereafter under British law which prevented her nomination is to be regarded as an irremediable impediment. Such a submission finds no support from what was said in *Re Canavan*. It is not sufficient for the exception to s 44(i) to apply for a person to have made reasonable efforts to renounce. In *Re Canavan* it was explicitly said that the majority in *Sykes v Cleary* did not suggest that a candidate who made a reasonable effort to comply with s 44(i) was thereby exempt from compliance with it.

Avoidance of the disqualification so as to preserve the ability to participate in a particular election therefore demands a degree of vigilance on the part of a potential candidate not simply as to the taking of available remedial action but also as to the timing of that available remedial action. Just as it was held in *Sykes v Cleary* to have been the responsibility of Mr Cleary to have ensured that his resignation as an officer of the Victorian teaching service took effect before his nomination for the election which occurred on 11 April 1992 if he was to escape the disqualifying effect of s 44(iv) so as to be capable of being chosen as a member of the House of Representatives in that election, it was the responsibility of Senator Gallagher to ensure that renunciation of her British citizenship took effect under the law of the United Kingdom before her nomination for the election which occurred on 2 July 2016 if she was to escape the disqualifying effect of s 44(i) so as to be capable of being chosen as a senator in that election.

1.13 The Committee’s report incorrectly suggests that a whole range of people will be forever disqualified from seeking election as a Member of Parliament. For example:

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3 *Re Gallagher* [2018] HCA 17, para 38.
4 *Re Gallagher* [2018] HCA 17, para 50.
those unsuccessful in clearing all disqualification barriers will forever remain ineligible to nominate.\textsuperscript{5}

1.14 The High Court has made it clear that if there is a step required by foreign law, which is reasonably open to the person, then it must be taken. This is not to say that if there are no steps that that person will be forever disqualified.

1.15 \textit{In Sykes v Cleary:}

\begin{quote}
It would be wrong to interpret the constitutional provision in such a way as to disbar an Australian citizen who had taken all reasonable steps to divest himself or herself of any conflicting allegiance ... [Section 44(i)] ... could scarcely have been intended to disqualify an Australian citizen for election to Parliament on account of his or her continuing to possess a foreign nationality, notwithstanding that he or she had taken reasonable steps to renounce that nationality.\textsuperscript{6}
\end{quote}

1.16 \textit{In Re Canavan:}

Consistently with that view, the Court in \textit{Sykes v Cleary} recognised that an Australian citizen who is also a citizen of a foreign power will not be prevented from participating in the representative form of government ordained by the Constitution by reason of a foreign law which would render an Australian citizen irremediably incapable of being elected to either house of the Commonwealth Parliament.\textsuperscript{7}

1.17 \textit{In Re Gallagher} the High Court expressed that its decision was a re-application of what had already been set out in \textit{Re Canavan:}

\begin{quote}
In \textit{Re Canavan} this Court accepted that s 44(i) is subject to an implicit qualification which arises from the constitutional imperative underlying it. The constitutional imperative was stated to be "that an Australian citizen not be irremediably prevented by foreign law from participation in representative government."\textsuperscript{8}
\end{quote}

1.18 Section 44 and the decisions of the High Court have placed hurdles for some to ensure they are not disqualified. However, these hurdles are not irremediable barriers, as the Committee has suggested.

\textsuperscript{5} Majority report, p. 53.
\textsuperscript{7} \textit{Re Canavan} [2017] HCA 45, para 44.
\textsuperscript{8} \textit{Re Gallagher} [2018] HCA 17, para 11.
Individuals nominating to be elected as a Member of Parliament are taking a serious, deliberate and considered action. Not an action that is done on a whim. No Australian Citizen is irremediably prevented by foreign law from participation in representative Government.

The Committee considers the impact of disqualified, unsuccessful candidates on the election of qualified, successful candidates:

The impact of this [disqualified unsuccessful candidate in an election] is demonstrated through the following scenario.

A number of candidates nominate for election to the Senate, either aware or unaware that they are disqualified under s. 44. The election result is close; with the Government holding a one-seat majority in the Senate, or the Opposition and crossbench hold a one-seat majority.

A qualified and elected candidate is challenged, on the grounds that she was elected on the basis of preferences from unsuccessful disqualified candidates. Because the disqualification applies at the time of nomination, votes cast and preferences gained from that candidate may not be able to be applied in the way the voter intended.

This scenario has not been addressed by the High Court and the outcome is unknown. It could take months to be determined. In the event of a close election it could well impact on the ability to form government, trigger a House of Representatives election and delay the confirmation of State and Territory Senate teams.⁹

The matter of Re Wood in 1988 touches on this issue and must be considered in the context of the scenario given:

The problem of want of qualification arises under the Act if an unqualified candidate is elected, but an election is not avoided if an unqualified candidate stands. If it were otherwise, the nomination of unqualified candidates would play havoc with the electoral process, for the ministerial officer who accepts nominations has no general power to refuse a nomination in due form: see s.172 of the Act.

In other words, the inclusion of an unqualified candidate does not make the ballot paper informal. It doesn't invalidate the entire election. It only becomes an issue "once the return of the unqualified candidate has been held to be invalid."¹⁰

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⁹ Majority report para 3.75.

Setting a higher standard for our elected representatives

1.22 While the Committee states that it makes no judgement on the dual citizenship issue, the Committee’s recommendations can or will remove from the Constitution the requirement that Members of Parliament be only citizens of Australia and not also citizens of other Countries. There can be no certainty that a future Parliament will retain this important disqualification. In my view, the report, read as whole, seeks to make the case for the removal of the requirement that Members of Parliament be only citizens of Australia and not also citizens of other Countries.

1.23 Australia has benefited from people from all over the world making our nation their home. We are truly a very successful modern, multicultural nation. However, while the Committee rightly points out that many Australians have dual citizenship, this should not mean that Members of Parliament not be held to a higher standard.

1.24 Mr Simon Cowan gave evidence that:

Much is made of the fact that Australia has many migrants, and so many potential dual citizens. But I would submit that this is actually less important than claimed, because section 44 does not forever prohibit the political participation of dual citizens. If it did, as, for example, article II of the US constitution prohibits those born outside the US from becoming President, a better case could be made for change. Dual citizens are entitled to stand for parliament, be elected and hold the office of Prime Minister. The only requirement is that they shed the potential conflict of interest arising from their dual citizen status before they do so. The obligations of section 44, in my view, are not an onerous burden for the vast majority of the population, and having such a provision in our Constitution sends the message very clearly that politicians should have unequivocal and undivided loyalty to Australia and its people. This is neither too great a price to pay nor an outdated idea.\(^\text{11}\)

1.25 Dr John Cameron was of the view that:

I may well be a citizen of the United Kingdom as well—I don’t know—but I don’t believe that I should be in the Australian parliament until such time as I’m prepared to devote to divesting myself of the other citizenships and to demonstrate to those whom I expect to vote for me that I am solely devoted to the interests of Australia. I don’t believe that we do hold members of parliament to a higher standard, in the sense that it has been suggested that in some way a large part of the electorate is refused entry to the parliament because they are dual citizens. All they have to do is what I could do:

\(^\text{11}\) Mr Simon Cowan, *Committee Hansard*, Sydney, Friday 2 February 2018, pp. 4-5.
renounce the other citizenships and demonstrate their single allegiance to Australia.\textsuperscript{12}

1.26 Many other witnesses also gave evidence in support of the requirement that Members of Parliament be only citizens of Australia and not also citizens of other Countries. I am strongly of the view that to sit as a Member of the Australian Parliament you should only be an Australian Citizen and not a citizen of another nation. Giving away the citizenship of another country to take the privilege and responsibility of being a Member of the Australian Parliament is not an unreasonable requirement.

**Australian Constitution v politicians in dealing with matters of disqualification**

1.27 The Constitution’s drafters foreshadowed that Australian society would change over time and included the ability for the Australian people to change the Constitution through a referendum.

1.28 This process is not easy but allows Australians to have a direct say in that change. In other sections of the Constitution, as the Committee rightly points out, provision has been made to allow the Parliament to make changes, “until the Parliament otherwise provides.” Section 44 dealing with disqualifications was not one of them.

1.29 Paragraph 2.5 of the Committee’s report deserves further emphasis:

Delegates considered an amendment to include the words ‘until Parliament otherwise provides’ in s. 44 for disqualifications, as they had for qualifications in s. 34. This amendment would have allowed Parliament to determine the grounds for both qualifications and disqualifications at a later time; however, for reasons not clear to the Committee today, it was defeated 26 votes to 8.\textsuperscript{13}

1.30 This matter was actively considered and voted on. There was a decision made that only the Australian people though referendum should determine who should be disqualified from being a Member of Parliament.

1.31 The Committee’s recommendations ask the Australian people to override the consideration given by the Constitution’s drafters and to remove their direct say in the disqualifications of Member of Parliament. The Committee’s recommendations give that say only to the politicians.

\textsuperscript{12} Dr John Cameron, *Committee Hansard*, Perth, Tuesday 20 February 2018, p. 2.

\textsuperscript{13} Majority report, para 2.5.
1.32 Liz Burton, University of Melbourne, makes the case:

There is concern that this frustration with the process conflates operational performance outcomes with the purpose of the section, without giving due recognition to its strategic functions. In doing so, changes or repealing the provisions can undermine important core pillars protecting Australia’s democratic framework.\(^\text{14}\)

1.33 Mrs Lorraine Finlay said that in its current form, Section 44 provides ‘certainty, consistency and stability’ and removes partisan considerations. She also noted that Section 44 relates to more than citizenship:

it seems a little bit difficult to formulate an argument that, for example, someone should only be disqualified for treason until parliament otherwise provides.\(^\text{15}\)

1.34 These fundamental disqualifications should remain in the Constitution and should only be adjusted by way of referendum with the Australian people having a direct say.

**Administrative reforms**

1.35 The obligation to comply with Section 44 is on candidates themselves. The Australian Electoral Commission’s resources for candidates clearly state this. A candidate is required to formally declare, as part of their nomination, that they are ‘qualified under the Constitution and the laws of the Commonwealth to be elected.’

1.36 Mr Tom Rogers gave evidence explaining that:

The AEC conducts pre-election briefings for intending candidates at the national, state and divisional level. All briefings provide intending candidates and party representatives with relevant information relating to eligibility requirements under section 44.\(^\text{16}\)

1.37 That said, more needs to be done to support those individuals who seek public office, to fully understand what action they must take to ensure they are qualified to be a Member of Parliament under the Constitution.

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\(^{16}\) Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, Canberra, 8 December 2017, p. 1.
Constitutional change is certainly not required to achieve better understanding and compliance with the rules. Administrative mechanisms can be adopted to prevent the disqualification of Members of Parliament and to assist individuals prior to seeking nomination.

A number of witnesses held the view that politicians could have entirely avoided this situation with greater vigilance, and consequently, Section 44 should not be altered.\(^{17}\)

Professor Anne Twomey gave evidence that:

> My personal view is that there is no necessity to amend s. 44(i) of the Constitution. The current problem was not caused by a matter of principle, but rather by the fact that some Members and Senators did not make the effort to inquire into their circumstances and take the necessary steps at the appropriate time to avoid disqualification.\(^{18}\)

A number of witnesses gave evidence that additional support can be given to potential candidates to assist them ensuring they are qualified.

Professor George Williams AO, Dr Sangeetha Pillai and Harry Hobbs, who seek constitutional change, also see potential 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’.\(^{19}\)

The AEC in evidence suggested an online self-assessment tool:

> Moving forward, and as a suggestion to minimise the chances of the current situation occurring again—and here I’m looking at non-legislative solutions—it may be possible for the AEC, with the provision of funding and a range of other issues, to develop a comprehensive online self-assessment tool for potential candidates as part of the nomination process. Without absolving the candidate’s responsibility to ensure the veracity of statements made during the process, such a tool, or a checklist, based on section 44 criteria, could take candidates through a step-by-step process—or, I should say, a further step-by-

\(^{17}\) John Taylor, Submission 57; Ms Margaret Hurle, Submission 21; Paula D Hall, Submission 3; Anne C. Tan, Submission 10; Madonna Waugh, Submission 14; Greg Northover, Submission 18. Anon., Submission 45; Graham Raynor, Submission 54; Anne Keogh-Casey, Submission 60; Colin Lynch, Submission 61; Mark Dickenson, Submission 64; Len Warfe, Submission 65; Caroline Cavanagh, Submission 69; Michelle Tesoriero, Submission 70; Allan Laws, Submission 26; Tony Magrathea, Submission 1.

\(^{18}\) Prof. Anne Twomey, Submission 34, p. 2.

\(^{19}\) George Williams AO, Dr Sangeetha Pillai and Harry Hobbs, Submission 36, p. 6.
step process—to help determine whether or not they’re eligible to nominate. It could buttress the existing nomination form, which already includes a statement and declaration of eligibility as to the candidate’s citizenship, age, qualification as elector, and qualification under the Constitution and the laws of the Commonwealth. As an aside, the nomination form specifically refers to both citizenship and section 44 to ensure nominees are aware of the provisions before making their declaration.

The intention of the self-assessment tool that I’ve just outlined would be to assist the candidate to understand their eligibility requirements to nominate, not for the AEC to approve eligibility. As the Standing Committee on Legal and Constitutional Affairs stated 20 years ago, it should not be the AEC’s role to vet potential candidates. The AEC made the following statement in its submission to the Legal and Constitutional Affairs Committee in 1997. It’s as relevant now as it was then. We said: “... it has been concluded that such an extension of the role of AEC officers into areas of factual analysis and Constitutional interpretation in the limited time available at nomination would be impractical and unworkable. The responsibility for ensuring that they are legally qualified rests squarely with the candidate, and if in doubt candidates are urged by the AEC to seek their own legal advice. 20

1.44 On notice, the AEC confirmed that the online self-assessment tool should be linked with the Attorney-General’s Department, Department of Home Affairs, Department of Immigration and Border Protection and Department of Foreign Affairs and Trade. This tool would be available at any time, not just around elections.

1.45 I recognise that there are, very rightly, concerns about the involvement of the AEC in ‘vetting candidates.’

1.46 Lorraine Finlay stated in a public hearing that:

I would strongly endorse the view that the Australian Electoral Commission ‘should have no role in giving legal advice to candidates, and no role in going behind a candidate’s declaration that he or she is eligible to stand for election’. It is vitally important that the AEC is seen to be independent and impartial in the way it conducts elections, and there is a real risk that this could be undermined if they were asked to provide legal advice to candidates or to perform any type of vetting function. Similarly, there is a risk whenever legal advice is given that it could lead to subsequent legal challenges, or leave the AEC open to criticism were they to give incorrect advice. This must be considered a real risk in these circumstances given the uncertainty that has

20 Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, Committee Hansard, Canberra, 8 December 2017, p. 2.
recently surrounded the interpretation of s. 44. It would also be entirely impractical to ask the AEC to conduct ‘s. 44 checks’ on nominated candidates, given the sheer number of candidates and the short time-frame between the close of nominations and the subsequent steps in the election process.21

1.47 The AEC should not be involved in the vetting of candidates. The Committee is agreed on this point. However, there is an argument for the creation of a Foreign Citizenship Renunciation Advice and Support Office (FCRASO). Such an office could comprise officials from the Attorney-General’s Department, Department of Home Affairs, Department of Immigration and Border Protection and Department of Foreign Affairs and Trade. In the first instance, the office would be responsible for the creation and maintenance of the publicly available database containing details of possible foreign citizenships and processes for renunciation. The FCRASO could then provide an easy to use self-assessment tool for potential candidates and other interested citizens.

1.48 The FCRASO would also be able to provide support for potential candidates for election with the process of renunciation. Individuals would remain responsible for ensuring that they have engaged support early enough to ensure that the entire process is completed prior to nomination. Support can be offered with a deposit equal to the nomination fee payable by candidates to the AEC and then refunded when the individual does in fact nominate. On this basis this service would be free to those who use it to ensure compliance prior to seeking election.

1.49 The Department of Foreign Affairs and Trade should also enter into Memoranda of Understanding with foreign nations to establish a process where applications for renunciation made through the FCRASO can be fast tracked on the basis that the individual is seeking election as a Member of Parliament.

Recommendation

1.50 That the Australian Government establish a Foreign Citizenship Renunciation Advice and Support Office to assist potential candidates in understanding their constitutional obligations and to provide support in the renunciation of foreign citizenship.

Recommendation

21 Lorraine Finlay, Submission 51, p. 2.
That the Department of Foreign Affairs and Trade enter into Memoranda of Understanding with foreign nations to establish a process where applications for renunciation made through or with the support of a Foreign Citizenship Renunciation Advice and Support Office can be fast tracked.

**Australian Public Service and Australian Defence Force Members**

1.52 The Committee raises concerns about the impact of Section 44 on the Australian Public Service (APS) employees and Australian Defence Force (ADF) members and the requirement that they resign prior to nomination. Despite these concerns, many former Public Servants and Defence Force members have been elected to Parliament.

1.53 The APS and ADF are obligated to reemploy APS and ADF members who resign to contest election but are unsuccessful. The ADF Manual for Pay and Conditions, as well as Section 32 of the Public Service Act 1999, clearly sets out the regulatory basis for re-employment which addresses the concerns around s44(iv).

1.54 There is an inequity in relation to the payment of salary during this period. Many in the private sector may take annual or long service leave to contest an election; this option is not available to APS and ADF members.

**Recommendation**

1.55 That the Australian Government consider ways that would allow APS and ADF members to draw down additional leave entitlements prior to them resigning to contest an election, or after the election in the event they were unsuccessful.

**Disclosure at time of nomination**

1.56 There is support to have full disclosure of matters relating to a candidate’s family history at the time of nomination and any other matters relevant to Section 44.

1.57 Dr John Cameron stated:

> I believe that more effective would be if nominations were to be put on the public record at the time of nomination—in other words, if you could check the candidate’s qualification at the time they nominated… I believe that all candidates should have their nomination forms on the public record, and then
there is a possibility of challenging before they are elected or immediately after they're elected.22

1.58 MBSC Australia, a non-partisan not-for-profit organisation, submitted:

To prevent the current ‘dual citizenship fiasco’ under Section 44(1) it is recommended, as part of the nomination requirements of prospective candidates, a more comprehensive questionnaire which requires ‘proof of Australian citizenship’ and ‘proof of renunciation of any foreign citizenship’ prior to accepting nominations from candidates. We support the strict enforcement of the Constitutional Law dealing with Dual Citizenship as the rule of law vital to our democracy, by holding our Multicultural Society to a common standard.23

1.59 It is often said that sunlight is the best disinfectant and I see no reason why candidates should not also disclose at nomination the information that they would be required to disclose if elected. The process of doing so will reinforce the need to ensure compliance.

Recommendation

1.60 That the Australian Government put in place a requirement for candidates to disclose, at the time of nomination, all information that may be relevant to potential disqualification under Section 44.

Referral Procedure reforms

1.61 The Committee outlines a number of reform options as “early measures.” The Committee is of the view that these are not long-term solutions. However, combined with the administrative reforms I have recommended, these referral procedure reforms should be considered by the Government as possible long-term reform options. The disclosure of information relevant to disqualifications at the time of nomination mentioned above is one of these.

1.62 The Committee’s report outlines Section 47 of the Constitution and is worthy of further emphasis here:

Section 47: 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

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22 Dr John Cameron, *Committee Hansard*, Perth, 20 February 2018, p. 3.

a disputed election to either House, shall be determined by the House in which the question arises.\textsuperscript{24}

1.63 It is in fact the respective Houses and not the High Court that the Constitution gives the responsibility of determining eligibility of Members of Parliament.

1.64 Section 47 includes ‘until the Parliament otherwise provides’ and the Parliament in 1918 in Part XXII of the Commonwealth Electoral Act 1918 created the Court of Disputed Returns.

1.65 The Parliament can, under Section 47, restore the respective Houses as the sole determining authority of the eligibility of its Members.

1.66 The respective Houses have not given away their ability to determine these matters entirely; they still retain the ability to determine such matters.

1.67 In the case of the Member for Leichhardt, as referenced in the Committee’s report, the House of Representatives passed an amended motion that “… the Member for Leichhardt is therefore not incapable of sitting as a Member of this House.” \textsuperscript{25}

1.68 The then Attorney General, Mr Williams in the debate said:

There is no suggestion within (the Electoral Act) that this house has prevented itself from utilising the procedure set out in section 47 of the Constitution. … By providing one procedure there is no exclusion of another.\textsuperscript{26}

1.69 There was earlier precedent of such action in 1977 regarding the possible disqualification of the Member for Macarthur. The matter could be referred to the High Court under the Electoral Act or determined by the Parliament under Section 47 of the Constitution. The then Attorney General, Mr Ellicott argued that ‘because of the question and the answer that can be given to it, this House should determine the matter and not send it off to the High Court.’\textsuperscript{27}

1.70 The High Court has most recently confirmed the position of the Houses and their primary authority to determine these matters:

\textsuperscript{24} Constitution, s. 47, quoted in Majority report, p. 74.
\textsuperscript{25} House of Representatives Practice, 6th Edn, p. 192. Majority Report paras 1.34, 1.36.
\textsuperscript{26} H.R. Deb. (10 June 1999), 6727.
\textsuperscript{27} H.R. Deb. (5 May 1977) 1605.
The authority given in s 47 to the Houses of the Commonwealth Parliament to determine the questions there stated, and the denial of that authority to the courts unless Parliament otherwise provided, is confirmed by the Convention Debates and it is confirmed by authority.\textsuperscript{28}

\ldots

The relevant effect of the section is that, unless the Parliament otherwise provides and to the extent that the Parliament does not otherwise provide, "any question" which answers the description of a "question respecting the qualification of a senator" can only be determined by the Senate and "any question" which answers the description of a "question respecting the qualification of a … member" can only be determined by the House of Representatives.

Absent the Parliament otherwise providing for the purpose of s 47 of the Constitution by a law enacted under s 76(i)or(ii) or s 77(i)or(iii) of the Constitution, no question respecting the qualification of a senator or of a member is within the adjudicatory competence of the High Court or of any other court.\textsuperscript{29}

1.71 In a public hearing in Canberra, Mr Guy Reynolds SC gave evidence in relation to the Parliament’s powers under section 47:

Section 47 deals with the determination of various matters which are set out in that section. Basically, the parliament, under section 51(xxxvi) has a plenary power to deal with the matter raised in section 47—that is, to pass laws about who shall determine the various matters referred to in section 47. That gives the parliament power, subject to the remainder of the Constitution; to limit or restrict the role of anybody it gives power to under that provision. For example, you can have—and this is featured in the Electoral Act—a limitation provision, which limits the time within which such matters can be brought before a court or before any other body.

So, in short, section 51(xxxvi) gives a fairly full power in relation to determination of the issues referred to in section 47—as to who determines those matters, how they determine them, the manner in which those matters are determined et cetera.\textsuperscript{30}

\textsuperscript{28} Alley v. Gillespie, [2018], HCA 11, para 30.

\textsuperscript{29} Alley v. Gillespie, [2018], HCA 11, paras 72, 73.

\textsuperscript{30} Mr Guy Reynolds SC, Committee Hansard, Canberra, 24 April 2018, p. 1.
1.72 The Parliament has the power to return some or all of the considerations of these matters relating to the Qualification of Members of Parliament, to the respective Houses.

I think section 51(36) would enable the parliament to bring all of the powers that previously existed under section 47, and which inhere in the parliament, back to the parliament or—putting it another way, as you have—to eliminate the powers of the Court of Disputed Returns to consider those matters, and also the High Court’s power to consider those matters on a reference.

... 

There’s no reason why the parliament could not give the High Court some of the issues and keep others for itself.

...

I don’t see any reason why, if the parliament chose to do so, the relevant house could not determine issues such as foreign citizenship.  

1.73 Evidence was received advocating improved processes and guidelines within the Parliament prior to referral. Lorraine Finlay said:

It may be useful to consider whether providing internal referral guidelines, or even some independent mechanism to assess whether referral is warranted in an individual case, would provide for a more transparent process that ensures Parliament focuses on the legal issues rather than political factors when considering referrals.

1.74 The Australian people seek stability in their political institutions. The 40-day time limit from the return of the writs should remain and elections be open for challenge to the Court of Disputed Returns on matters such as disqualifications of Members of Parliament. These time limits give a window of opportunity to raise matters that were the subject of public disclosure (as previously recommended), and provides certainty that matters cannot be raised again during the life of that Parliament.

1.75 As Mr Reynolds SC said in evidence to the Committee:

The policy behind the 40-day period is to not leave a period of further uncertainty beyond those 40 days during which there is doubt about who the


32 Lorraine Finlay, *Submission 51*, p. 4.
government is or, to look at the smaller question, about who the relevant member or senator is.\textsuperscript{33}

1.76 Allegations of breaches not disclosed at the time of nomination or that arise thereafter, require a non-partisan process for review and consideration. The bi-partisan Privileges Committee is best placed to fulfil this role. The Privileges Committee can recommend to the relevant House, based on its inquiries, whether or not there is a prospect that Section 44 has been breached and, on that basis whether the relevant House should refer the matter to the Court of Disputed Returns. Of course, the Privileges Committee could come to a view similar to the view taken in the case of the Member for Leichhardt, in which case there would be no referral to the Court of Disputed Returns.

1.77 I do not support the respective Houses taking back the sole ability to determine the eligibility of Members of Parliament.

Recommendation

1.78 That the Senate and the House of Representatives agree to only make a referral to the Court of Disputed Returns after a recommendation from the Privileges Committee if the breach arises from information that was not publicly disclosed or arose after nomination.

Minimal constitutional change that preserves the Constitutional principles and can pass

1.79 As the Committee has rightly observed, constitutional change is difficult. 19.8\% of Australians, representing the majority in each of the four smallest states can vote no and a referendum will be defeated. Great care should therefore be taken when proposing possible referenda.

1.80 The High Court’s interpretation of the words ‘being chosen’ in Section 44 of the Constitution is taken to include the election period when the candidate nominates.

1.81 As the Committee Report outlines, a number of witnesses said the broad legal meaning of ‘being chosen’ is excessive and causes complications for Parliament and candidates.

1.82 Only in the event the Government considers that administrative and procedural changes alone are not sufficient, should the Government consider constitutional change to move the point at which disqualification

\textsuperscript{33} Mr Guy Reynolds SC, Committee Hansard, Canberra, 20 February 2018, p. 2.
takes effect from the point nomination, to the point of being sworn in as a Member of Parliament. This would resolve the issues identified by this Committee, while retaining the important constitutional objectives and principles.

1.83 In this scenario, only those elected would have a requirement to deal with the disqualifications prior to being sworn in as a Member of Parliament. It would also remove all of the issues with APS and ADF members and others who hold an office of profit under the Crown.

1.84 This change, unlike those recommended by the Committee, will not transfer the determination of qualifications from the Constitution and the people to the Parliament and politicians.

1.85 At the 2016 federal election there were 1,625 candidates. Only 150 were elected in the House of Representatives and only 75 in the Senate. Yet all candidates were required to ensure eligibility even though most would never be elected.

1.86 Some witnesses have dealt with this issue with some suggesting other points in time to determine eligibility.

1.87 Lorraine Finlay suggests the return of the writs:

A further amendment that would have a positive impact on a number of the sub-sections under s. 44 would be to consider altering the time at which eligibility needs to be established. In Sykes v Cleary [No. 2] the majority approach (which has become the accepted position) is to view the words ‘shall be incapable of being chosen’ in s. 44 as referring ‘to the process of being chosen, of which nomination is an essential part.34

1.88 This means that eligibility is judged to be at the time of nominating as a candidate.

A narrower construction was adopted by Deane J who interpreted the relevant time as being the declaration of the poll, which represented the final step in the procedure for choosing the particular parliamentarian.

There are compelling arguments for amending the words ‘shall be incapable of being chosen’ to ensure that the time at which eligibility is determined is either the declaration of the polls or, preferably, the return of the writs. This would provide greater certainty to candidates, maximise participation by ensuring that candidates are not required to take potentially irreversible actions simply in order to contest an election, and provides successful

34 Lorraine Finlay, Submission 51, p. 10.
candidates with a window of opportunity (immediately following the election but before the return of the writs) to deal with any eligibility issues.\textsuperscript{35}

1.89 This view is broadly shared by Professor Twomey and Associate Professor Luke Beck.

1.90 Professor Twomey said that it would be ‘better to change it so that there is a specific date upon which a person is disqualified from being chosen.’ She suggested this could be at the return of the writs: ‘That would allow anyone who was likely to have been elected to have a period of time to resolve any other kind of disqualification issues before the writs are returned, and it would give more certainty.’\textsuperscript{36}

1.91 Associate Professor Luke Beck said:

There are eminently good reasons to make the disqualification attached to being elected and sitting in parliament, not the process of nominating and being chosen. The current situation is just an effect of the language of the current section.\textsuperscript{37}

1.92 Mr Simon Cowan from the Centre of Independent Studies gave strong evidence in support of existing Constitutional arrangements, and has committed to campaign against change to the Constitution. Mr Cowan considered the option of minimal constitutional change to adjust the date at which the disqualification takes place, and concluded that many of his concerns would be resolved under such a scenario, as the following Hansard excerpt demonstrates:

Mr Cowan: Just as an initial observation, the idea of a grace period, where you are prohibited from sitting or making decisions, either through law or through custom of parliament, certainly has a degree of attraction. We talk a lot about the difficulties for candidates in this context, but this is happening in conjunction with an investigation in the US, for example, into inappropriate connections between the incoming regime and Russia, and the perception of a conflict of interest that arises as a result of that. There’s still going to be the potential for a conflict in those circumstances, but I think the actuality of that conflict arising is a lot less with a grace period.

\textsuperscript{35} Lorraine Finlay, \textit{Submission 51}, p. 10, 11.

\textsuperscript{36} Professor Anne Twomey, \textit{Committee Hansard}, Canberra, 8 December 2017, p. 10. Quoted in Majority report, para 3.51.

Mr MORTON: You would support constitutional change that maintains that elected parliamentarians can’t hold dual citizenship, so long as there’s a period after being elected in which to extinguish that dual citizenship?

Mr Cowan: My initial thought is that that would probably be satisfactory. I’d like to think about that a bit more, because that’s the first time I’ve heard that idea, but certainly a lot of my concerns would be resolved.  

1.93 If the Government considers constitutional change, then the only option it should consider is to adjust the date at which disqualifications take effect, from nomination to a later date.

1.94 When matters arise during the life of a Parliament, affected Members of Parliament should be suspended from the House or Senate and given time to rectify any previously unknown foreign citizenship before retaking their seat and avoiding a costly by-election.

1.95 By using a date, such as the swearing in of the Member of Parliament, that date can be adjusted if additional time is required, within reason. Not all Members of Parliament need be sworn in on the opening day of Parliament. Hard dates, like the return of the writs, cannot be adjusted.

1.96 A joint submission from Professor Rosalind Dixon, Associate Professor Appleby and Mr Lachlan Peake posed an option of amending s. 44 to allow a grace period:

language could also simply be added to end of s 44… so that it reads something like:

... and does not within 3 months of being elected take all reasonable steps to renounce, discharge or discontinue this foreign citizenship; bankruptcy or insolvency; office of profit, pension, or pecuniary interest … shall be incapable of taking their seat as a member of Parliament.

Recommendation

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38 Mr Simon Cowan, Committee Hansard, Sydney, 2 February 2018, p. 16.

39 Dr Gabrielle Appleby, Professor Rosalind Dixon, Mr Lachlan Peak, Submission 44, p. 12. Quoted in Majority report, para 4.76.
Only in the event that the Government considers that administrative and procedural changes alone are not sufficient, should the Government consider constitutional change to move the point at which the disqualification of Members of Parliament takes place, from prior to nomination, to a point prior to being sworn in as a Member of Parliament, to resolve the issues identified by this Committee, while retaining important Constitutional objectives and principles.

Minority Report Recommendations

Recommendation:

That the Australian Government establish the Foreign Citizenship Renunciation Advice and Support Office to assist potential candidates in understanding their constitutional obligations and to provide support in the renunciation of foreign citizenship.

Recommendation:

That the Department of Foreign Affairs and Trade enter into Memoranda of Understanding with foreign nations to establish a process where applications for renunciation made through or with the support of the Foreign Citizenship Renunciation Advice and Support Office can be fast tracked.

Recommendation:

That the Australian Government consider ways that would allow APS and ADF members to draw down additional leave entitlements prior to them resigning to contest an election, or after the election in the event they were unsuccessful.

Recommendation:

That the Australian Government put in place a requirement for candidates to disclose, at the time of nomination, all information that may be relevant to potential disqualification under Section 44.

Recommendation:

That the Senate and the House of Representatives agree to only make a referral to the Court of Disputed Returns after a recommendation from the Privileges Committee if the breach arises from information that was not publicly disclosed or arose after nomination.

Recommendation:
Only in the event that the Government considers that the administrative and procedural changes alone are not sufficient, should the Government consider constitutional change to move the point at which the disqualification of Members of Parliament takes place, from prior to nomination, to a point prior to being sworn in as a Member of Parliament, to resolve the issues identified by this Committee, while retaining the important Constitutional objectives and principles.

Mr Ben Morton MP
Member for Tangney