

# 21 Qualifications of senators and candidates for senate elections

Senators are chosen by the people of each state and territory voting as one electorate at periodic elections. The term of a senator representing a state is 6 years, while territory senators' terms coincide with the term of the House of Representatives.

The provisions governing the qualifications of candidates for election and of senators, once elected, are contained in the [Constitution](#) and the *Commonwealth Electoral Act 1918* (CEA). The purpose of these provisions is to ensure that the people who stand for, and are members of, the national Parliament are beholden to no-one but the electors as a whole and may therefore perform their duties free from undue external influence, including from the executive government, foreign governments and commercial pressures.

## 1. Candidates

To stand for either House, a person must be:

- at least 18 years old; and
- an Australian citizen; and
- an elector entitled to vote or a person qualified to become an elector.

In 1901, the requirements for qualification were different, but the Constitution gave the Parliament power to change these requirements and it has done so on several occasions (see [s.16](#) and [34](#) of the Constitution and [s.163](#) of the CEA).

A person who is a member of the House of Representatives or a state or territory legislature must resign before being eligible to stand for the Senate (see [s.43](#) of the Constitution and [s.164](#) of the CEA). A person may not make multiple nominations ([s.165](#) of the CEA).

[Section 44](#) of the Constitution provides further limitations on eligibility. Broadly, a person cannot be chosen as a senator if he or she:

- is a citizen or subject of a foreign power; or
- is attainted of treason; or
- has been convicted and is under sentence, or subject to be sentenced, for an offence under Commonwealth or state law punishable by a prison sentence of 12 months or more; or
- is an undischarged bankrupt; or
- holds an office of profit under the Crown; or
- has a pecuniary interest in any agreement with the Commonwealth Public Service (except as a member of an incorporated company of more than 25 people).

Further, a person convicted of certain bribery or undue influence offences is disqualified from being chosen as a senator for 2 years after the conviction (see [s.386](#) of the CEA).

Following numerous cases during the 45th Parliament of sitting senators found to have been ineligible to stand as candidates, the [Commonwealth Electoral Act](#) was amended in 2019 to require candidates to complete a checklist relating to eligibility under section 44 of the Constitution as part

of the nomination process. The AEC is required to provide the documents relating to all successful candidates to the respective Houses for tabling.

The Senate subsequently established a [Register of Senators' Qualifications](#). The Register includes the material provided by the AEC, and similar statements made by any senators filling casual vacancies, (as well as the citizenship statements made by those senators in the 45th Parliament with six year terms).

## 2. Disqualification of senators

The place of a senator who becomes subject to any of the grounds for disqualification in [s.44](#) of the Constitution automatically becomes vacant. Disqualification also occurs if a senator becomes bankrupt or insolvent or if he or she takes, or agrees to take, any fee or honorarium for services to the Commonwealth or for services rendered in the Parliament on behalf of any person (see [s.45](#) of the Constitution). A monetary penalty may apply if a person continues to sit as a senator while disqualified.

## 3. Determination of disqualifications

There are two methods of challenging the qualifications of a senator. Under each method, challenges are determined by the High Court sitting as the Court of Disputed Returns (CDR).

The first method is under [sections 353 to 357](#) of the CEA, which provide that the Australian Electoral Commission, or any candidate or person qualified to vote, may petition the Court, within 40 days after the return of the writ (or, in the case of a casual vacancy, the notification of the choice or appointment) to examine the validity of the election, including the qualifications of candidates. The Court may examine the petition or refer it to a lower court. Possible outcomes include declarations that:

- a person returned as elected was not duly elected
- a candidate not previously returned as elected is now duly elected; or
- the election is void.

Secondly, the Senate may by resolution refer a question relating to the qualifications of a senator to the Court, under section 376 of the CEA. The motion is categorised as Business of the Senate and therefore has priority over other types of business at most times see [Guide No. 4—Categories of Business](#). The Court may declare that a senator is not qualified, or that a candidate was ineligible, and may declare that a vacancy exists. In 2017 and 2018, a number of senators were found to have been incapable of being chosen as senators at the 2016 election following the reference of questions under this method.

The [order of the Senate establishing the Register of Senators' Qualifications](#) seeks to constrain the circumstances in which referrals to the CDR may be proposed, although this procedural constraint is yet to be tested.

It was previously thought that a third method was available to challenge the qualifications of a senator, by initiating proceedings under [section 3](#) of the *Common Informers (Parliamentary Disqualifications) Act 1975* against a senator alleged to be disqualified. This Act supersedes [section 46](#) of the Constitution ([s.4](#)) and suits are heard in the original jurisdiction of the High Court ([s.5](#)). However, the High Court, in *Alley v Gillespie* [2018] HCA 11, held that an action under the Common Informers Act could succeed only where a senator or member had first been found ineligible under one of the other two methods, outlined above.

## 4. Grounds for disqualification

The High Court has adjudicated a number of aspects of [section 44](#) of the Constitution as it applies to both candidates and sitting senators and members. For a candidate, the critical point is nomination, which begins the process of being chosen ([Sykes v Cleary](#) (No. 2) (1992) 176 CLR 77). To be eligible for election, a candidate must be clear of any of the grounds for disqualification at the time of nomination ([Free v Kelly](#) (No. 2) (1996) 185 CLR 296); and must remain so until chosen ([Re Nash \[No 2\]](#) 2017 HCA 52, at 44-45).

As noted earlier, during the 45th Parliament a number of senators were found by the High Court, sitting as the Court of Disputed Returns, to have been incapable of being chosen, under section 44 of the Constitution. (For a summary of cases arising from the referral of senators to the Court, see: [Consideration of senators' qualifications in the Court of Disputed Returns and related matters](#)).

### 44(i): owes allegiance to a foreign power etc.

Prior to the 45th Parliament, it was generally understood that paragraph [44\(i\)](#) applies 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 allegiance ([Nile v Wood](#) (1988) 167 CLR 133). For these purposes, “foreign power” includes the United Kingdom ([Sue v Hill](#) (1999) 199 CLR 462). To qualify for election, it was not considered enough for a person to have become an Australian citizen unless that person had also taken **reasonable steps** to renounce foreign nationality ([Sue v Hill](#) (1999) 176 CLR 77). What amounted to reasonable steps would depend on the circumstances of the particular case ([Sykes v Cleary](#) (No. 2) (1992) 176 CLR 77).

In 2017, the High Court made orders and delivered its judgment on questions concerning the qualifications of six senators and one member of the House of Representatives ([Re Canavan](#) [2017] HCA 45). The Court adopted the **ordinary and natural language** of paragraph 44(i), consistent with the majority view in the previous leading case [Sykes v Cleary](#). In doing so, the Court distinguished between the first part of the provision (“acknowledgement of allegiance” etc.), which requires a **voluntary** act, and the second part (“a subject or a citizen...of a foreign power”), which involves a state of affairs **existing under foreign law**.

Each of the matters referred turned on the construction of the second part of the provision. The Court rejected the alternative interpretations put before it, which sought to introduce into the second part questions about an individual’s knowledge of their citizenship status and a degree of “voluntariness” in retaining foreign citizenship.

The Court held that paragraph 44(i) operates to render incapable of being chosen, or of sitting, persons who have the status of a subject or citizen of a foreign power, which is determined by the law of the foreign power in question. In these instances, the candidate does not need to be aware of their foreign citizenship status. Further, a person who at the time of nomination retains the status of a subject or citizen of a foreign power is disqualified by section 44(i) unless the operation of the foreign law is “contrary to the constitutional imperative that an Australian citizen not be irremediably prevented by foreign law from participation in representative government”. Finally, the Court held that where it could be demonstrated that a person had taken **all reasonable steps** that are **reasonably required by the foreign law to renounce** the foreign citizenship or subject status within the person’s power, the constitutional imperative of paragraph 44(i) is engaged ([Re Canavan](#) [2017] HCA 45, 72).

Four senators and the member were found to be foreign citizens at the time of nomination and so were ineligible to be elected. The senators’ places were subsequently filled by special counts of the ballots for the affected states. Three further references in 2017 saw three more senators disqualified on the same grounds.

In 2018, a further reference was made by the Senate to the Court (*Re Gallagher* [2018] HCA 17). The Court considered whether taking the steps necessary to renounce foreign citizenship prior to nomination, even though the renunciation was not registered until after the election, was enough to meet what had come to be known as the reasonable steps test.

In *Re Gallagher* the Court further developed the exception relating to the constitutional imperative, described in *Re Canavan* (above), holding that, where foreign law presents “something of an insurmountable obstacle” to renouncing citizenship, a person taking all reasonable steps to do so may avoid disqualification. However, the procedure for renouncing British citizenship was held not to be onerous. The issue for Gallagher was merely one of timing, and the reasonable steps exception could not apply. As the senator remained a dual citizen at the time of the election, the Court declared her incapable of being chosen and ordered that the resultant vacancy be filled by a special count of the ballot papers under the direction of a single justice.

#### **44(ii): has been convicted and is under sentence etc.**

For paragraph 44(ii) to apply, a person must have been convicted and be **either** serving a sentence **or** subject to be sentenced in relation to an offence punishable by imprisonment for one year or longer (*Nile v Wood* (1988) 167 CLR 133). A person is subject to be sentenced if he or she is awaiting sentencing, and also if he or she has been given a suspended sentence, subject to certain conditions being met. In *Re Culleton [No 2]* [2017] HCA 4 a person against whom a warrant had been issued to attend court for sentencing was held to be “convicted and...subject to be sentenced” for a disqualifying offence. The subsequent annulment of the conviction did not prevent the operation of paragraph 44(ii).

#### **44(iii): is an undischarged bankrupt or insolvent**

Paragraph 44(iii) refers to a person who has been declared bankrupt or insolvent and who has not been discharged from that condition (*Nile v Wood* (1988) 167 CLR 133). A senator or member who **becomes** bankrupt or insolvent while serving is disqualified under paragraph 45(ii). On 23 December 2016, the Federal Court ordered the sequestration of a senator’s estate (*Balwyn Nominees Pty Ltd v Culleton* [2016] FCA 1578), the prima facie effect of which was to cause the vacation of his office as a senator (*Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC8 at 1). The vacancy was notified after the President received documents recording the status of the senator as an undischarged bankrupt: [statement to the Senate](#), 7 February 2017.

#### **44(iv): holds any office of profit under the Crown**

Paragraph 44(iv) refers “at least” to a person who is permanently employed by government, including at the state level. Taking leave without pay does not alter the character of that employment (*Sykes v Cleary* (1992) 176 CLR 77). In *Re Lambie* [2018] HCA 6, the Court found that the offices of mayor and councillor held by a candidate were not “offices for profit under the crown”, turning on the degree of control an executive government might exercise over those positions.

#### **44(v): pecuniary interest in any agreement with the Commonwealth public service**

Paragraph 44(v) refers to a person who “has any direct or indirect interest in any agreement with the Public Service of the Commonwealth”. In a 1975 case, the High Court found that a senator who was a shareholder in a company that had an agreement with the Commonwealth Public Service was not disqualified. Barwick CJ, hearing the case alone, held that an agreement needed to cover a substantial period of time and be one under which the Crown could conceivably influence the contractor in relation to parliamentary affairs (*Re Webster* (1975) 132 CLR 270)

In *Re Day [No 2]* [2017] HCA 14, however, the Court found that *Webster* was decided on an overly narrow reading of the provision and should not be followed. The Court found that the purpose of paragraph 44(v) extends to ensuring that members “will not seek to benefit by such agreements or

to put themselves in a position where their duty to the people they represent and their own personal interests may conflict” (at [48]). The indirect pecuniary interest found to exist on the facts of the case sufficed for the Court to hold that Day was incapable of being chosen, or of sitting, as a senator.

While sections [44 and 45](#) refer specifically to candidates and members or senators, there are no safe grounds for concluding that they do not also apply to senators-elect (that is, senators who have been elected but whose terms have not begun).

For further information, see [chapter 6](#) of *Odgers’ Australian Senate Practice*.

## 5. Loss of place for non-attendance

The disqualification provisions in the Constitution and the CEA safeguard members of Parliament against undue influence. A person who succumbs to undue influence may be ruled ineligible to stand or may lose his or her place. Senators can also lose their places if they fail to attend the Senate for two consecutive months without permission. A parallel provision applies to members of the House of Representatives (see sections [20](#) and [38](#) of the Constitution). These provisions safeguard electors against absentee representatives but have applied only once since Federation (Senator Ferguson, QLD, 1903).

### Need assistance?

For advice on any of the matters covered by this guide, senators or their staff should contact the Clerk of the Senate on extension 3350 or [clerk.sen@aph.gov.au](mailto:clerk.sen@aph.gov.au).

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