

Submission to the Joint Standing Committee on Electoral Matters

Inquiry into matters relating to Section 44 of the Constitution

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1. We thank the Committee for the opportunity to make a submission to its *Inquiry into matters relating to Section 44 of the Constitution*.
2. We are public law scholars at the Universities of Adelaide and Oxford, who both completed PhDs in Australian constitutional law at the University of Adelaide, and we have extensive university teaching experience in public law as well as a broad range of academic, professional and community publications in the area.
3. We acknowledge the important function that s 44 of the *Australian Constitution* is intended to serve – to ensure the loyalty of members of the Parliament to the Australian people who elect them. As Isaac Isaacs put it at the *Convention Debates* in Adelaide in 1897:
‘We should be careful to do all that is possible to separate the personal interests of a public man from the exercise of his public duty ... The public are interested in seeing and ensuring, so far as it is possible to ensure it, that no member of Parliament shall for his own personal profit allow his judgment to be warped in the slightest when he is called upon to decide on questions of public moment.’¹
In 1923, then-Justice Isaacs joined with Rich J in explaining that: ‘The fundamental obligation of a member in relation to the Parliament ... is the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.’²
4. However, the loyalty to the public of members of the Commonwealth Parliament is now, and has always been, secured primarily by the regular and free elections which characterise our representative democracy. In our view, the time is right to ask whether s 44 remains an appropriate additional protection, or whether greater emphasis should be placed on facilitating the democratic solution at the ballot box, with legal disqualifications enforced by the High Court being limited to more exceptional situations.
5. Our primary submission is not that any of the grounds of ineligibility listed in s 44 are inappropriate (either because they were always inappropriate, or because they have become so through changes to society with the passage of time), although we do not deny the force of observations made by others as to whether dual citizenship should be a barrier to eligibility in the modern globalised world of the information age. It is perhaps also worth noting that in New Zealand, Canada and the United Kingdom there is no such restriction on candidates for election or members of parliament holding dual citizenship.³

¹ *Official Report of the National Australasian Convention Debates*, (Adelaide), 21 April 1897, 1037-8; cited in *Re Day [No 2]* [2017] HCA 14, [174] (Keane J), [270] (Nettle and Gordon JJ).

² *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ) (emphasis in original); cited in *Re Day [No 2]* [2017] HCA 14, [49] (Kiefel CJ, Bell and Edelman JJ), [179] (Keane J), [269] (Nettle and Gordon JJ).

³ In New Zealand, a person will not be precluded from running as a candidate by virtue of dual citizenship. However, if a member of Parliament applies for citizenship of another country or nominates as a candidate for election in another country *after* they are elected, they will be disqualified and their seat will be vacated: *Electoral Act 1993* (NZ) ss 55(1)(b)-(cb) and 55AA. . This removes the problems observed in Australia where members of parliament are ineligible because they ‘discover’ they are in fact dual citizens, as a member of Parliament will only become ineligible to continue to sit as a member where they have taken positive steps to acquire citizenship of another country. In Canada, the only restriction is that the candidate is a Canadian citizen: *Canada Elections Act*, SC 2000, c 9, ss 3 and 65(a). In the United Kingdom, it is not even necessary to be a British citizen to be a member of Parliament. Candidates in a parliamentary election need only be a ‘qualifying Commonwealth citizen’ – which includes a British citizen – or a citizen of the Republic of Ireland: *Electoral*

6. Instead, we approach the issue being inquired into by the Committee from the perspective of a more fundamental question: in a representative democracy, when would it be justified to call upon the judiciary to enforce the disqualification of a person who has been elected by the people?

7. In our submission, the appropriate approach to the issues being inquired into by the Committee would be as follows:

- Section 44 of the *Constitution* should be repealed;
- The general rule should be that any person who is eligible to vote is eligible to be elected to the Parliament – and this threshold should continue to be set in the *Commonwealth Electoral Act* so that it is amenable to change by the Parliament within the relevant constitutional limits;
- A person should be ineligible to nominate for election or be elected to the Parliament if they may be unable to attend the Parliament due to imprisonment – this requirement should be inserted into the *Commonwealth Electoral Act*; and
- Matters that might impact on the potential loyalty and focus of a member of the Parliament and that may therefore properly influence the choice of electors (which may include those presently addressed by s 44 of the *Constitution*) should be disclosed by candidates for election at the time of nomination. The *Commonwealth Electoral Act* should be amended to require the disclosure by candidates of a range of relevant matters. These disclosures should be required to be made as at the date of nomination for election, with changes of circumstances to be disclosed within 7 days. A publicly accessible register of all disclosed information should be kept by the Australian Electoral Commission.

We expand on each of these submissions below.

8. Our reason for suggesting the repeal of s 44 is that it appears to us to place insufficient trust in the Australian people. Whilst there may be occasions, perhaps many occasions, on which an individual might question the wisdom of particular choices by the Australian people as a body politic, in a constitutional democracy the fundamental assumption must be that the wisdom of the people is to be trusted. Gummow and Bell JJ stated in 2010 that ‘the Constitution was drawn with an appreciation of both past and future development of a democratic system of government representative of, and reflective of the wishes of, “the people”.’⁴ In our view, the evolution of Australia’s constitutional democracy has reached the point where representative government can be protected at the ballot box, not by the *Constitution*. We address below the steps that, in our view, should be taken to ensure that the Australian people are able to make an appropriately informed choice.

9. As Gleeson CJ said in 2007: ‘the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community’.⁵ As Gummow, Kirby and Crennan JJ noted, the disqualifications that apply in respect of voting reflect ‘an

Administration Act 2006 (UK) c 22, s 18. ‘Commonwealth citizen’ is defined in Schedule 3 to the *British Nationality Act 1981* to include citizens of 51 Commonwealth nations, including Australia.

⁴ *Rowe v Electoral Commissioner* [2010] HCA 46, [117] (Gummow and Bell JJ).

⁵ *Roach v Electoral Commissioner* [2007] HCA 43, [7] (Gleeson CJ).

understanding of what [i]s required for participation in the public affairs of the body politic'.⁶ In our view, the fundamental choice about where the boundaries of entitlement to participate in the political life of the nation has already been made – and it is reflected in the criteria for eligibility to vote. Accordingly, in our submission the general principle should be that a person who is capable of voting⁷ is capable of being elected to the Parliament, subject to an exception that we explain in paragraph 12 below. Given eligibility to vote is already a requirement for eligibility to nominate under *Commonwealth Electoral Act 1918* (Cth) s 163, there would be no need for any change to the legislation to achieve this result if s 44 of the *Constitution* were to be repealed.

10. We note that leaving it to Parliament to determine the grounds of disqualification from voting and eligibility to be elected might be thought to raise a possibility of abuse that does not exist with a constitutional definition of eligibility issues. However, parliamentary definition of the grounds for eligibility has the benefit of flexibility, in that the grounds can be amended by statute if circumstances are thought to require it. Parliament might also take some confidence from the fact that it already determines the grounds for voter eligibility and has largely done so without controversy. Further, Parliament's discretion in this respect is not unlimited, as any disqualifications it imposes must be 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.⁸

11. We now turn to how, in our view, the concerns that motivated the inclusion of s 44 in the *Constitution* might be more appropriately handled.

12. In our submission, only one issue should rise to the level of disqualification, and this is the prospective inability of a candidate to attend Parliament. This is the reason underlying s 44(ii) which disqualifies any person who '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'.⁹ We note that failure to attend Parliament for 'two consecutive months of any session of the Parliament' is already a constitutional ground of disqualification under ss 20 and 38 of the *Constitution*. However, it is not appropriate to merely wait for this circumstance to arise and then face the potential requirement of a by-election or special count. In our submission, s 163 of the *Commonwealth Electoral Act 1918* (Cth) should be amended to disqualify from nomination any person who is serving a sentence of imprisonment, or is subject to be sentenced to a term of imprisonment for one year or longer. If this submission were to be accepted, we recommend that consideration also be given to whether being subject to a shorter period of imprisonment than one year might also be an appropriate ground for disqualification, and to whether the provision should also address other potential causes of inability to attend Parliament.

⁶ *Roach v Electoral Commissioner* [2007] HCA 43, [62] (Gummow, Kirby and Crennan JJ).

⁷ See: *Commonwealth Electoral Act 1918* (Cth) s 93.

⁸ *Roach v Electoral Commissioner* [2007] HCA 43, [85] (Gummow, Kirby and Crennan JJ). *Rowe v Electoral Commissioner* [2010] HCA 46, [161] (Gummow and Bell JJ).

⁹ *Re Culleton [No 2]* (2017) 341 ALR 1, [22] (Kiefel, Bell, Gageler and Keane JJ).

13. In our view, other issues that might impact on the potential loyalty and focus of a member of the Parliament can be suitably addressed by making provision to ensure that the public is able to take these factors into account in deciding how to vote. Thus, in our submission, the *Commonwealth Electoral Act* should be amended to require the disclosure by candidates for election of a range of matters that may properly influence the choice of electors. If Parliament was of the view that the disqualifications currently expressed in sub-ss 44(i), (iii), (iv) and (v) of the *Constitution* were matters that may properly influence the choice of the electors then the following matters could be disclosed:

- Any foreign citizenship(s) held;
- Any previous criminal convictions or bankruptcies;
- Any direct or indirect pecuniary interest deriving from the Crown.

While these may be important issues, in our view the appropriate means of dealing with them is to make the relevant information available to electors and let electors take this into account in deciding how they wish to vote. If a disclosure regime along these lines were to be adopted, we also recommend that consideration be given to whether there are other factors properly relevant to electors' choices that should also be disclosed (we note, without adopting a position, that information relating to a candidate's health and/or financial status is regarded by some as being relevant). Equally, consideration might be given to whether the matters listed in s 44 are in fact matters that may properly influence the choice of the electors. As is noted above, in other jurisdictions there is no such restriction on dual citizens.¹⁰ Equally, the eligibility restriction on undischarged bankrupts is not a restriction universally applied in other jurisdictions.¹¹ The benefit of including such a disclosure regime within the *Commonwealth Electoral Act* – as opposed to within the *Constitution* – would be that it could be reviewed from time to time with a view to determining what information is relevant to electors' choices (and therefore should be declared by candidates).

14. In our submission, these disclosures should be required to be made as at the date of nomination for election, with changes of circumstances to be disclosed within 7 days. A publicly accessible register of all disclosed information should be kept by the Australian Electoral Commission. The contemporaneous financial disclosure arrangements implemented during the recent Queensland election provide a good model. In our view, only disclosures which are contemporaneous with the election are capable of meaningfully informing electors' choices – for this reason, a disclosure regime applying from the date of nomination is the appropriate tool: a purely retrospective approach, such as those adopted in 2017 by the House of Representatives and the Senate through the creation of registers of citizenship information, cannot inform electors' choice during the election campaign, and is therefore insufficient.

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¹⁰ See above n 3

¹¹ There is no such restriction in Canada or New Zealand. However, in contrast, there is such a restriction on undischarged bankrupts in the United Kingdom: *Insolvency Act 1986* (UK) c 45, s 426A.