

PUBLIC LAW AND POLICY RESEARCH UNIT

Submission to the Joint Standing Committee on Electoral Matters: Inquiry into matters relating to Section 44 of the Constitution

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This submission has the endorsement of members of the Research Unit, including Professor Paul Babie, Associate Professor Anne Hewitt, Associate Professor Peter Burdon, Dr Manuel Solis, Kellie Toole and Cornelia Koch.

I address only Terms of Reference C, D and E in this submission. It will be clear from my remarks on these Terms that I believe, in answer to Terms A and B, that there is little Parliament can do to minimise the risk of candidates being found ineligible pursuant to section 44(i) or to make the operation of section 44(i) more certain and predictable.

C. Whether the Parliament should seek to amend section 44(i)

Section 44(i) should be amended because it is unnecessary, unworkable, and it is out of step with the criteria for membership in Australian society as it has evolved since Federation.

I. S 44(i) is unnecessary

Whether or not s 44(i) was ever a necessary protection against foreign influence in the Australian Parliament, as our democratic system of government has matured, in 2018 it has no work to do.

- As a general rule, all members of the Australian community who are eligible to vote should be encouraged to seek election to the Parliament, and as few barriers as possible should be put in their way.
- We are a multicultural nation that actively sought out people with other citizenships to join the community after the Second World War, implemented a non-discriminatory immigration policy from 1975, and since 2002, have allowed new Australian citizens to retain their other citizenships.
- Citizenship has multiple functions. It represents the rights a person has within a national community, it represents their status in that community, and it can reflect a person's identity and sense of allegiance. None of these roles of foreign citizenship pose a 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.
- If foreign citizenship compromises a person's ability to perform their duties as a Parliamentarian, such as compulsory military service obligations overseas, this can be dealt with through the rules governing the operation of the Parliament.
- Our system of government has a wide range of protections that can guard against foreign influence and interference. The Constitution provides robust protection through establishing responsible government, requiring periodic elections and instituting a separation of powers. In addition, the Parliament has developed rules to maintain its integrity, and Australia has established security agencies to protect against foreign influence, such as the Australian Security Intelligence Organisation and Australian Security Intelligence Service.

- It should be noted, in any case, that foreign influence is unlikely to originate from those known to be citizens of another country. Influence is wielded in more sophisticated ways.

II. S 44(i) is unworkable

The High Court's interpretation of s 44(i) in *Sykes v Cleary* (1992) and *Re Canavan* (2017) has confirmed that the very fact of being a citizen of another country or owing allegiance to another country renders a person ineligible to run for Parliament, and that a candidate for election needs to divest themselves of any foreign citizenship at the time of nomination for election. The determination of whether a person is a citizen of another country is made according to the laws of the foreign country, although the Court has recognised a constitutional imperative that an Australian citizen not be 'irremediably prevented by foreign law from participation in representative government'. Therefore, if a person has taken all steps that can be reasonably expected under the foreign law to renounce their foreign citizenship they are eligible to run for Parliament.

The problems the Parliament has had developing a protocol for members to declare their foreign citizenships demonstrates the unworkability of s 44(i). Whether a person is a citizen of a foreign country is not always easy to ascertain. A person may be put on notice by the fact of their birth or ancestry, but ascertaining the citizenship implications of foreign birth or ancestry can be extremely difficult as the circumstances of Matt Canavan and Nick Xenophon demonstrated.

Although the Parliament may be able to develop a workable protocol for dealing with foreign citizenships, it will still leave a significant proportion of the population having to divest themselves of a foreign citizenship at the point of nomination. This will be a strong disincentive to nominate for Parliament at all which has serious implications for the diversity of representation in our Parliament.

III. The changing significance of s 44(i) as Australia has evolved as a nation

The crisis in s 44(i) has come about because of a disjuncture between the regulation of citizenship in Australia and the rules around eligibility in the Constitution. The law and policy on citizenship has evolved, but the constitutional requirements pertaining to eligibility have not.

In 1901 membership in the Australian community and eligibility for Parliament worked in parallel. The overwhelming majority of the population were British subjects with sole allegiance to the Crown. There were few foreign nationals in Australia, and their position in the community was perilous, being liable to be deported under the *Immigration Restriction Act 1901* (Cth). The expectation was that people who had allegiances outside the Crown would not be in the Australian community, let alone run for Parliament. Section 44(i) reflected this.

Since 1901, the concept of citizenship has changed in the world, and Australian citizenship has changed in parallel. In 1948, we had a new concept of Australian citizenship which existed alongside British subjecthood as providing membership in the Australian community.

After World War II, there was a rapid transformation in the Australian nation. Immigration opened up to citizens from Europe from the 1940s. From 1975, Australia introduced a non-discriminatory immigration policy which led to high levels of migration from Asia and the rest of the world. In 2018, over half the Australian population was either born overseas or has a parent born overseas. Many of these will retain citizenship with their countries of origin.

In 1982, amendments to the *Australian Citizenship Act 1948* (Cth) stripped British subjects of the privileges of Australian citizenship, and in 1999, in the case of *Sue v Hill*, the High Court declared Britain to be a foreign country from at least 1987. As a result of these changes, in 2018 citizens of countries that were part of the British Empire, including the UK, Canada and New Zealand, are now considered to be foreign citizens for the purpose of s 44(i).

In sum, the Australian community has changed in constitution dramatically, and our relationship to the rest of the world has also changed. However, the rules around eligibility to run for Parliament have not been updated in parallel. Paradoxically, the creation of a separate

Australian citizenship means that s 44(i) has a more exclusionary operation than it did at Federation.

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).

I agree with many of the other submissions that the other paragraphs in s 44 are also unnecessary, and any of the concerns about a person's fitness to serve in Parliament expressed in those provisions are best dealt with through the electoral process, and the rules of the Parliament. Sensible suggestions for reform have been made in previous inquiries, including the House Standing Committee in 1997, the Constitutional Commission in 1988, and the Senate Standing Committee on Legal and Constitutional Affairs in 1981.

E. Any related matters.

Two proposals for amendment of s 44 have been discussed in submissions. One is to completely delete the section, and the other is to add the words, 'Until Parliament otherwise provides' at the beginning of the section.

The second proposal makes strategic sense as it makes no substantive change to the Constitution, but simply provides Parliament with the power to update the constitutional requirements. Being the least dramatic change, it may have the best chance of success at a referendum. However, such an amendment leaves the impression that there is a *prima facie* case for excluding dual citizens from running for Parliament, which is obnoxious in a multicultural nation such as Australia.

I therefore favour complete repeal of s 44. 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.

Success at a referendum to remove s 44(i) from the Constitution may have the additional benefit of reinvigorating constitutional reform under s 128 which has stalled in recent decades.