

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

Dr Joe McIntyre, Sue Milne and Professor Wendy Lacey
School of Law, University of South Australia¹

Summary of Submission

The current challenges posed by section 44 of the Constitution have been latent for decades. Now that these problems have become publically manifest, they are likely to linger as a recurrent distraction in our political landscape:

- The dependence on foreign law means that changes to Australian electoral laws and administrative procedures will not provide a definitive solution to the problems posed by section 44;
- The unqualified nature of section 44 means that Parliament can do very little to ameliorate or eliminate the uncertainties posed by that section;
- Rather than amend section 44(i), that provision ought to be repealed;
- All aspects of section 44 should be re-examined, and the recommendation of the 1988 Constitutional Convention should be adopted.

For both substantive and procedural reasons the resolution of the problems posed by section 44 will not be achieved through administrative or legislative responses to that section. Only constitutional change can remedy the situation.

Overview of Key Issues

The disqualifications set out in section 44 of the Constitution represent a uniquely Australian impediment to the most active form of participation in our democratic processes. The incorporation of this provision into the Constitution has proved cumbersome and problematic, and has burdened the Australian polity with prohibitions from another era. The continuing operation, and indeed expansion, of these prohibitions, weaken our democratic processes. In a modern multicultural society, built on waves of migration, the exclusion of dual citizens (and those with a shadow of dual citizenship hanging over them) risks diminishing the vital representativeness of our Parliament for little effective gain. Ideas of allegiance and subjecthood have evolved exponentially since Federation, with the increasingly relaxed attitude to such ideas evident in the rapid expansion globally of permissive approaches to dual citizenship. Similarly, prohibitions on holding an ‘office of profit’ appear deeply anachronistic when up to 30% of the working population² may be affected by the provision.

¹ This submission represents our own views, and not those of the School or University

² The calculation of precisely how many people are affected by section 44(iv) is unclear as the scope of its operation remains uncertain. The ABS reports that 1.95 million people worked in the public sector in 2017: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6248.0.55.002Main+Features12016-17?OpenDocument>. At more than 15% of the workforce this would be concerning enough. However, the figure may be much larger given that 3.2 million people work in just the fields of Public Administration, Education and Training, and

To ask such persons to give up their employment on the *possibility* they may be elected, appears unnecessarily harsh and punitive. Indeed each of the prohibitions set out in section 44 appear of limited continuing utility.

The controversy provoked by the dual-citizenship provides a window of opportunity whereby it may be possible to harness the political will necessary to modernise this constitutional relic. The many ambiguities emerging from the jurisprudence of the High Court, together with the increasing partisanship of the issue, suggests that this issue is unlikely to fade away in the near future. As the legislative and administrative means of abrogating the harshness and uncertainty of this constitutional impediment are limited, it is submitted that constitutional change is warranted.³

Australia's Constitution was never meant to be a static document. It is now more than 40 years since we successfully amended the Constitution, and nearly 20 years since a referendum was even held.⁴ Both of these are record periods of time for our Federation. This has perpetuated the myth that constitutional change is effectively implausible. A referendum on section 44 would re-engage the Australian people in this vital process. This would itself be a valuable secondary benefit of such a process.

While this may be seen as a largely technical issue, it is consuming vital public resources and distracting our politicians from the role of governing Australia. Changing the Constitution is the only way to draw a line under this chaos

It is likely that the uncertainties inherent in the wording and operation of section 44 will mean that there will be no quick resolution of how to deal with this matter. Constitutional reform offers the only means of eliminating this debilitating uncertainty permanently. The model proposed by the 1988 Constitutional Commission⁵ offers a sensible and appropriate model for such reform.

THE REMAINING CHALLENGES OF SECTION 44(I)

The dual-citizenship problem has long been an open secret. It has been the subject of numerous parliamentary reports over the last 40 years, the most recent in 1997.⁶ In evidence given before that most recent inquiry, Professor Tony Blackshield highlighted allegations

Health Care and Social Assistance where the majority of funding comes from Government sources: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/April/Stats-Employment-Industry.

³ See generally Joe McIntyre, *The dual citizenship saga shows our Constitution must be changed, and now* (2017) *The Conversation*, published November 17, 2017, available <https://theconversation.com/the-dual-citizenship-saga-shows-our-constitution-must-be-changed-and-now-87330>

⁴ See http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm.

⁵ Constitution Commission, *Final Report of the Constitutional Commission: Volume 1* (1988) 283, 289, 293, 296, 301

⁶ See for example: Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Constitutional Qualifications of Members of Parliament* (1981); Sarah O'Brien, Background Paper Number 29: *Dual Citizenship, Foreign Allegiance and s.44(i) of the Australian Constitution* (1992) Parliamentary Research Service, 9 December 1992, available <http://www.aph.gov.au/binaries/library/pubs/bp/1992/92bp29.pdf>; Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution - Subsections 44(i) and (iv)* (1997) Report tabled 25 August 1997, available: https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/inquiryinsec44.htm.

made in the 1980's where after one election 35 members of parliament, and after another election 57 members, were alleged to be disqualified.⁷ A royal commission was once suggested to audit all politicians.⁸ This has been a time bomb waiting to go off, but one that stayed strangely inert for more than 100 years.

Throughout this period, there has been a general acceptance that the current form of section 44 is problematic and in need of reform.⁹ Without any acute political crisis, there has not, however, been sufficient political will to address the issue. It appears that the major parties developed reasonably robust vetting mechanisms, informed by decisions such as *Sykes v Cleary*,¹⁰ to avoid the most obvious violations of the prohibition. This has, historically, been a sufficient stopgap.

The resignation of Greens Senator Scott Ludlam in July 2017 shattered this fragile balance. The spectacular ignition of the long running campaign by Perth barrister Dr John Cameron to bring this issue to public attention¹¹ has rendered inoperative the political device of ignoring the issue. While that initial challenge culminated in the decision of *Re Canavan*,¹² the broader fallout will continue for indeterminate time.

While the disclosure process rolled on in both the Senate and House of Representatives may clarify matters in the short term, at least for the 45th Parliament, this issue will continue to linger. There are a number of factors to suggest that even with the more robust and systematic vetting processes, as will no doubt be developed, this issue will remain an unpredictable influence on our political processes.

When the developments of section 44(i) are put into the broader context of the other recent decisions in 2017 of *Day*¹³ and *Culleton*,¹⁴ the trend is towards an increasingly harsh interpretation of these prohibitions. Unfortunately, that harshness has aggravated, rather than alleviated, the uncertainty surrounding the operation of section 44.

For the reasons outlined below, it is our submission that section 44, as interpreted by the High Court in the series of cases in 2017, is now effectively unworkable. It will continue to operate as a lightning rod, attracting dramatic challenges to the eligibility of members of parliament. The provision provides an inherent uncertainty in the operation of our Parliament that is unnecessary and, now, apparently unresolvable. For these reasons, we submit that section 44 be amended through the requisite constitutional reform.

⁷ Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution - Subsections 44(i) and (iv)* (1997), Chapter 2, 12.

⁸ Stephen Murray, *When a Royal Commission Was the Answer to Section 44 Cloud Over MPs* (2017) published online on 28 August 2017, available at <https://boilermakerbill.wordpress.com/2017/08/28/when-a-royal-commission-was-the-answer-to-section-44-cloud-over-mps/>

⁹ See Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution - Subsections 44(i) and (iv)* (1997), Chapter 2, 39; Constitution Commission, *Final Report of the Constitutional Commission: Volume 1* (1988) 275.

¹⁰ (1992) 176 CLR 77.

¹¹ See <https://www.theaustralian.com.au/national-affairs/barrister-who-toppled-scott-ludlam-on-scalps-hes-claimed/news-story/08c6aee2d920a602922fe31df8483ef2>

¹² *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (27 October 2017) ('*Re Canavan*').

¹³ *Re Day [No 2]* [2017] HCA 14 (5 April 2017).

¹⁴ *Re Culleton [No 2]* [2017] HCA 4 (3 February 2017).

SUBSTANTIVE CHALLENGES IN THE FUTURE OPERATION OF SECTION 44

First, there are a number of issues that remain in the construction of section 44(i) that may lead to substantial and continuing uncertainty and injustice in the operation of that provision. The concerns are outlined below.

1. The Compliance Problem

Of these, perhaps the most challenging concern is the apparently straightforward issue of compliance with the prohibition. There appears to be a widespread belief that it is a relatively simple and definitive process of assessing whether or not a person is a subject or citizen of a foreign power. Such a belief is quickly belied by the complexity of the facts regarding both Senator Canavan and (to a lesser extent) Senator Roberts.¹⁵ In the former case, even after the provision of expert reports, the Court could not determine whether or not Senator Canavan was or was not an Italian citizen.¹⁶

Given that the question of whether a person has the status of a subject or a citizen of a foreign power ‘necessarily depends upon the law of the foreign power’,¹⁷ the definitive determination of that issue will require relevant expertise in that foreign law. Given that citizenship may be granted through both matrilineal and patrilineal line (potentially back many generations), through marriage, or through the place and time of birth, the assessment of citizenship by foreign law is a potentially onerous task.

There is very little that the Australian Parliament can do to ameliorate this difficulty – even a law that stripped all Australian citizens of their foreign citizenship would not be effective in removing such status with respect to that foreign law. The suggestion that the AEC or some other body may investigate potential dual citizenship status of nominees is misguided, as the complexity of determining the status of every potential nominee would be overwhelming and ruinously expensive.

Moreover, the dependence on foreign law makes the assessment of compliance a continuing obligation. A person who is duly elected may be rendered ineligible by subsequent legislative or judicial determinations in a foreign country.¹⁸ There is an effective contingent nature to any assessment of eligibility as events beyond the control and reasonable knowledge of a candidate or politician may subsequently render them in contravention of the prohibition.

2. The ‘Entitled to’ Problem

A second significant area of uncertainty in s44(i) that remain unresolved is the extent and operation of the component of the provision which disqualifies persons ‘entitled to the right and privileges of a subject or citizen of a foreign power.’ This component has been described by Brennan J in *Sykes v Cleary*¹⁹ as the ‘third limb’ of the provision, and by the Court in *Re Canavan* as the ‘second limb’.²⁰ Putting aside issues of nomenclature, beyond the facts that

¹⁵ *Re Roberts* [2017] HCA 39 (22 September 2017).

¹⁶ *Re Canavan* [2017] HCA 45 (27 October 2017), [86].

¹⁷ *Re Canavan* [2017] HCA 45 (27 October 2017), [37], [71].

¹⁸ The potential for such a situation is seen in the Italian Constitutional Court case discusses in *Re Canavan* [2017] HCA 45, [81].

¹⁹ (1992) 176 CLR 77, 109-110.

²⁰ See *Re Canavan* [2017] HCA 45 (27 October 2017), [22]

this limb connotes ‘a state of affairs involving the existence of a status or of rights under the law of the foreign power,’²¹ there is little in the jurisprudence that substantively clarifies which rights and privileges are relevant to this, nor what ‘entitled to’ entails.

Assessing definitively whether or not a person contravenes this limb is potentially factually even harder than for citizenship, as a broader range of factors must be considered. The legal ambiguity as to the nature and extent of the prohibition only amplifies this difficulty.

This difficulty can be usefully illustrated by reference to the Israeli Law of Return. As O’Brien notes, the right of Jews to settle in Israel provides a vivid illustration of a situation where it is difficult to determine ‘whether a person is entitled to merely some rights or entitled to the whole package of citizenship rights.’²² It has been suggested that an Australian person of the Jewish faith who possesses the *right* to acquire Israeli citizenship ‘is not necessarily treated as an Israeli until he takes up such citizenship’.²³ Writing on the issue in 1982, Michael Pryles argued that,

... a right to acquire the nationality of a foreign state does not *ipso facto* constitute an entitlement to the rights or privileges of such nationality. A person who can become a national of a foreign state is not necessarily treated as a national of the foreign state until he takes up the foreign nationality.²⁴

On its face, this is a relatively attractive proposition, restricting the operation of the prohibition and effectively creating space for a requirement that some positive act is required before that prohibition engages.

Unfortunately, such an interpretation does not appear consistent with the wording of the second/third limb, nor the reasoning in *Re Canavan*. In *Re Canavan*, a major question for Senator Xenophon was whether he currently had any of the rights generally associated with citizenship under international law, including rights of entry and of work.²⁵ As Senator Xenophon's class of ‘citizenship’ did not carry these rights, it was not captured by the prohibition. This reasoning is useful in clarifying the type of rights and privileges that may be captured by the ‘entitled to’ limb, including rights of abode, entry, and work.

Arguably, a Jewish person eligible for an Olah visa under the Law of Return (with rights of entry, residence and work) will have sufficient rights and privileges even if they do not subsequently apply for Israeli citizenship - the rights may be currently latent, which under this brutal literalism may be sufficient.

This illustration highlights that there are numerous substantial legal uncertainties still unresolved as to the scope of section 44(i). Until they are clarified by subsequent judicial determinations, there is a real risk posed that substantially large number of other candidates and politicians may be affected.

²¹ *Re Canavan* [2017] HCA 45 (27 October 2017), [21].

²² O’Brien, above n6, p41

²³ Michael Pryles, ‘Nationality Qualifications for Members of Parliament,’ (1982) 8(3) *Monash University Law Review* 163, 179.

²⁴ *Ibid.*

²⁵ *Re Canavan* [2017] HCA 45 (27 October 2017), [131], [134].

3. The ‘Reasonable Steps’ / Constitutional Imperative Problem

Perhaps the largest alteration to the interpretation of section 44(i) affected by *Re Canavan* was with respect to the caveat that foreign law would be permitted to render an Australian citizen irremediably incapable of participating in the representative government. In *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ said:

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.²⁶

This test led to a practice that if a person had taken ‘all reasonable steps’ to divest his or her self of foreign citizenship, then the prohibition would not engage.

However, it appears that the Court in *Re Canavan* has imposed a far harsher test than expected, and has made clear that it is not sufficient that a person takes ‘reasonable steps’ to divest foreign citizenship. Unless a foreign law would ‘irredeemably’ prevent a person from participating in representative government, the fact of dual citizenship will be sufficient to disqualify a person:

A person who, at the time that he or she nominates for election, retains the status of subject or citizen of a foreign power will be disqualified by reason of s 44(i), except where 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. Where it can be demonstrated that the person has taken all steps that are reasonably required by the foreign law to renounce his or her citizenship and within his or her power, the constitutional imperative is engaged.²⁷

The focus of this new articulation is not on the reasonableness of the steps taken by the candidate, but on the reasonableness of the steps required by the foreign law. If those requirements are ‘reasonable’, a candidate will remain barred until such time as their renunciation is formalised.

It is this strict new interpretation that has cast doubt over the eligibility of politicians such as the Member for Braddon, Justine Keay and Senator Katy Gallagher. Keay, for example, had renounced her British citizenship prior to nomination, but did not receive final notification until after the election.

Not only is it unclear which steps may be deemed ‘unreasonable’, this interpretation imposes real issues of timing.

4. The Timing Problem

The effect of this new interpretation will be that prospective politicians would be required to irrevocably rid themselves of dual citizenship early enough to ensure this is confirmed prior to nomination. It will no longer be sufficient that they have taken all steps required of them to renounce their citizenship; such renunciation must now be effectively formalised. This

²⁶ *Sykes v Cleary* (1992) 176 CLR 77, 107.

²⁷ *Re Canavan* [2017] HCA 45 (27 October 2017), [72].

creates a deeply disquieting potential for foreign bureaucratic processes to interfere with Australia's domestic politics.

The Bennelong by-election provides a graphic illustration of the issue – the ten days between the issuing of the writs and the close of nominations would generally be far too short for any effective renunciation. That John Alexander was able to successfully renounce his citizenship in this instance (with the glare of the world media on the saga) should not minimise this concern. Indeed, the contrast with the substantial time period required before Senator Gallagher's renunciation was confirmed, highlights the concern. While there is no suggestion that there is anything untoward in this instance, the potential for interference is unsettling.

Moreover, under this approach a candidate will be required to renounce their citizenship months, or potentially years, before they nominate, and certainly well before the issuing of the writs. Of itself this is a troubling development with little avenue for remedial reform.

5. The Diversity Problem

Taken together, these legal ambiguities, factual uncertainties and logistical burdens risks distorting the representativeness of our Parliament. One rational response to this compound uncertainty may well be that political parties alter their pre-selection processes to exclude any potential candidate that has any colour of potential (even if remote) claim of dual-citizenship. This will disproportionately affect more recent migrants (as many citizenship rights only carry down for two generations), as well as candidates from certain countries with generous citizenship rights. Arguably, any person of Italian decent may be ineligible, excluding a large population block. Similar concerns may arise for Jewish Australians and other national and ethnic groups in Australia.

The alteration of the 'reasonable steps' test, together with the above timing concerns, may distort the selection process of potential candidates, as parties take a conservative approach to selection. This self-censoring may exclude candidates who may survive any subsequent challenge, but the large spheres of legal uncertainty may mean that parties are not willing to take such risks.

PROCEDURAL CHALLENGES IN THE FUTURE OPERATION OF SECTION 44

Against these substantive concerns as to the interpretation of section 44, there are a number of procedural concerns about the ways in which section 44 matters may be agitated suggest that the issue will continue as a vexing political issue for the foreseeable future.

1) The Increasing Political Partisanship of the Issue

First, it appears that historically there was an effective convention between the major parties not to agitate the many ambiguous cases arising from the operation of section 44. However, the issue has become politically volatile, with the major parties increasingly willing to use the issue as a means of scoring political points. This suggests that even if the matter quietened down for a period, the issue may reignite in subsequent Parliaments where one party see short-term political advantage in agitating the matter.

2) The Challenge Presented by Third-Parties

Secondly, one of the deeper structural changes that has precipitated this current constitutional difficulty posed by section 44 has been the emergence of significant numbers of (comparatively) successful third and minor parties in the electoral landscape. Such parties will not have the resources, infrastructure and experience to engage in the rigorous, intense and, no doubt, expensive vetting process that appears to be demanded by the current interpretation of section 44.

Even if major parties put in flawless vetting processes for their candidates, it is unlikely that these will filter through to smaller parties. This means that it is likely that, whenever a third-party or minor party candidate garners significant votes, other persons will potentially dig into their eligibility. It is likely that, in this scenario, we will continue to have periodic episodes of disqualifications.

3) The Decision-Making Style of the High Court

Thirdly, there are reasons to suggest that recent changes to the way in which the Court makes its decisions may be having real and potentially detrimental impacts on legal certainty in this area.

Starting with the former Chief Justice, and accelerating under the current Chief Justice, there has been a drive for more efficient and collegiate decision-making.²⁸ Rates of dissents have fallen while there has been an increase in whole-of-court joint judgments. This may appear beneficial,²⁹ however, devices such as dissent play an important role in increasing the quality and (perhaps counter-intuitively) the predictability of law.³⁰ This was evident in *Wilkie*, where the apparently strong administrative law concerns were dealt with in a cursory manner.³¹

This emerging change in methodology has diminished the predictability of the law in this context. It is notable that, following the largely unexpected result in *Wilkie*, there was very little agreement amongst legal academics and practitioners about how the High Court would resolve the issues in *Re Canavan*.

The decision in *Re Canavan* was handed down in an extraordinarily fast period of little over two weeks. The fact that it was a single joint judgment no doubt contributed to this turn around. It does not appear that the High Court was intending to effect a substantial alteration of the law as set down in *Sykes v Cleary*, though it appears to have done just that. The current tranche of referrals and potential referrals to the Court on section 44 include a number of cases that would have appeared clearly safe under the prior law.

²⁸ See Andrew Lynch, 'Collective Decision-Making: The Current Australian Debate' (2015) 21 *European Journal of Current Legal Issues*. This development has been subject to heated critique: See D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205.

²⁹ See Susan Kiefel, *The 2017 Atkin Lecture: Judicial Courage and the Decorum of Dissent* (2017) delivered at the Supreme Court of Queensland, 28 November 2017. The text of the speech is available at: <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ28Nov2017.pdf>

³⁰ See Joe McIntyre, 'In Defence of Dissent' (2016) 37 *Adelaide Law Review* 431

³¹ *Wilkie v Commonwealth* *Australian Marriage Equality Ltd v Cormann* [2017] HCA 40 (28 September 2017);

This fast, constrained, and more limited style of judgment writing lends itself to the more effective termination of the given dispute. However, it also diminishes the normative guidance provided by the judicial determination of cases. This emerging style is likely to lead to more uncertainty in the operation of these provisions, as each determination will provide comparably less guidance when compared to decisions of the past.

In short, the potential for decisions of the High Court on this issue to increase uncertainty rather than to provide clarity appears elevated by the current decision methodology of the Court.

4) The *Common Informers Problem*

Finally, the presence of the broad right of action provided by the *Common Informers Act 1975* (Cth) means that this issue will continue to fester. That Act entitles any interested party to bring an action against a potentially disqualified member of parliament personally and, if successful, be entitled to a monetary award.³² In effect, this provision provides a standing bounty that will lurk in the background enticing people to keep digging.³³ There are currently at least three actions that have been initiated under this Act. Even if it could be guaranteed that all current Federal politicians were properly eligible, this Act will ensure that the disaffected persons will continue to agitate the matter in subsequent cases.

OTHER ASPECTS OF SECTION 44

This submission has largely focussed on the issues raised by section 44(i). However, there remain serious and unresolved issues posed by the other provisions of section 44. Perhaps the most immediate is the scope of the pecuniary interest prohibition of section 44(v).

The decision of the Court in *Day*, evidenced the strictly legalistic and potentially harsh interpretation the Court, appears to be bringing attention to this area. In light of that decision, the challenge to the Member for Lyle, Dr David Gillespie, appears far stronger than would previously have been the case. This has real implications as to what may happen next. For example, it has been suggested that Senator Jordan Steele-Johns may be ineligible under section 44(v), as his HELP debt represents a direct pecuniary interest in an agreement with the Commonwealth.³⁴ Such an argument should be untenable under any modern purposive interpretation, however, *Day* and *Re Nash [No 2]*³⁵ makes this position look much more vulnerable.

This issue raises the further concern that the potential to ‘bring down’ a politician may incentivise a large number of actors to agitate arguments as to potential ineligibility that

³² *Common Informers Act 1975* (Cth) s 3.

³³ See Joe McIntyre, ‘Barnaby Joyce can have a bounty put on his head by any Australian citizen’ (2017) *The Advertiser*, August 17, 2017, available at <http://www.adelaidenow.com.au/news/opinion/joe-mcintyre-barnaby-joyce-can-have-a-bounty-put-on-his-head-by-any-australian-citizen/news-story/08e439d7322e60299ceea4748f896b1a>

³⁴ See Stephen Murray, *Section 44: Would a student loan from the Commonwealth prove grounds for disqualification?* (2017) published online on 17 November 2017 at: <https://boilermakerbill.wordpress.com/2017/11/17/section-44-would-a-student-loan-from-the-commonwealth-prove-grounds-for-disqualification/>

³⁵ *Re Nash [No 2]* [2017] HCA 52 (5 November 2017).

would previously have been dismissed as fanciful. In light of the ‘brutal literalism’³⁶ of the High Court, it is now difficult to say how far the prohibition may extend, even if the result appears absurd. The existence of the cause of action under the *Common Informers Act* means that there will remain a mechanism for such agitation to continue.

RECOMMENDATIONS

Ultimately, there is very little that the Parliament can do directly to eliminate, or even to greatly reduce, the difficulty posed by this prohibition.

Any remediation granted by an audit of a politician – no matter how thorough that audit – will only be a temporary salve. As each election cycle comes around, the matter will re-emerge. It is notable that this issue did not arise in this electoral cycle until over a year into the 45th Parliament, well beyond the 40 day period for filing a petition under the *Commonwealth Electoral Act 1918* (Cth) to dispute an election result.³⁷ In future election cycles, it is likely that many disaffected candidates will consider petitioning the Court over these issues.

As outlined above, the suggestion that the AEC should vet all candidates is unviable as such a process would be burdensome, slow, expensive and ultimately futile, as the complexity of foreign citizenship laws mean that many ambiguous cases may be missed.

These measures will all impose significant costs, while the prohibition will continue to impose real costs on our democracy by limiting the pool of people able to engage in the most active sense. The profound difficulties and potential distortions to our democratic processes posed by section 44 should be an invitation to pause and ask whether this provision is serving any functional purpose. It is our submission that it is not.

It is noteworthy that in both by-elections caused by this matter, the electors have comfortably returned the candidate previously ineligible. The electorate does not appear overly concerned with the impact of the matters raised by section 44 on the electability of candidates. The better response to this issue is that the matter is be left to the electorate, and that the prohibitions be removed from the Constitution.

We submit that Constitutional reform offers the only means of eliminating this debilitating uncertainty permanently. The model proposed by the 1988 Constitutional Commission³⁸ offers a sensible and appropriate model for such reform.

Responses to the Terms of Reference

With respect to the specific issues raised in the Terms of Reference, our submissions are as follows:

³⁶ The Attorney-General George Brandis memorably described the High Court’s decision in *Re Canavan* as demonstrating “almost brutal literalism”: See Paul Karp, *‘Brutal literalism’: Brandis critiques high court and contradicts PM on reform* (2017) *The Guardian*, 29 October 2017, available at: <https://www.theguardian.com/australia-news/2017/oct/29/brutal-literalism-brandis-critiques-high-court-and-contradicts-pm-on-reform>

³⁷ *Commonwealth Electoral Act 1918* (Cth) s355.

³⁸ See Constitution Commission, *Final Report of the Constitutional Commission: Volume 1* (1988) 283, 289, 293, 296, 301

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);

The purpose of s 44(i) is to ensure that members of our Parliament have neither a split allegiance, nor an allegiance to a foreign power.³⁹ Section 44(i) achieves this purpose by requiring an examination of the conduct of a person (under the so-called ‘first limb’ of section 44(i)), and looking to the actual legal status or rights of subject-hood or citizenship of that person under a foreign law. Changes to Australian electoral laws and administrative procedures would not provide a definitive solution to determining questions of allegiance governed as they are by foreign laws that are subject to change that then requires assessment of compliance as a continuing obligation. This places excessive, expensive, and ultimately futile demands upon bodies such as the AEC.

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);

To quote the 1988 Constitutional Convention, ‘Section 44 is unqualified. It is absolute.’⁴⁰ Parliament can do very little to ameliorate or eliminate the uncertainties posed by section 44(i). To legislate upon conduct that demonstrated an allegiance to a foreign power, similar to section 33AA of the *Australian Citizenship Act 2007* (Cth) would be a guide to, but not determinative of foreign allegiance. Laws to renunciate foreign citizenship would have no impact upon the question of status and entitlement to foreign citizenship under a foreign law. At best, renunciation might go towards recognising conduct that does not demonstrate allegiance to a foreign power, but as it is expressed in the negative it would not directly address the first limb of section 44(i).

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);

The status of citizenship under Australian law is largely a matter for Parliament to determine. Section 34 of the Constitution grants power to the Commonwealth Parliament to determine the qualifications for becoming a member of Parliament. Parliament now requires that a person be an Australian citizen to be a member of Parliament.⁴¹ There is no express reference to Australian citizenship in the Constitution. It is therefore inappropriate to align Australian citizenship with constitutional provisions concerning disqualification from becoming a member of parliament.

Section 44(i) of the *Constitution* prohibits any suggestion that a member of parliament has any form of foreign ties of allegiance. This is culturally and morally repugnant in

³⁹ *Re Canavan* [2017] HCA 45 (27 October 2017) [25].

⁴⁰ Constitution Commission, *Final Report of the Constitutional Commission: Volume 1* (1988) 288.

⁴¹ *Commonwealth Electoral Act 1918* (Cth).

Australia's multicultural society today. Furthermore, it is a unique constitutional provision in that foreign laws are determinative of its operation and effect. The vulnerability of our system of representative government to the impact of foreign laws now rests upon the protection of a 'constitutional imperative' that is demonstrably uncertain. The recommendation of the 1988 Constitutional Convention should be adopted. Section 44(i) should be repealed.

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);

In light of the overly strict and potentially harsh interpretation of section 44(iv)-(v), in conjunction with the 'mischief' available by way of the *Common Informers Act*, we submit that the prohibitions of section 44(iv)-(v) be subject to further examination. We recommend that both provisions be removed, and power given to the Parliament to regulate the issue, as per the recommendations of the 1988 Constitutional Convention