



Luke Beck
Associate Professor
Faculty of Law

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Submission to the Inquiry into Matters Relating to Section 44 of the Constitution

Dear Committee

I am an Associate Professor of Constitutional Law at Monash University. I provide this submission in my private capacity.

This submission deals with the following matters:

1. Amending section 44 of the *Constitution* to allow Parliament to legislate the grounds of disqualification,
2. Why section 44 of the *Constitution* needs amendment,
3. Amending the reference power in the *Commonwealth Electoral Act 1918*,
4. Legislating to minimise the risk of ineligibility.

1 Amending section 44 of the *Constitution*

In its current form, section 44 sets out a number of grounds on which a person is incapable of being 'chosen' as a Senator or as a Member of the House of Representatives. As the Committee is aware, the precise scope of operation of those grounds of disqualification is not clear and probably not in line with contemporary community standards.

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*. Section 44 should be amended to insert the words "*Until Parliament otherwise provides*" at the start of the provision.

This simple amendment would have the effect that Parliament would have power to enact legislation to provide the grounds of disqualification and to specify the point in time at which disqualification is tested. Parliament would also have the power to amend that legislation to clarify any uncertainties about its operation that may arise or to alter the grounds of disqualification if community standards change over time.

By way of comparison, the grounds of disqualification in respect of each of the State Parliaments are able to be changed by ordinary legislation. There is no reason why the grounds of disqualification need to be set out in the *Constitution*.

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2 Why section 44 of the *Constitution* needs amendment

The Committee is aware that the precise scope of section 44 generally is not clear and that the operation of section 44(i) specifically is determined the law of foreign nations, which may change at any time and with retrospective effect and which may not be certain or easily ascertained.

Section 44 puts a question mark over all parliamentarians, including those parliamentarians who are themselves not disqualified by reason of section 44. This is because many parliamentarians hold their seats by reason of preference flows. If a sitting parliamentarian won his or her seat by reason of preference flows from a candidate who was disqualified by section 44, then it may be the case that the parliamentarian did not validity win their seat.

I am not aware of any challenge to preference flows on the basis of candidate disqualification having been considered by the courts. However, the possibility of such a challenge is real and has the potential to unseat parliamentarians who are not themselves disqualified. (It should be noted that a case to dispute an election must be commenced within 40 days of polling day: *Commonwealth Electoral Act 1918* s 355.)

3 Amending the reference power in the *Commonwealth Electoral Act 1918*

Section 376 of the *Commonwealth Electoral Act 1918* (Cth) is the mechanism by which the Senate and the House of Representatives can refer any question respecting the qualifications of one its members to the Court of the Disputed Returns for determination.

If the Committee is minded to introduce a hurdle or obstacle to the exercise of this power, I suggest amending section 376 so that it reads (new text in italics):

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.

A question respecting the qualifications of a Senator or of a Member of the House of Representatives may not be referred to the Court of Disputed Returns unless legal advice from an Australian lawyer indicating that there is a reasonable basis for thinking that a Senator or a Member of the House of Representatives may not be qualified is tabled in the Senate or the House of Representative as the case may be.

Such an amendment would have the effect of discouraging referrals motivated by political considerations.

4 Legislating to minimise the risk of ineligibility

In respect of section 44(i) (the dual citizen provision), 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.

There is also very little in the way of administrative assistance that could be provided to candidates. A person might inherit citizenship from their parents or grandparents or might gain it upon marriage (which would require an investigation into the citizenship of the spouse's parents

and grandparents). Given the large number of candidates for election at each general election, that works out to be an extraordinarily large number of countries whose citizenship laws would need to be investigated to determine the citizenship status of an extraordinarily large number of individuals. No Commonwealth agency has the function of undertaking such a task, and no Commonwealth agency could possibly undertake such an enormous task which would involve investigating not only current citizenship laws but changes to citizenship laws over long time spans.

I trust this submission is of assistance. Please let me know if I can be of further assistance.

Yours sincerely

Associate Professor Luke Beck