Dr Rayner Thwaites
Senior Lecturer in Public and Administrative Law

10 November 2021

Senator the Hon James McGrath
Chair
Parliamentary Joint Committee on Electoral Matters
By email: em@aph.gov.au

Submission re: *Candidate Qualification Checklist*

Dear Chair,

My thanks for the grant of an extension to submit to the above inquiry.

The legislative objectives of the qualification checklist

Section 170A of Electoral Act 1918, inserted in 2018 in response to the 'electoral crisis' of 2017,[1] states in part that:

> 170A(1) The objects of the qualification checklist are:
> (a) To ensure that electors are informed about the eligibility under the Constitution and this Act of candidates in elections.

Recommendation 1 of this Committee's *Report on the conduct of the 2019 federal election and matters related thereto* (December 2020),[2] to which the current inquiry responds, states in part:

> The Committee recommends that the Candidate Qualification Checklist be revised before the next election to make mandatory the provision of

[1] On the 2017 electoral crisis see Commonwealth Joint Standing Committee on Electoral Matters, *Excluded: The Impact of Section 44 on Australian Democracy* (Report, May 2018) ('Excluded'), and Tony Blackshield, 'Comment: The Unfortunate Section Forty-Four' (2018) 29(1) Public Law Review 3.
[2] Commonwealth Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto* (December 2020) ('Report on the 2019 Election').

Facu ty of Law
New Law Bu d ng F10
The Un vers ty of Sydney
NSW 2006 Austra a

E rayner.thwa tes@sydney.edu.au
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information about the date and country of birth for candidate, their parents and grandparents.

Recommendation 1 is at best an inadequate response to the above statutory object. At worst it is misleading when assessed against the legislative objectives quoted above, and indifferent to issues which were front and centre of this Committee's earlier report *Excluded: the impact of section 44 on Australian democracy* (May 2018).[3]

Recommendation 1 is misleading when assessed against the legislative objectives of the qualification checklist

Knowing the citizenship of a person's parents or grandparents does not ensure that electors, or the candidate, are informed about that person's eligibility under s 44(i). To meet that objective, detailed knowledge of the relevant foreign nationality law is required.

This evaluation is supported by the facts of past cases on s 44(i).

In determining his eligibility to sit, Senator Canavan, represented by four lawyers including a QC, initially focused on the citizenship of his father under Italian nationality law, on the assumption Italian citizenship by descent was patrilineal at the relevant time. On making inquiries of overseas experts in Italian nationality law, his legal team concluded that owing to the retrospective effect of a 1983 decision of the Italian constitutional court, his mother's Italian citizenship history was legally relevant to Senator Canavan's status. It was ultimately his mother's Italian citizenship history which was the subject of scrutiny in the High Court, sitting as the court of disputed returns.[4]

[3] Excluded.
[4] *Re Canavan* [2017] HCA 45; (2017) 263 CLR 284. For an account of the difficult of determining the legally salient facts in Senator Canavan's case see: Rayner Thwaites and Helen Irving, 'Allegiance, Foreign Citizenship and the Constitutional Right to Stand for Parliament' (2020) 48 Federal Law Review 299 ('Thwaites and Irving'), 312 – 313.

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More recently, Frydenberg MP, represented by two lawyers, including a QC, engaged Hungarian lawyers and historians in response to the petition, to determine the legal significance of the documentation relied upon by his mother and her family when they left Hungary in 1949.[5]

In both the Canavan and Frydenberg cases note above, a public record of their parents' citizenship does remarkably little to inform electors about their eligibility for Parliament. To get from that starting information to a determination of eligibility required: (i) considerable and expensive legal and historical resources, the former in both Australian constitutional law and the relevant foreign nationality law; and (ii) extended consideration and judgment by a court.

Recommendation 1 (viewed in the context of the full suite of recommendations) is indifferent to the issues raised in this Committee's 2018 report, Excluded.

Recommendation 1 is the only response offered by the report on the 2019 elections to the problems generated by the current interpretation and application of s 44(i) of the Constitution. If implemented, it will do little to 'ensure that electors are informed about the eligibility under the Constitution and this Act of candidates [or sitting members and Senators] in elections.', to use the terms of s170A. More is needed.

The issues raised in the case of Canavan and Frydenberg posed difficulties for a sitting member supported by an Australian legal team together with foreign legal and historical experts in the relevant foreign nationality law. These issues can be anticipated to discourage and effectively preclude many candidates from running. As recorded in this Committee's report in *Excluded*, a sizeable proportion of the Australian electorate is discouraged from making a valuable contribution to Australian public life as a candidate and (potential) parliamentarian.

This was rightly treated as a burning issue in *Excluded.* That report's key concerns: with equal opportunity to nominate and with the need for

[5] *Staindl v Frydenberg* [2020] FCAFC 41; (2020) 276 FCR 301.

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NSW 2006 Austra a

E rayner.thwa tes@sydney.edu.au
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representation of the broader Australian community, are, without explanation, absent from the report on the 2019 election, issued two and a half years later.

This committee's report on the 2019 election states that 'the Candidate checklist worked well in the 2019 election, with significantly fewer issues arising about the possible credentials of candidates. No MP or Senator has lost a seat in the current Parliament due to citizenship issues.'[6] This brief summary minimises the significance of those cases that did make the media.[7] It shows no evidence of investigating, or inquiring into, the wider potential issue of candidates passed over for preselection by reason of concerns about their potential foreign citizenship status. It is to be welcomed that no one has lost a seat. But in current circumstances, that provides limited assurance. The problems have not been addressed. The fact that no one has lost a seat is a tentative and fragile indication that a variant of the 2017 electoral crisis does not lie around the corner. In addition, it does not address the chilling effect of s 44 on parliamentary representation.

What can be done?

(a) The need for a constitutional referendum

The need for a referendum on s 44, prominent in this committee's recommendations in *Excluded*, remains. The report on the 2019 election does contains a recommendation for a referendum, on breaking the constitutional nexus between the size of the House of Representatives and the Senate (recommendation 24). Constitutional reform has not been ruled out of scope. But the urgency attending the need to reform s 44 appears to have died. No explanation is offered as to why. The issues highlighted in *Excluded* are no less urgent now than they were at the time of its publication. The damage to the

[6] Report on the 2019 Election, para 2.6.
[7] See for example https://www.smh.com.au/federal-election-2019/three-liberal-candidates-dumped-from-party-two-days-into-the-campaign-20190412-p51doj.html; and https://www.theguardian.com/australia-news/2019/may/04/liberal-candidate-mina-zakis-eligibility-to-sit-in-parliament-questioned.

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ability of all Australian citizens to participate in parliamentary politics is no less.

(b) The need for further steps to mitigate the effects of s 44 (with a focus on 44(i))

There are indications that the scope of disqualification has been interpreted cautiously and given a wide ambit, augmenting the chilling effect of s 44. Candidates may have withdrawn by reason of s44(i) issues when they did not need to. As a practical example, in the 2019 election Vaishali Ghosh voluntarily withdrew as Liberal Party candidate for the seat of Wills due to concerns that her Overseas Citizenship of India (OCI), might disqualify her under s 44(i).[8] It appears, prima facie, that this withdrawal was unnecessary. In *Re Canavan*, the High Court examined whether Senator Xenophon's status as a British Overseas Citizen (BOC) disqualified him pursuant to s 44(i). The High Court held that it did not. The High Court's ruling was premised on the fact that BOC status did not confer a right to enter and remain in the UK. BOC status was accordingly held not to be a true foreign citizenship, and accordingly was held not to disqualify Senator Xenophon under s 44(i).[9] This reasoning appears, prima facie, to extend to the OCI status that led Vaishali Ghosh to withdraw. As with BOC status, OCI status does not confer a right to enter and remain. OCI status is in effect a form of a visa. It is far from clear that, properly advised, there was any need for Ms Ghosh to withdraw her candidacy.

To properly inform candidates and electors on a candidate's eligibility under s 44(i), this Committee should commit to education, funding and resources to ensure that knowledge of parental or grandparental foreign citizenship can better be converted into knowledge of their eligibility under the Constitution. This would better ensure that the law is not read as broader in scope than it is, leading to the unnecessary withdrawal of candidates.

[8] https://www.bharattimes.com/2019/04/27/oci-concerns-for-a-liberal-party-candidate-of-indian-descent/

[9] Re Canavan. For a summary of the Court's reasoning as to why the status of British Overseas Citizen did not disqualify Senator Xenophon see Thwaites and Irving, 317.

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In addition, there is a need to consider new approaches to meeting the requirements of s44(i) that make compliance less onerous, on a principled basis. New administrative approaches may in turn inform the courts understanding of the provision's operation. The tight reporting deadlines for this inquiry limit development of this last suggestion.

If the Committee seeks further information, please do not hesitate to contact me.

Yours sincerely,

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Senior Lecturer in Public and Administrative Law

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