

Parliamentary terms and members' qualifications

Introduction

- 3.1 The second session of the roundtable discussed two key, though unrelated, topics:
- the duration of parliamentary terms; and
 - the qualifications for membership of Parliament.
- 3.2 Section 28 of the Constitution sets out the term of the House of Representatives and thus the election cycle. Discussions considered options for:
- fixed or non fixed terms; and
 - extending the length of term.
- 3.3 Section 34 of the Constitution sets out the qualifications for membership of Parliament, while section 44 sets out five disqualification provisions. Discussion focussed on two of the disqualification provisions:
- section 44 (i) – foreign allegiance; and
 - section 44 (iv) – holding an office of profit under the Crown.

The duration of parliamentary terms

3.4 The parliamentary cycle is driven by the term of the House of Representatives because the Government is formed from the majority party in that House.

3.5 Section 28 of the Constitution stipulates three year terms for the House of Representatives, but with the option of an early dissolution:

Every House of Representatives should continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

3.6 The term of the Senate is covered by section 7. It specifies that Senators serve for six years and that every three years there be an election for half of the Senate.

3.7 Professor Lavarch noted that at the time of Federation all the States except Western Australia had adopted three-year terms. It was not long, however, before debate began on the possibility of extending the Commonwealth's parliamentary term from the three years stipulated in the Constitution. In 1927 the first referendum on the issue was defeated.

3.8 Currently, all the States except Queensland have a four-year parliamentary term. Queensland, which has a unicameral Parliament, retains the three-year parliamentary term.¹

3.9 There are three options commonly discussed for changing the length of parliamentary terms at the Commonwealth level. These are:

- fixed three-year terms;
- fixed four-year terms; and
- non-fixed four-year terms.

3.10 At the roundtable the fourth option of a hybrid model consisting of a four year non-fixed term with a minimum of three years was also raised.²

3.11 Professor Behrendt suggested it was important to separate discussion of the length of the term of Parliament from whether it was fixed or

1 Professor Lavarch, *Transcript of Evidence*, pp. 18–19.

2 Professor Lavarch, *Transcript of Evidence*, p. 21.

not.³ She maintained there are separate issues to consider around each proposal.

Fixed or non-fixed parliamentary terms

- 3.12 Fixed terms, Professor Behrendt suggested, provide a greater degree of certainty for governments and the electorate. She suggested fixed terms would also impact on the ability of people to enrol in time for an election since the deadline would be known – before the 2007 election changes to the electoral laws had set the deadline at when the election was called.⁴
- 3.13 Fixed terms, whether of three or four years, would extend the life of the Parliament (this was true even for a fixed three-year parliamentary term because the current interval between elections averages two and a half years.) A longer and more certain parliamentary term in the House would enable more business to be transacted.⁵
- 3.14 A fixed three-year parliamentary term for the House of Representatives would continue the close alignment with the six-year fixed term for Senators. This would allow for simultaneous elections, removing the current delay between an election and the subsequent appointment of new Senators.⁶
- 3.15 On the other hand, fixed terms removed the advantage of incumbency because the Prime Minister would be unable to take advantage of circumstances in the political cycle and call an early election. Professor Saunders felt the ability to call an early election was an anachronism:

[T]he view that the head of government, whoever it may be, can pick and choose a time for an election to suit his or her political advantage seems to me to be really rather odd in this day and age. So I would go for fixed terms ...⁷

3 Professor Behrendt, *Transcript of Evidence*, p. 25.

4 Professor Behrendt, *Transcript of Evidence*, p. 25.

5 Professor Lavarch, *Transcript of Evidence*, p. 19.

6 Professor Saunders, *Transcript of Evidence*, p. 23.

7 Professor Saunders, *Transcript of Evidence*, p. 23.

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- 3.16 Professor Zines noted that several issues arose from the introduction of fixed parliamentary terms:
- If the Prime Minister lost the power to call an election at his/her discretion, is it sensible for the Opposition in the Senate to have the ability to force an election?
 - What would happen if the House of Representatives moved a motion of no-confidence?
 - Presumably the possibility of a double dissolution during a fixed term would need to be excluded.
- 3.17 Professor Zines also drew attention to the situation in the United States where ‘the Senate retains power to reject supply but has no reason for doing so to get rid of the government; they cannot get rid of the government because there are fixed terms.’ Eventually supply is provided but not for a week or two, during which public servants are not paid.
- 3.18 Some or all of these issues, Professor Zines suggested, could be addressed by building in exemptions into any fixed term requirement of an amended Constitution.⁸

Extending parliamentary terms to four years

- 3.19 Currently the three-year term of the House of Representatives is in broad harmony with the six-year terms of Senators (a half term Senate election occurs every three years). As noted earlier, however, there is a time lag because elected Senators take their position on 1 July after a general election.⁹
- 3.20 Extending the parliamentary cycle to four years would break the harmony with the Senate, but would enable more time for parliamentary business before the commencement of the election cycle.¹⁰ As one Committee member noted:
- [G]enerally, for the last six months or so there is often a fairly directionless government, very much affected by the day-to-day media stories... certainly a lot of the legislative program is cut short. As everyone knows, any bills remaining when an election is called generally go into the ether – some to return

8 Professor Zines, *Transcript of Evidence*, pp. 24–25.

9 Professor Saunders, *Transcript of Evidence*, p. 23.

10 Professor Lavarch, *Transcript of Evidence*, p. 19.

and some never to return – so a lot of good work of both the parliament and the executive is lost.¹¹

- 3.21 Another member of the Committee questioned whether extending the life of the Parliament guaranteed improved outcomes:

I do not think we have seen, at the state level, the extension of a four-year term, fixed or otherwise, improve policy or the quality of government.¹²

- 3.22 On the other hand, a fixed term would be an opportunity to harmonise the Commonwealth and the majority of State parliamentary cycles. Professor Williams considered alternating State and Federal elections was worthy of debate. The proposal would be for all of the States to hold an election on one day, with two years later there being a Federal election.¹³

- 3.23 However Commonwealth–State electoral alignment was not supported by Professor Saunders on the grounds that it would:

... preclude further experimentation in the timing of elections. One of the ways in which this debate about whether we should have fixed terms or partly fixed terms has come about is by the various states experimenting with their electoral cycles.¹⁴

- 3.24 Support was provided by Professor Craven who strongly opposed Commonwealth–State alignment, stating:

... it would be yet another thing downplaying the character of the states as genuine polities within the Australian Constitution. They would just become electoral cabooses tied to the engine of the Commonwealth.¹⁵

The term of the Senate

- 3.25 Extending the term of the House of Representatives without altering the term of the Senate would significantly increase the number of elections in the Commonwealth jurisdiction.¹⁶ The term of the Senate is an important issue, as Professor Craven noted:

11 Ms Neal MP, *Transcript of Evidence*, p. 26.

12 Mrs Mirabella MP, *Transcript of Evidence*, p. 21.

13 Professor Williams, *Transcript of Evidence*, p. 22.

14 Professor Saunders, *Transcript of Evidence*, p. 23.

15 Professor Craven, *Transcript of Evidence*, p. 24.

16 Professor Lavarch, *Transcript of Evidence*, p. 20.

[I]f you are into checks and balances in this country you are probably pretty fond of the Senate ... unless you can come up with some sensible answer to what you do with the Senate in a proposal like this ... you have got another massive problem.¹⁷

- 3.26 Participants identified several issues which would arise if the term for Senators was increased to eight years:
- Would Australians accept an eight-year term for Senators?¹⁸
 - Was it 'desirable for someone who slips through on some complicated flow of preferences but with a fairly small percentage of the vote' to become a Senator for eight years?¹⁹
 - How should party defectors in the Senate be treated? Should the loss of endorsement trigger a casual vacancy and consequent replacement by a member of the same party?²⁰
- 3.27 Lowering the Senate term to four years, on the other hand, may not receive popular support. Professor Lavarch noted that the referendum in 1988 proposing a four-year term for both Houses of Parliament resulted in the lowest support for a referendum since Federation.²¹

Committee comment

- 3.28 In relation to options and recommendations for changing the parliamentary term, the Committee notes the recommendations of the Joint Standing Committee on Electoral Matters in its report on the 2004 Federal Election. That report makes the following recommendations:
- ... that there be four-year terms for the House of Representatives
 - that the Government promote public discussion and advocacy for the introduction of four-year terms during the remainder of the current Federal Parliament
 - ...that in the course of such public discussion, consideration be given to the application of consequential changes to the length of the Senate term

17 Professor Craven, *Transcript of Evidence*, p. 24.

18 Professor Saunders, *Transcript of Evidence*, p. 23.

19 Professor Lavarch, *Transcript of Evidence*, p. 20.

20 Mr Melham MP, *Transcript of Evidence*, p. 21.

21 Professor Lavarch, *Transcript of Evidence*, p. 19.

- ... that proposals be put to the Australian public via a referendum at the time of the next Federal Election. If these proposals are successful, it is intended that they come into effect at the commencement of the parliamentary term following the subsequent Federal Election²²
- 3.29 Although there was dissent on some aspects of the Electoral Matters Committee report, there appeared to be bipartisan agreement for these recommendations.
- 3.30 The Australian Government response to the report indicated in principle support for these recommendations.²³ However, the response also stated that there was no intention on the part of the Government to take the issues to referenda at this stage.
- 3.31 During the roundtable discussions, the issue of possible changes to the electoral cycle was debated without coming to a consensus position. However there was general agreement from both participants and Committee members that a bipartisan position was critical.²⁴
- 3.32 The Committee notes Professor Williams' point that on the topic of extending the parliamentary term it would be very easy to mount an emotive 'no' case in any referendum:
- It is hard to think of a better example of something people would love to vote 'No' to than the idea that politicians, through their own self-interest, correct or otherwise, have drafted a proposal to give them an extra year in office. That is very easy to defeat.²⁵
- 3.33 Consequently, the Committee considers that the referendum would have to be preceded by extensive public engagement on the issue.
- 3.34 The debate regarding fixed four-year terms has been a persistent one. However the Committee is of the view that a changed climate renews the impetus for change at the federal level. The Committee considers

22 Recommendations 32 to 35, Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: The Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, Canberra, September 2005
<aph.gov.au/house/committee/em/elect04/report.htm> accessed 13 June 2008.

23 *Government Response to the Report of the Joint Standing Committee on Electoral Matters on the 2004 Federal Election*, August 2006
<aph.gov.au/house/committee/em/elect04/Report/govres.pdf> accessed 13 June 2008.

24 Professor Lavarch, *Transcript of Evidence*, p. 21.

25 Professor Williams, *Transcript of Evidence*, p. 21.

that the Australian public, having now experienced four-year terms in all States except Queensland, may be ready for the Commonwealth to 'catch-up' and introduce fixed four-year terms.

- 3.35 The Committee supports greater engagement in the debate around parliamentary terms. It suggests that this debate needs to be taken up in public fora, to avoid it being perceived as a purely parliamentary push for constitutional reform.
- 3.36 In addition, the Committee considers that the concerns raised regarding how any alteration to the parliamentary term might be emotively opposed adds weight to the need to examine the processes of referenda (as discussed in Chapter 2).

Qualifications of Members

- 3.37 Two sections of the Constitution determine eligibility to become a Member of Parliament. Section 34 sets out the qualifications of members but contains the phrase, 'until the Parliament otherwise provides'. This has allowed legislation to override the original provisions of section 34. Consequently, under the *Commonwealth Electoral Act 1918*, to be elected a person must:
- have reached the age of 18 years;
 - be an Australian citizen; and
 - be either an elector entitled to vote at a House of Representatives election or be a person qualified to become such an elector.
- 3.38 Section 44, which sets out grounds for disqualification, contains no qualifying phrase allowing Parliament to override the section by way of legislation. The section disqualifies a candidate if he or she:
- (i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power: or
 - (ii) Is attainted of treason, or 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: or
 - (iii) Is an undischarged bankrupt or insolvent: or

- (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
- (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons.

3.39 At the roundtable, discussion focussed on two aspects:

- section 44 (i) – foreign allegiance; and
- section 44 (iv) – holding an office of profit under the Crown.

The need to disavow foreign allegiance

3.40 Professor Lavarch noted that recent High Court decisions determined that adopting Australian citizenship was insufficient for holders of dual citizenship unless they had taken 'additional steps or reasonable steps' to disavow any allegiance to the foreign country.²⁶

3.41 Professor Williams suggested this provided a degree of uncertainty because it required knowledge of the citizenship laws of the candidate's country of origin:

It means that Australian lawyers have to give legal advice based on the law of an African country, of Israel or of any country around the world to determine the answer. People are left in enormous uncertainty because they may be entitled to citizenship under a foreign law, going back to their ancestry, which will disqualify them even though they have never taken any positive steps to actually enliven that citizenship, and that is a wholly unsatisfactory situation ...²⁷

3.42 This view was challenged by a member of the Committee:

We are actually asking them ... to make a choice. Whether we like it or not, there are different standards expected of the legislators in the federal parliament in whether they deal with potential, perceived or imagined conflicts of interest ... Everything has to be seen to be above board because it goes to

26 Professor Lavarch, *Transcript of Evidence*, p. 20.

27 Professor Williams, *Transcript of Evidence*, p. 28.

the very confidence that people have in their members of parliament.²⁸

3.43 Professor Rubenstein countered, arguing that a formal renunciation of citizenship might not affect the ‘continuing affection, association and sense of commitment’ to the country whose allegiance was being renounced. What was needed, she added, was a register which listed candidates’ and Members of Parliament’s other citizenships. This disclosure would provide transparency and Members could be held to account in their decision making processes.²⁹

3.44 Professor Rubenstein concluded that a more positive view should be taken of dual citizenship:

I do think that in a globalised world we can think much more positively about dual citizenship and not see it as undermining Australia... I always make the distinction of people who see citizenship like marriage or parenting: you can have more than one child and have a commitment to each of them without necessarily undermining the other.³⁰

3.45 On a different tack, Professor Saunders argued that the Constitution had been drafted at a time when there was no concept of Australian citizenship. Had there been, the founding fathers:

... would have created the status of Australian citizenship, given them the right to vote and given them a right to stand for Parliament – basic, democratic rights... I think it would be much more desirable to face the reality that we need a concept of citizenship in the Constitution and deal with it appropriately, and then I think you probably would leave these matters to legislation, and very properly so.³¹

3.46 The possible inclusion of a concept of citizenship in the Constitution was discussed further in a later session of the roundtable. That discussion is summarised in Chapter 6.

28 Mrs Mirabella MP, *Transcript of Evidence*, p. 28.

29 Professor Rubenstein, *Transcript of Evidence*, pp. 29–30.

30 Professor Rubenstein, *Transcript of Evidence*, p. 30.

31 Professor Saunders, *Transcript of Evidence*, p. 34.

The need to not hold an office of profit under the Crown

- 3.47 Section 44 (iv) provides a general disqualification for candidates who receive a benefit from the Crown. There is an exception, however, applying to:
- ... the office of any of the Queen's Ministers of State for the Commonwealth,³² or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.
- 3.48 The issue is clear for government employees who have to resign their positions before they nominate as an election candidate. As the High Court determination against Victorian candidate Phil Cleary in 1992 showed, being on leave without pay for some years was insufficient to prevent disqualification.³³
- 3.49 It was noted that there was uncertainty around the description of office for profit and whether employees of universities and other quasi-independent bodies were captured by section 44 (iv.)³⁴
- 3.50 Two possible constitutional amendments were suggested. The first option was changing the point at which the provision took effect, from requiring the candidate to resign before nomination to resignation after election but before taking a seat in Parliament.³⁵ Professor Williams agreed with this suggestion noting that the current provision cuts in too early.³⁶
- 3.51 The second option was introducing a provision similar to that in New South Wales whereby the Parliament was allowed to 'vote to excuse very minor problems in relation to "office of profit" to get rid of the really ridiculous aspects of it.'³⁷

32 The exemption does not cover Parliamentary Secretaries, who were consequently not remunerated until an amendment of the Ministers of State Act in 2000 provided for them to be sworn in as Ministers, but without that title. Harry Evans, ed., *Odgers' Australian Senate Practice*, 11th edn, Canberra, 2004, p. 128.

33 Professor Lavarch, *Transcript of Evidence*, p. 20. See also *Sykes v Cleary* (1992) 176 CLR 77.

34 Dr Twomey and Professor Williams, *Transcript of Evidence*, pp. 26-8.

35 Professor Saunders, *Transcript of Evidence*, p. 27

36 Professor Williams, *Transcript of Evidence*, p. 28.

37 Dr Twomey, *Transcript of Evidence*, p. 26.

- 3.52 Notwithstanding these options, the situation current in the Commonwealth jurisdiction for some 50 years is that public servants resign before nomination and have an automatic right of re-entry should they fail at the subsequent election.³⁸ Some participants cautioned, however, that the validity of Commonwealth legislation establishing this right may not survive a High Court challenge.³⁹
- 3.53 It was also noted that the provision was not effective in terms of determining an electoral outcome. Each time someone in the House of Representatives had won a seat and then faced disqualification under a provision of section 44, at the subsequent by-election he or she had again won the seat. In effect the provision did not solve the problem; it simply created further problems.

Committee comment

- 3.54 The Committee notes that a report on *Aspects of Section 44 of the Australian Constitution* was released in 1997 by the Standing Committee on Legal and Constitutional Affairs. The focus of this report was on sections (i) and (iv) and the following recommendations were made:

The Committee recommends that if the parliament proceeds with a referendum to amend subsections 44(i) and (iv) of the constitution, consideration should be given to the need for amendments to the other parts of section 44, especially subsection 44(v).

The Committee recommends that a referendum be held to make the following changes to the constitution:

- delete subsection 44(i)
- insert a new provision requiring candidates and members of parliament to be Australian citizens
- empower parliament to enact legislation determining the grounds for disqualification of members of parliament in relation to foreign allegiance.

The Committee recommends that subsection 44(iv) be deleted and new provisions be inserted in the constitution.

38 Mr Georgiou MP, *Transcript of Evidence*, p. 31.

39 Dr Twomey, *Transcript of Evidence*, p. 30.

One provision should require a person who holds a judicial office under the Crown in right of the Commonwealth or a state or a territory to resign from the office before he or she nominates for election to the federal parliament.

Under the second provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office nominated for election to the Senate or the House of Representatives.

Under the third provision certain other public offices, specified by the parliament, would be automatically declared vacant if the occupant of any such office were elected to the Senate or the House of Representatives.⁴⁰

- 3.55 The Government response indicated support in principle for the amendment or removal of subsections 44 (i) and (iv). However it suggested the Attorney-General should give the issues further consideration to develop a specific response.⁴¹
- 3.56 While discussions at the roundtable focussed on two of the disqualification subsections, the Committee agrees that significant problems exist with section 44. As Professor Blackshield concluded:

The whole of section 44 is a mess. The provisions that have proved to be judicially enforceable are not justified, and the ones that are justified have proved not to be judicially enforceable. Most of it is obsolete... I think it is possible to make a public case that these are outmoded, in some cases 18th century, political problems, and that whatever real problems there are about disqualification need to be thought through again.

... we should take the disqualification problems out of the Constitution altogether and whatever we do regard as sensible disqualifications should be regulated by act of

40 Recommendations 1 to 3, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: subsections 44 (i) and (iv)*, Canberra, August 1997, <aph.gov.au/house/committee/laca/Inquiryinsec44.htm> accessed 13 June 2008.

41 *Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Aspects of Section 44 of the Australian Constitution'*, December 1997 <aph.gov.au/house/committee/laca/governmentresponse/section44.pdf> accessed 13 June 2008.

parliament, precisely because they do become obsolete and need to be looked at again from time to time.⁴²

3.57 It is apparent that the uncertainty concerning section 44 is less than desirable. One Committee member suggested that the disqualification-for-office provision should:

... be something that people are able to pick up, read and understand. At the moment, we have a provision which not even constitutional lawyers – not even the eminent people in this room – can pick up, read, interpret and understand.⁴³

3.58 Professor Williams advocated raising the issues with the public:

I am very attracted to section 44 being the subject of popular debate... It throws up issues of citizenship and representation. It is exactly the sort of issue, I think, that is well suited to a public debate... We have so many good parliamentary committees that have established the problem. If we are serious about fixing it we should be asking people what they see as the appropriate qualities and disqualifications of their representatives in the Australian parliament, including as to issues of citizenship and the like.⁴⁴

3.59 The Committee is supportive of the need to situate this debate in public fora, as is suggested in relation to parliamentary terms.

3.60 The Committee considers that engaging the public over an extended period, perhaps by way of a constitutional convention and an education campaign to build a more participative democracy, is essential. It is the Committee's conclusion that such a strategy would enable a fruitful examination, and perhaps constitutional reform, of the disqualifications considered appropriate in the 21st century for members of parliaments.

42 Professor Blackshield, *Transcript of Evidence*, p. 27.

43 Mr Dreyfus QC MP, *Transcript of Evidence*, p. 32.

44 Professor Williams, *Transcript of Evidence*, p. 28.