

# Submission to the Inquiry into matters relating to section 44 of the Constitution

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Joint Standing Committee on Electoral Matters

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The NSW Young Lawyers Public Law and Government Committee welcomes the opportunity to make a submission to the Joint Standing Committee's (**the Committee**) inquiry into matters relating to section 44 of the Constitution.

This inquiry provides an opportunity to evaluate Australia's current constitutional framework, as well as consider alternatives to constitutional amendments to prevent candidates for election and members of Parliament from being disqualified under section 44 of the Constitution.

This submission considers the issues detailed in the Committee's Terms of Reference, and does so by dealing with the specifically constitutional considerations before turning to legislative and administrative arrangements that support the constitutional framework.

This submission reflects the views of the NSW Young Lawyers Public Law and Government Committee, and does not reflect the views of individual members of the Committee, or the wider membership of the Law Society or any Law Society Committees.

## **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Public Law and Government Committee (PLGC) comprises over 1,000 members who include a range of practicing lawyers from the public and private sectors, barristers and law students. The PLGC aims to educate members of the legal profession, and the wider community, about developments in public law and to provide a social environment for young lawyers to develop their skills. The PLGC's areas of interest include, but are not limited to, administrative and constitutional law and the work of government lawyers.

## **Summary of Recommendations**

In summary, NSW Young Lawyers makes the following recommendations:

1. That section 44 of the Constitution remain in its current form.
2. That each candidate in an election continue to bear the responsibility of investigating whether he or she infringes section 44(i).
3. That, in order to assist candidates to investigate and monitor their eligibility under section 44(i), the

following changes are made to the electoral nomination process, and parliamentary procedure:

- a. the AEC introduces a checklist of recommended steps to the electoral nomination process;
  - b. all candidates are required to provide a statutory declaration detailing that they are eligible to nominate to stand for election pursuant to any requirements under section 44;
  - c. Parliament imposes ongoing reporting requirements upon members of Parliament and senators;
  - d. Parliament establishes a parliamentary committee to receive referrals about the eligibility of individual members;
  - e. appropriate penalties, including the introduction of a civil penalty regime, are imposed on candidates that have not taken reasonable steps to ensure they are not disqualified under section 44.
4. That all States and Territories and the Commonwealth adopt statutory provisions in relevant public sector employment legislation guaranteeing members of Government sector agencies ongoing employment where the employee:
- a. resigns in writing from the government sector agency and the resignation takes effect before the employee nominates to contest a Commonwealth election, and
  - b. includes in the resignation notice of the person's intention to become a candidate at that election, and
  - c. becomes a candidate at that election, and
  - d. fails to be elected at that election, and
  - e. makes written application for re-employment in the government sector agency concerned within a set timeframe after the declaration of the result of that election.

## **Section 44 of the Constitution remains an effective determinant for parliamentary eligibility**

Section 44 enumerates grounds which preclude a candidate from being elected as a Member of Parliament, or which disqualify a Member of Parliament from ongoing membership.

Section 44 sets out the following grounds for disqualification:

*Any person who:*

- (i) *is under any acknowledgment 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 a 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;*

*shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.*

Section 44 sits within Part IV, Chapter 1 of the Constitution, which amongst other things, empowers the Parliament to make laws and rules with respect to the conduct of its members. However, section 44, quite deliberately, entrenches the resolution of issues concerning eligibility to hold public office within the Constitution itself, rather than leaving the matter to Parliament to determine. While each placitum within section 44 serves to exclude a discrete class of persons, these classes are drawn from United Kingdom law<sup>1</sup> and reflect the concerns of the framers of the Constitution, and their contemporaries, of what may threaten the integrity of the Parliament. Section 44 has operated, unchanged, since 1900, overseeing the eligibility of all Federal Parliaments since Federation.<sup>2</sup>

Section 44 requires any candidate to satisfy themselves that they do not form part of a prescribed class at the time of their nomination, as well as during their term of office.

The PLGC acknowledges that recent events – including the events culminating in the High Court of Australia's decision in *Re Canavan* [2017] HCA 45 – have caused concern amongst parliamentarians and the community about the impact of section 44 on the stability of Parliament, and therefore effective government.

The PLGC, however, considers that the current section 44 should remain unchanged. The limited disqualifying factors included in section 44 are an appropriate protection to ensure that Australia's parliamentarians continue to be fit and proper persons to discharge the duties that have been given to them

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<sup>1</sup> See, e.g., *House of Commons (Disqualification) Act 1782* (UK), which informed the drafting of section 44(iv).

<sup>2</sup> However, reform of section 44 has been considered previously, including the Senate Standing Committee on Constitutional and Legal Affairs 1981 inquiry *The Constitutional Qualifications of Members of Parliament*; the Constitutional Commission 1988 *Final report of the Constitutional Commission 1988*; and the House of Representatives Standing Committee on Legal and Constitutional Affairs 1997 report *Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)*.

by the Constitution and the people of Australia. Section 44 strikes an appropriate balance of disqualifying factors that should bar a person from eligibility to sit in Parliament, while continuing to allow Parliament to settle other issues of eligibility without undue constitutional limiting words.

The PLGC does not consider that the words of section 44 inappropriately limit the kinds of people that are eligible to stand for office. The Federal Parliament has continued to be made up of a range of talented and committed individuals who have been elected as members of Parliament from different backgrounds and with different skills. The words of section 44 do not restrict this from continuing to occur, and the PLGC recommends that there be no changes to the wording of section 44.

The PLGC considers each of the section 44 placita briefly below.

#### *Dual Citizenship*

Section 44(i) operates to prevent a candidate serving as a Member of Parliament while being a citizen of another country, irrespective of whether he or she has taken active steps to obtain the foreign citizenship or even knows about it.<sup>3</sup> Section 44(i) was drafted in the 1890s, during a period where not only was dual citizenship rare,<sup>4</sup> but Australian citizenship did not exist.<sup>5</sup>

Section 44(i) requires a person to relinquish their foreign citizenship prior to the date of nomination. In some cases, this may be a disincentive for the person to nominate, particularly if they have strong ties to the country.

Section 44(i) continues to ensure that all members of Parliament fully commit their allegiance to the Australian Commonwealth. While section 44(i) requires dual citizens considering candidacy for Parliament to forgo other rights and privileges arising from their foreign allegiance, something that may be potentially problematic for some dual citizens considering candidacy for Parliament, the PLGC does not consider this commitment not too onerous a burden to ask of citizens seeking to represent the Australian people.

#### *Treason and other offences*

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<sup>3</sup> *Re Canavan* [2017] HCA 45 (27 October 2017), [47]-[60].

<sup>4</sup> George Williams, *Now the High Court has ruled, there are just two ways forward* (27 October 2017) <<https://newsroom.unsw.edu.au/news/business-law/now-high-court-has-ruled-there-are-just-two-ways-forward>>.

<sup>5</sup> Australians were considered citizens of the British Empire, which also included New Zealand, Canada and India.

Section 44(ii) prevents citizens who have been convicted of the offence of treason, or other offences punishable by one year imprisonment from serving as a Member of Parliament.

PLGC notes that the range of offences which include a sentence of one year imprisonment has increased dramatically since 1900, and now includes a range of offences that the framers of the Constitution are unlikely to have considered, including recklessly allowing serious injury in a workplace (five years imprisonment),<sup>6</sup> unlawful interference with the Births, Deaths and Marriages Register (two years imprisonment),<sup>7</sup> or cheating in a casino (two years imprisonment).<sup>8</sup>

However, the PLGC considers that Parliament should retain the function of determining what misconduct appropriately disqualifies a person from nominating for election to Parliament.

#### *Bankruptcy*

The PLGC considers that preventing a person who is an undischarged bankrupt or insolvent is an appropriate protection to ensure that a member is not beholden to another person's interest and is able to act independently. This issue is discussed further with respect to office of profit under section 44(iv) below.

#### *Office of profit*

Section 44(iv) prevents a person from holding an office of profit under the Crown from holding office. The provision was drafted to replicate similar restrictions imposed on members of the United Kingdom House of Commons,<sup>9</sup> and the *Constitution of the United States*.<sup>10</sup>

This provision was originally intended to respond to concerns of the House of Commons that the Crown would seek to use its powers of patronage to pressure members of the House to act in a certain way, thereby reducing the independence of the House.<sup>11</sup>

Moreover, the PLGC notes that this provision ensures that a person who holds an office under the Crown is not forced to "split allegiances" between the two roles – preventing the obligations owed to one role conflicting with the other. For example, a public servant could not serve the role of an opposition Member of

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<sup>6</sup> *Work Health and Safety Act 2011* (NSW) s 31.

<sup>7</sup> *Births, Deaths and Marriages Registration Act 1995* (NSW) s 58.

<sup>8</sup> *Casino Control Act 1992* (NSW) s 87.

<sup>9</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1995 ed), 493.

<sup>10</sup> *United States Constitution*, art I, § vi, cl 2.

<sup>11</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv)* (1997), [3.2]

Parliament while also providing apolitical advice to a Minister of the Crown. This potential conflict also ensures that Ministers of the Crown are able to faithfully perform their duties under the doctrine of responsible government, which requires that Ministers are held to account for their actions, and the actions of the public servants that undertake actions on their behalf – a state of affairs that may be compromised if the public servant in question is also a Member of Parliament supposedly holding the Minister to account.

However a clear disadvantage of the strict reading of section 44(iv) is to prevent a range of candidates from running for public office while maintaining their source of livelihood if they are unsuccessful. For example, the effect of section 44(iv) is to prevent public school teachers, public hospital nurses, members of state police forces, and public servants of Departments of State from running for office. This disqualification impedes some two million Australians from running for office while retaining their employment.<sup>12</sup> This disqualification does not apply to persons serving similar functions in the private sector.

While PLGC considers that the existing constitutional prohibition should continue to prevent members of Parliament *holding* dual roles, it considers that legislative amendments should be enacted to remedy the loss of experience and skills in *candidates*. This is discussed further below.

#### *Pecuniary interest*

Section 44(v) operates in substance in a similar way to the *House of Commons (Disqualification) Act 1782* (UK) (**the 1782 Act**) which was passed to prevent the Crown exerting undue influence on the Parliament; the Act's preamble provides that the Act is intended for the further securing the freedom and independence of parliament<sup>13</sup>. This safeguarding disqualification was imported into Australian through colonial constitutions to ensure that the ongoing influence of the Crown was appropriately checked to ensure the independence of the Parliament.<sup>14</sup>

This protection, considered at length by English courts, was intended to prevent the Crown exercising influence over a man by allowing him to accrue a future benefit from dealing with the Executive.<sup>15</sup>

While there is a risk that this provision prevents members of Parliament from having the benefit of engaging in some forms of private enterprise during their term, such as ownership of offices let to the Commonwealth, the PLGC considers that this ongoing protection from the Executive exerting pressure of the independence of the Parliament by providing individual members of Parliament pecuniary benefits must be maintained.

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<sup>12</sup> *Ibid*, 58-59.

<sup>13</sup> See, *Re Day (No 2)* [2017] HCA 14, [18]-[19] (Kiefel CJ, Bell and Edelman JJ)

<sup>14</sup> *Constitution Act 1855* (NSW), s 28; *Constitution Act 1855* (Vic), s 25; *Constitution Act 1867* (Qld), s 6.

<sup>15</sup> *Re Day*, [20] (Kiefel CJ, Bell and Edelman JJ).

**Recommendation 1**

**That section 44 of the Constitution remain in its current form.**

## **Legislative and administrative changes could improve the operation of section 44(i)**

While the PLGC does not support amendment of section 44(i) itself, the PLGC considers that other forms of change are capable of:

- (i) Improving public confidence that individual candidates for Parliament are eligible to hold office; and
- (ii) Reducing the waste of resources associated with removing and replacing ineligible parliamentarians.

In the first instance, the PLGC supports the introduction of a more developed self-assessment model for all candidates. This approach, appropriately, puts the onus of satisfying section 44(i) on the individual candidate, who remains best placed to be responsible for assessing whether he or she has foreign citizenship.

The PLGC considers that the words of section 44(i) are clear,<sup>16</sup> which reduces the lenience any candidate should be afforded in relation to the requirements of section 44(i).

Secondly, the PLGC does not support the use of an external audit process to systematically examine the backgrounds of nominees or parliamentarians. The PLGC considers that these models would be wasteful, and possibly also ineffective. We consider that they are unlikely to enhance public confidence in Parliament. This is discussed further below.

The PLGC supports consideration of the following measures to make the self-assessment model as functional as possible:

**(i) Checklist in nomination process**

The Australian Electoral Commission (AEC) should provide a procedural checklist of requirements that each individual is advised to complete before nominating. The list could include inquiring about family history and contacting relevant embassies.

However, while the individual would provide this information to the AEC, the AEC would have no role in auditing or certifying the correctness of the individual's investigations.

Instead, the nomination form should include a statutory declaration, completed by the candidate, outlining the steps taken to satisfy the candidate that he or she is not a dual citizen. It remains appropriate that

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<sup>16</sup> See, e.g. *Sykes v Cleary* [1992] HCA 60 (25 November 1992); *Re Canavan* [2017] HCA 45 (27 October 2017).



candidates are responsible for compliance with section 44(i), and for non-compliance to be punishable either under section 46 of the Constitution (as affected in its operation by the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth)) or laws with respect to false statutory declarations.

The checklist should be made publicly available, along with any statutory declarations provided by the candidate. This would improve public confidence and reduce the opaqueness of the process of declarations by making it apparent that nominees are taking diligent steps to ensure their eligibility.

**(ii) Ongoing reporting requirements**

The PLGC supports using a standardised timetable for the investigation and declaration of citizenship concerns throughout the parliamentary term. The PLGC considers that clearly defined time requirements provide a level playing field for all members of Parliament, irrespective of party membership.

This continuing obligation could take the form of requiring all parliamentarians to make a short declaration about their citizenship (and any other requirements that may be relevant under section 44) every year while holding office, which would operate in a similar way to declarations of conflicts, property ownership and benefits received.

**(iii) Referrals to parliamentary committee**

The PLGC supports a more clearly defined process for referring individual members of Parliament for alleged breaches of section 44(i).

While the PLGC considers it appropriate that the burden for discharging responsibilities under the Constitution should remain with the candidate or member, it recognises that in some cases members may not adequately fulfil their obligations.

In this case, Parliament should provide for a clear process that will determine whether a person has breached an obligation under section 44(i) (or any requirement under section 44). The PLGC supports a process that, in the first instance, empowers the Parliament to consider whether a candidate is in breach of section 44.

This process will allow members the opportunity to be assessed by their peers, as well as providing an alternative to immediate reference to the High Court sitting as the Court of Disputed Returns.

This process should remain impartial, and should not be used as an opportunity for partisanship. The PLGC considers that this could be achieved by appointing a joint standing committee with equal membership for members of the Government and opposition, and between the two Houses of Parliament, with the position of chair held jointly by a member of the Government and a member of the opposition. This committee should also be staffed with an independent legal adviser, in a similar manner as the Senate Standing Committee for the Scrutiny of Bills.

If the matter is not satisfactorily resolved in Parliament, the member would be referred to the Court of Disputed Returns.

(iv) **Heightened consequences for making an incorrect declaration**

As noted above, the PLGC considers it appropriate that members who breach section 44, either intentionally, recklessly or without undertaking due diligence, should be not only disqualified but also sanctioned appropriately.

It is an offence to give information to a Commonwealth entity knowing that it is false or misleading (Division 137, *Criminal Code* (Cth)), which would capture any deliberately false declaration made by a candidate. Notably, if a statutory declaration was required as proposed above, an intentionally false statement in the statutory declaration would be an offence under the *Statutory Declarations Act 1969* (Cth), punishable by up to four years imprisonment. It appears that most cases to date have involved genuine mistakes. As such, we think this provision has only a small role to play in increasing compliance.

However, the PLGC considers that underutilisation of existing penalties and processes has impacted on the readiness of candidates to undertake these important steps. A re-invigorated approach to utilising existing powers, complemented by clear guidance to candidates, will provide an appropriate incentive for candidates to understand that compliance with section 44 remains their responsibility.

The PLGC also supports consideration of the imposition of a civil monetary penalty regime for making a declaration in the AEC nomination form which a reasonable person would have known to be false. This prohibition would capture a case where the candidate failed to make proper inquiries before nominating. This would supplement the emphasis on individual inquiry which is at the centre of the self-assessment model.

While this approach is an additional penalty to the person not serving as a Member of Parliament, the PLGC considers it appropriate that there are additional significant consequences to a person not undertaking reasonable steps to comply with section 44, noting the significant time and financial costs associated with disqualifying a member and then undertaking a new election. The PLGC also notes that it has become standing practice by under successive governments to not seek to recoup wages paid to members that have not been validly elected.

**Recommendation 2**

**That each candidate in an election continue to bear the responsibility of investigating whether he or she infringes section 44(i).**

### Recommendation 3

That, in order to assist candidates to investigate and monitor their eligibility under section 44(i), the following changes are made to the electoral nomination process, and parliamentary procedure:

- a. the AEC introduces a checklist of recommended steps to the electoral nomination process;
- b. all candidates are required to provide a statutory declaration detailing that they are eligible to nominate to stand for election pursuant to any requirements under section 44;
- c. Parliament imposes ongoing reporting requirements upon members of Parliament and senators;
- d. Parliament establishes a parliamentary committee to receive referrals about the eligibility of individual members;
- e. appropriate penalties, including the introduction of a civil penalty regime, are imposed on candidates that have not taken reasonable steps to ensure they are not disqualified under section 44.

## **An external audit model is unlikely to improve the operation of section 44(i)**

The PLGC does not support conferring an auditing role on an external body to monitor compliance with section 44(i) (other than the High Court sitting as the Court of Disputed Returns).<sup>17</sup> We consider that such a model would contain inefficiencies and would not, in any case, be any more effective than the self-assessment model we have advocated.

### **(i) Australian Electoral Commission assesses citizenship at nomination**

One model might be to confer the role of auditor or investigator upon the AEC. For example, the AEC could take a greater role in examining each nominee's background at the time of nomination. The PLGC notes that this model was raised during the Committee's Public Hearings.

The PLGC does not support this approach, as it considers that this would inappropriately give a function with significant constitutional complexity to a body that does not have the resources or expertise to undertake an assessment of constitutional eligibility.

Were such a model to be adopted, there is no guarantee that the candidate would provide all relevant information, or that the AEC would be able to identify relevant information that had not been provided. This has been seen in recent citizenship cases, where members of Parliament have often provided incomplete information on their citizenship status months after the results of the election, let alone the time that they nominated.

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<sup>17</sup> See, Division I of Pt XXII of the *Commonwealth Electoral Act 1918* (Cth)

The consequence of this is that it would risk the AEC providing advice, or making decisions, that could prevent a person from standing for office who would otherwise be eligible. The PLGC considers that it is more appropriate to rely on the candidate to self-identify their disqualification, and allow the Court of Disputed Returns to act as a final arbiter of whether a person is in fact disqualified after the election.

While this may risk circumstances where a person who is ineligible may win office, or impact the results of the election (for example by impacting on preferences) the PLGC considers that the AEC is not sufficiently equipped to provide this form of advice. The PLGC understands that this view is also held by the AEC,<sup>18</sup> and was the position adopted by the 1997 House of Representatives Standing Committee on Legal and Constitutional Affairs.

(ii) **External body monitors citizenship**

The PLGC does not support the establishment of an external body (for example, a commissioner within the Department of Foreign Affairs) to independently audit or monitor the citizenship of parliamentarians and candidates.

The PLGC considers that such a body would be unnecessary with appropriately enforced consequences under the self-identification process discussed above.

It would be difficult and unwieldy for the body to continually obtain information from parliamentarians in order to perform a function that is more appropriately carried out by members themselves.

## **Further action could be taken to improve the range of candidates eligible for election**

In addition to the proposed changes discussed above with respect to section 44(i), the PLGC considers that the development of a more comprehensive legislative scheme will improve the operation of section 44(iv) to increase the pool of candidates that stand for Commonwealth elections.

The PLGC supports consideration by all States and Territories and the Commonwealth of legislative changes that replicate a statutory regime similar to sections 71 and 72 of the *Government Sector Employment Act 2013* (NSW) (**the NSW Act**). Section 71 of the NSW Act provides that a member of a government sector agency is entitled to a leave of absence from their job from the time that they nominate until the day that the result of the election is declared,<sup>19</sup> with the person to resign from the agency if they are

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<sup>18</sup> See, Evidence to Joint Standing Committee on Electoral Matters, Commonwealth, Canberra, 8 December 2017, 1 (Mr Tom Rogers). Rogers also noted (at 8) that the AEC's process 'is not designed to protect people from a High Court challenge. The Australian electoral system is set up such that there are challenges to elections all the time'.

<sup>19</sup> *Government Sector Employment Act 2013* (NSW), s 71(1).

elected.<sup>20</sup> This has allowed a wide variety of candidates to stand for election to the Legislative Assembly and Council, including nurses, teachers, police officers and government lawyers.

Section 72 of the NSW Act provides that where the person seeks to nominate for a Commonwealth election, that person may resign before the nomination, but is able to be reappointed following the election if they have been successful. Specifically, the person is deemed to have not resigned *following* their re-appointment, which ensures that the requirements of section 44(iv) are fulfilled, while ensuring that the candidate is not disadvantaged professionally by having run.

The PLGC considers that this model should be adopted by all jurisdictions, including the Commonwealth, to ensure that candidates in the public sector interested in standing for office are not disenfranchised by the potential impediment of lost future employment.

#### **Recommendation 4**

**That all States and Territories and the Commonwealth adopt statutory provisions in relevant public sector employment legislation guaranteeing members of Government sector agencies ongoing employment where the employee:**

- a. resigns in writing from the government sector agency and the resignation takes effect before the employee nominates to contest a Commonwealth election, and**
- b. includes in the resignation notice of the person's intention to become a candidate at that election, and**
- c. becomes a candidate at that election, and**
- d. fails to be elected at that election, and**
- e. makes written application for re-employment in the government sector agency concerned within a set timeframe after the declaration of the result of that election.**

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<sup>20</sup> Ibid, s 71(2).

## Concluding Comments

NSW Young Lawyers thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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