Section 44 of the Constitution – What Have We Learnt and What Problems Do We Still Face?[1]

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In 2017, section 44 of the Commonwealth Constitution came to prominence in Australia. It renders persons 'incapable of being chosen or of sitting as a senator or a member of the House of Representatives'. It does so on grounds that include holding foreign citizenship, being convicted of an offence punishable by imprisonment for a year or longer, becoming bankrupt, holding an office of profit under the Crown or having a pecuniary interest in any agreement with the public service. If a sitting Member or Senator triggers any of these grounds of disqualification, then section 45 of the Constitution also vacates his or her seat.

At the time of writing, nine putative Senators had been held invalidly elected at the 2016 election, being Robert Day,[2] Rodney Culleton,[3] Scott Ludlam, Larissa Waters, Fiona Nash, Malcolm Roberts,[4] Stephen Parry, Jacqui Lambie[5] and Skye Kakoschke-Moore.[6] The possible disqualification of Senator Katy Gallagher was also referred to the Court of Disputed Returns for determination in 2018.

In the House of Representatives, the Deputy Prime Minister, Barnaby Joyce, was found to have been invalidly elected[7] and John Alexander resigned[8] as a consequence of holding dual citizenship. Both were returned to office in by-elections after renouncing their foreign citizenship. David Feeney also resigned after he found that he could not produce evidence that he had renounced his foreign citizenship,[9] averting the need for a full hearing before the Court of Disputed Returns.

In addition, the filling of the vacated Senate seats was delayed for a variety of reasons. The replacement of Fiona Nash was first delayed because the person next elected on a special count, Hollie Hughes, was also found to be disqualified.[10] There was then a further delay due to a dispute as to whether the person next elected in a special count should fill Nash's six year

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[1] This is the underlying paper for a Parliamentary Library Lecture, delivered at Parliament House, Canberra, on 30 November 2017, which has been updated to include further developments up to 13 February 2018.

[2] *Re Day [No 2]* [2017] HCA 14.

[3] Re Culleton [No 2] [2017] HCA 4.

[4] Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45 (hereafter 'Re Canavan').

[5] *Re Parry; Re Lambie; Re Kakoschke-Moore* [2017] HCATrans 254 (8 December 2017) (Nettle J).

[6] *Re Kakoschke-Moore* [2018] HCATrans 2 (24 January 2018) (Nettle J).

[7] *Re Canavan* [2017] HCA 45.

[8] Technically, one cannot resign from an office that one did not hold due to disqualification. But as the effect of the disqualification or resignation of a Member of the House of Representatives is the same—a by-election—there is no necessity for a court finding of disqualification if the Member resigns instead. The position is different in the Senate, as the resignation of a validly elected Senator would give rise to a casual vacancy under s 15 of the Constitution, whereas disqualification results in an incomplete election and a special recount. For this reason, a court finding of disqualification is necessary in relation to Senators.

[9] Katharine Murphy, 'Labor's David Feeney resigns, triggering byelection in Batman', *The Guardian,* 1 February 2018.

[10] *Re Nash [No 2]* [2017] HCA 5, [45].

term, or be relegated to the three year term,[11] as he was lower in the order of election.[12] This was resolved on 22 December 2017, with Jim Molan being declared as a duly elected Senator for the State of New South Wales, without any reference to whose place he filled or any implication as to the length of his term.[13] The issue was left on the basis that if anyone wished to challenge the capacity of the Senate to determine the length of Molan's term, that person could initiate future legal proceedings to do so.

The declaration of Lambie's replacement from Tasmania, Steve Martin, was also delayed by the question of whether or not he was incapable of being chosen because he held an office of profit under the Crown, being the office of Mayor of Devonport.[14] The High Court held unanimously that he was not disqualified on this ground[15] and he was declared elected on 9 February 2018. This in turn permitted the declaration of Parry's replacement, Richard Colbeck, which had been delayed due to mathematical uncertainties as to his election on the special Senate ballot recount if Martin had been declared disqualified.[16]

There was also a dispute about the replacement of Kakoschke-Moore in South Australia. The candidate who would replace her in a special recount, Timothy Storer, had left the Nick Xenophon Team and it was argued that his election would not reflect the choice of the voters.[17] It was also argued that now that Kakoschke-Moore had renounced her foreign citizenship, she should be counted in the special re-count and therefore fill the vacancy herself. The Court of Disputed Returns unanimously rejected those arguments, holding that Kakoschke-Moore could not fill her own vacancy and that Timothy Storer should not be excluded from the special count.[18]

In 2017 the High Court, sitting as the Court of Disputed Returns, handed down substantive judgments on three of the five different grounds for disqualification under s 44, being pecuniary interest in an agreement with the Public Service, conviction of an offence and being a citizen of a foreign power. A fourth ground, office of profit under the Crown, was briefly addressed when the High Court found that Hollie Hughes, who would have otherwise been chosen to fill the seat of Fiona Nash, was also incapable of being chosen because she acquired an office of profit under the Crown, being part-time membership of the Administrative Appeals Tribunal, after polling day but before the recount of the Senate vote.[19] As noted above, the High Court also held that Steve Martin's office as a mayor and local councillor did not amount to an office of profit under the Crown.[20]

[11] As the previous election had been a double dissolution, s 13 of the Constitution required that the Senate divide the number of senators chosen for each State into two classes, being those with six-year terms and those with three-year terms. No direction is given as to the criteria to be used. The Senate chose to do so on the basis of the order of election, with the first six elected in each State receiving six-year terms and the last six receiving three-year terms. This ordering was disrupted by the disqualifications and special recounts in a number of States. There was uncertainty as to whether the Senate could re-visit its allocation or whether its power to divide into classes was spent once exercised.

[12] *Re Nash* [2017] HCATrans 256 (11 December 2017) (Gageler J). The same concern was raised in relation to filling the seats of Parry and Lambie: *Re Parry; Re Lambie* [2017] HCA Trans 258 (13 December 2017) (Nettle J).

[13] *Re Nash* [2017] HCATrans 272 (22 December 2017) (Gageler J).

[14] *Re Lambie* (C27 of 2017) [2017] HCATrans 258 (13 December 2017) (Nettle J).

[15] *Re Lambie* [2018] HCATrans 7 (6 February 2018).

[16] *Re Parry; Re Lambie* [2018] HCA Trans 6 (6 February 2018) (Nettle J).

[17] *Re Parry; Re Lambie; Re Kakoschke-Moore* [2017] HCATrans 254 (8 December 2017) (Nettle J).

[18] *Re Kakoschke-Moore* [2018] HCA Trans 15 (13 February 2018). Reasons were to be given at a later date.

[19] *Re Nash [No 2]* [2017] HCA 52. The Court observed at [9] that there 'could be, and was, no dispute that the position Ms Hughes held during the period between 1 July and 27 October 2017 answered the description of an "office of profit under the Crown" within the meaning of s 44(vi) of the Constitution'. The issue in the case was, rather, one of timing.

[20] At the time of writing, reasons for this decision had not been handed down. Those reasons are likely to be based upon the fact that that the office is an elected one, not an appointment by the Crown, and the argument that the level of control over local councillors exercisable by the Crown, including with respect to their removal and remuneration, was insufficient to transform it into an office of profit under the Crown.

Disqualification on the ground of pecuniary interest in an agreement with the Public Service may also be further addressed in the common informer's action in *Alley v Gillespie*.[21] The only part of s 44 that is missing from recent judicial scrutiny is the bankruptcy ground, although this has been lurking in the background, with one replacement Senator being subject to allegations of disqualification on this ground.[22]

This article addresses what we have learnt so far from these cases and what we have yet to learn concerning the application of s 44 of the Constitution. It considers issues concerning the timing of disqualification, the High Court's approach to the interpretation of s 44 and lingering uncertainties concerning the identification and effect of dual citizenship, when an office of profit is 'under the Crown' and what type of arrangements are likely to amount to a pecuniary interest in an agreement with the Public Service. While more is known now about how s 44 will be interpreted than was known a year ago, there continue to be ambiguities and uncertainties that will have to be dealt with by the courts before a reasonably certain set of rules can be developed concerning its application. The s 44 game of musical seats has not yet stopped.

Timing

The most difficult issue remains timing. Section 44 of the Commonwealth Constitution says that anyone who breaches one of its five grounds of disqualification is 'incapable of being chosen or of sitting as a senator or a member of the House of Representatives'. What the Constitution does not explain is what is meant by 'chosen'. Tying the provision to the point of being 'chosen' was an innovation when the Constitution was enacted, at least in relation to foreign allegiance, as the precedents from Canada, New Zealand and the Australian colonies (now the States) focused upon acts done *after* a person had become a member of Parliament.[23] This may have been because any person who had acquired foreign citizenship *before* election was not qualified to be elected, as he or she would have lost the status of a subject of the Crown by virtue of acquiring the foreign citizenship. Hence, there was no need to apply the disqualification to the process of election itself.

In contrast, the British source of disqualification for holding an office of profit under the Crown, the *Succession to the Crown Act 1707* (UK)*,* provided that no person holding such an office 'shall be capable of being elected or of sitting or voting as a member of the House of Commons'. Presumably the drafters of the Commonwealth Constitution employed the 1707 terminology, but in relation to *all* grounds of disqualification, rather than just offices of profit under the Crown. They presumably also altered the word 'elected' to 'chosen' because the term needed to accommodate casual vacancies in the Senate which could be filled by the appointment of persons by the Governor of the State when the State Parliament was not in session.

Was a person chosen on nomination day, polling day, upon the declaration of the polls or at the return of the writs? British authorities in relation to disqualification for the holding of an office of profit under the Crown are not helpful, as uncertainty has reigned there as to the relevant date.[24]

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[21] *Alley v Gillespie* (Case S190/2017). Note that the case will first address issues concerning the powers of the Court under the *Common Informers (Parliamentary Disqualifications) Act* 1975 (Cth), which may mean that the substantive constitutional issue is not reached: *Alley v Gillespie* [2017] HCATrans 257 (12 December 2017).

[22] Adam Gartrell, 'One Nation's Fraser Anning avoids bankruptcy, cleared to replace Malcolm Roberts', *Sydney Morning Herald,* 3 October 2017; Rosie Lewis and Michael McKenna, 'Pauline Hanson's bitter struggle to retain One Nation Senate seat' *The Australian,* 22 January 2018.

[23] *Re Canavan* [2017] HCA 45, [28]-[29] and [35].

[24] See, eg, UK, *First Report from the Select Committee on Elections,* HC 71-I, 11 February 1946, where the Committee found that Mr Harrison, Mrs Corbett and Mr Awbery were all disqualified as they held offices of profit under the Crown at both the polling date and the date of the declaration of the poll, whereas Mr Jones was not disqualified as his resignation from his office of profit was effective before the polling date. Note the discussion at p 9 of the minutes of evidence concerning the relevance

The most logical answer is that a person is 'chosen' upon the return of the writs. This is because the inscription of a person's name on the writ and its return is the formal act which entitles a person to be sworn in as a Member of Parliament. While the people do the *choosing,* it is the return of the writ naming a person as officially elected that makes the person *chosen.* Such an interpretation would have allowed persons to stand for Parliament, even though they held a disqualifying disability,[25] such as an office of profit under the Crown but would allow them to divest themselves of that disqualifying disability after polling day, when it looked likely that they had won, but before the writ was returned. It has been argued against such an interpretation that this would mean that the people could not be confident that the candidate they elect could ever take up the office[26]—but as recent events have shown, that is already the case.[27]

In any event, the High Court has not taken this approach. In 1992 the High Court held in *Sykes v Cleary* that the relevant date for being 'chosen' was not a particular date, but the entire electoral process starting from the date of nomination.[28] The period in which a person is 'chosen' concludes at the time the election is completed,[29] which is normally indicated by the return of the writs for the election.[30] The High Court in *Re Canavan,* confirmed this interpretation, stating that it is settled authority that the 'temporal focus for the purposes of s 44(i) is upon the date of nomination as the date on and after which s 44(i) applies until the completion of the electoral process'.[31]

The fact that it is a period, not a date, and one that, according to the Court of Disputed Returns, may extend for a long time if the election is not properly completed, leads to problems. What happens if during this period a disqualifying event occurs and is then removed? For example, what if a person is convicted of an offence that would trigger s 44(ii), but that conviction is later quashed, still within the election period? Is it enough that the candidate has become disqualified at any time during this period, or does that not matter if the disqualification has been removed by the time the election period is completed and the process of being chosen is over?

The High Court nodded obliquely to this potential problem in *Re Culleton,* where four Justices pointed out that no question as to the temporal operation of s 44 arose in that case. Their Honours contended that this was because Rodney Culleton's conviction occurred before nomination and 'persisted during the whole of the period from the time of nomination to the return of the writs for the election'.[32] As the later annulment of his conviction was not regarded as having a retrospective effect,[33] he was clearly incapable of being chosen during that election period.

of the nomination date and how it is also the election date if there is only one candidate. See also the memorandum by the Attorney-General at Appendix 1, where he noted the difficulty of determining the date at which a member is 'elected'.

[25] Section 45 of the Commonwealth Constitution refers to the disqualifications listed in s 44 as 'disabilities'.

[26] *Sykes v Cleary* (1992) 176 CLR 77, 100 (Mason CJ, Toohey and McHugh JJ).

[27] As noted above, a significant number of persons declared elected at the 2016 double dissolution election were actually disqualified.

[28] *Sykes v Cleary* (1992) 176 CLR 77, 99-101 (Mason CJ, Toohey and McHugh JJ); 108 (Brennan J, agreeing); 130 (Dawson J agreeing) and 132 (Gaudron J, agreeing).

[29] See *Re Wood* (1988) 167 CLR 145, 168 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ), where their Honours stated that the disqualification of Senator Wood meant that his place had not been filled in the eye of the law but it 'can be filled by completing the election after a recount of the ballot papers'.

[30] *Re Culleton [No 2]* [2017] HCA 4, [13] (Kiefel, Bell, Gageler and Keane JJ).

[31] *Re Canavan* [2017] HCA 45, [3].

[32] *Re Culleton [No 2]* [2017] HCA 4, [13] (Kiefel, Bell, Gageler and Keane JJ).

[33] *Re Culleton [No 2]* [2017] HCA 4, [29] (Kiefel, Bell, Gageler and Keane JJ).

Ordinarily, the critical point for the timing of disqualification is the start, not the end, of the period. This is because s 44 continues in its application after the completion of the election period because it also renders elected persons incapable of 'sitting'. Section 45 also provides that if a senator or member 'becomes subject to any of the disabilities' mentioned in s 44 his or her 'place shall thereupon become vacant'. It is therefore generally unnecessary to define the point at which 'chosen' finishes and the elected person is then disqualified from 'sitting'. But what if the Court rules that the election was not completed because the candidate who was declared to have won the seat proves to have been disqualified and therefore incapable of being chosen? In such a case, a special recount is ordered by the Court of Disputed Returns so as to complete the election.

When this occurs, as it has a number of times recently, the process of choosing may extend for a much longer period. This means that there was, potentially, a temporal paradox in relation to Rodney Culleton. The fact of his disqualification meant that the period of the election was extended, meaning that the annulment of his conviction technically occurred within that election period. While it is doubtful that even Culleton would have argued that his disqualification had the effect of extending the election period, allowing his disqualification to be removed during that period, so that he was validly elected after all, this is one of the potential temporal paradoxes that arises from tying being 'chosen' to a period rather than a particular date.

Another, more practical example of the anomalies arising from this reliance on being chosen over a period of time, is the case of Hollie Hughes. The disqualification of Fiona Nash as a Senator would have led, in a recount, to the election of Hollie Hughes. However, in the belief that she had not been elected, Hughes had taken up an office of profit under the Crown, causing her own disqualification. Two issues arose.

The first was whether the fact that the disqualifying disability occurred *after* nomination and was removed *before* the end of the period of being chosen was enough to exculpate her from disqualification. In *Re Nash [No 2],* the Court of Disputed Returns did not accept that the occurrence and removal of a disqualifying disability during the election period was sufficient to negate disqualification. It held that Hughes was disqualified. The main dispute, however, concerned whether she was rendered 'incapable of being chosen' or whether she had been validly chosen at the time the election was held and was later disqualified by virtue of subsequently taking up her office of profit under the Crown. The critical difference was that if she had been validly chosen and later disqualified, this would give rise to a casual vacancy, which Hughes could then fill, having given up her office of profit under the Crown. If, however, she was incapable of being chosen, she would be excluded from the recount and the next candidate, Jim Molan, would be awarded the seat.

The Court held that Hughes was incapable of being chosen because her disqualifying disability occurred within the elongated election period. Their Honours concluded that the process of being chosen is not brought to an end until the election of a qualified, and not disqualified, candidate is declared, followed by the formality of the return of the writ.[34] Their Honours accepted the finding in *Vardon v O'Loghlin* that when an election is invalid, it is to be treated as if it had never been completed.[35] Hughes was therefore incapable of being elected because her disqualifying disability fell during the election period. The seat was to be filled by a further recount. The Court noted that it was a voluntary act on the part of Hughes to take up the office of profit and that by 'choosing to accept the appointment for the future, Ms Hughes forfeited the opportunity to benefit in the future from any special count of the ballot papers that

[34] *Re Nash [No 2]* [2017] HCA 5, [38]-[39] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[35] *Vardon v O'Loghlin* [(1907) 5 CLR 201, 208-9; *Re Nash [No 2]* [2017] HCA 5, [42]-[43].

might be directed as a result of such a vacancy [by reason of disqualification of a chosen candidate] being found'.[36]

A further temporal problem was raised, but not resolved, in Culleton's case. What happens if a disability is removed with retrospective effect so that in law it never happened? Culleton argued that the subsequent annulment of his conviction meant that it had never legally occurred and therefore he was not disqualified. The Court did not need to decide this issue because it could resolve the case on the narrower point that the legislation that gave effect to the annulment did not have retrospective effect, so that the initial conviction stood at the time of nomination and thereafter.

Justice Nettle, however, went further, addressing what the position would have been if the annulment had been given retrospective effect. He held that s 44(ii) was 'directed to a conviction in fact regardless of whether it is subsequently annulled.'[37] He considered that there was no room for 'contingent qualification' and that the Constitution required 'certainty that, at the date of nomination, a nominee is capable of being chosen'.[38] Nettle J concluded that an 'understanding of s 44(ii) as requiring order and certainty in the electoral process' accords with the system of representative and responsible government established by the Constitution.[39] Given the Court's recent concern in *Re Canavan* for certainty and stability, it is likely that the rest of the Court would follow this approach if the issue were to require determination in the future.

A final timing problem concerns the fact that while the initiation of the removal of a disqualification may be under the control of the candidate, its completion is usually not. It is dependent on the acts of others. What happens if a person has taken all reasonable steps to rid himself or herself of a disqualifying disability (eg renouncing foreign citizenship, resigning from an office of profit or selling shares in a corporation that holds an agreement with the Commonwealth Public Service) but it is not processed and given effect before nomination? A number of Labor members took action before nomination to renounce foreign citizenship, but it was not processed in the relevant country until sometime after nomination. This meant that at the time of nomination, they still held dual citizenship. Were they incapable of being chosen, even though they had done everything they could in advance of the nomination date, because they were still technically dual citizens at the time of nomination?

Again, we do not know for sure. In *Re Canavan,* the High Court seemed to wish to confine the notion of 'reasonable steps'. It said:

> Section 44(i) is cast in peremptory terms. Where the personal circumstances of a would-be candidate give rise to disqualification under s 44(i), the reasonableness of steps taken by way of inquiry to ascertain whether those circumstances exist is immaterial to the operation of s 44(i).[40]

The reasonable steps that must be taken are those required by the foreign law for renunciation of citizenship.[41] It is not enough to say one took reasonable steps to inform oneself of one's status regarding qualification or disqualification.

But what if the candidate has taken all the steps which he or she can take to renounce foreign citizenship under the foreign law, but is awaiting the response of the foreign country? Is it not

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[36] *Re Nash [No 2]* [2017] HCA 5, [45].

[37] *Re Culleton [No 2]* [2017] HCA 4, [57] (Nettle J).

[38] *Re Culleton [No 2]* [2017] HCA 4, [57] (Nettle J).

[39] *Re Culleton [No 2]* [2017] HCA 4, [59] (Nettle J).

[40] *Re Canavan* [2017] HCA 45, [61].

[41] *Re Canavan* [2017] HCA 45, [72].

a reasonable step if it is not taken early enough for the process to be completed in time? For example, is it unreasonable to take the steps two or three days before nomination? It has been suggested that one reason why candidates, despite sometimes having been pre-selected as long as a year before the election, have waited until as late as possible to renounce their dual citizenship before the nomination date is that they wanted to ensure it was not processed prior to the election, so that if they did not win, they could withdraw the renunciation and retain their foreign citizenship. Is this kind of equivocal renunciation sufficient to avoid disqualification?

In contrast, a person might have been pre-selected shortly before a by-election or early election was held and may have acted promptly and with due diligence to renounce his or her foreign citizenship but not had sufficient time for the renunciation to take effect prior to the nomination date. Should a prospective candidate be held hostage to disqualification by short time-frames or the amount of time that it may take for renunciation to be processed and recorded by the bureaucracy in a foreign country?

Despite the duelling opinions of David Bennett QC for the Commonwealth[42] and Peter Hanks QC for the Labor Party,[43] expressing adamant views on opposite sides, the issue was left unclear by the Court of Disputed Returns in *Re Canavan.* On the one hand, when the taking of 'reasonable steps' was recognised as the relevant test in *Re Canavan,* it was in the context of the constitutional imperative to avoid the irremediable exclusion of citizens from being capable of election to Parliament.[44] The Court in *Re Canavan* did not expressly recognise the application of a reasonable steps test in circumstances where the other country permitted renunciation by the taking of steps that could be reasonably performed and which did not involve risks to the person or property of the candidate.[45]

On the other hand, the High Court in *Re Canavan* upheld the authority of the majority judgment in *Sykes v Cleary* in circumstances where that Court appeared to accept that it was enough that a candidate take all reasonable steps to renounce his or her citizenship, where renunciation is permitted or is a matter of discretion by the appropriate Minister.[46] One could therefore argue that *Re Canavan* implicitly accepted that all that is needed is for a candidate to take all the reasonable steps that he or she can take before the nomination date, regardless of whether it is processed in time.

While a number of Members of Parliament appear to be affected by this issue, only one such case, that of Senator Katy Gallagher, has at the time of writing, been referred to the High Court. Senator Gallagher was chosen by the ACT Legislative Assembly to fill a casual vacancy in the Senate on 25 March 2015. At that time, she provided a statutory declaration to the ACT Legislative Assembly declaring that she was not a dual citizen.[47] It transpired, however, that she was a dual citizen at that time, holding United Kingdom citizenship by descent from her father, and that she did not take action to renounce that citizenship until April 2016, over a year later. While this delay may have been due to ignorance as to her status, the High Court did not accept in *Re Canavan* that ignorance was an excuse. Gallagher was therefore incapable of being chosen as a Senator in March 2015 and had sat invalidly in the Senate until the next election. Further, her renunciation did not take effect until 16 August 2016, which was after both the nomination date of 9 June 2016 and the polling date of 2 July

[42] David Bennett QC, 'Opinion – Re Justine Keay MP, Susan Lamb MP and Rebekha Sharkie MP' 10 November 2017.

[43] Peter Hanks QC, 'Opinion – Section 44(i) of the Constitution and Justine Keay, Susan Lamb and Rebekha Sharkie' 13 November 2017

[44] *Re Canavan* [2017] HCA 45, [13], [43]-[46], [72].

[45] *Re Canavan* [2017] HCA 45, [69].

[46] *Re Canavan* [2017] HCA 45, [64]-[65] and [68].

[47] See further: Australian Capital Territory, Legislative Assembly, *Hansard,* 28 November 2017, p 5099.

2016. The question then arises as to whether the fact that she had taken all steps within her control prior to the nomination date was sufficient.

Gallagher's case would potentially resolve the position of other vulnerable members, if the High Court were to decide either that it is enough for the candidate to take all steps within his or her control to renounce his or her foreign citizenship before the nomination date, or if it decided that renunciation had to be finalised before that date. However, it is also possible that even if the High Court applied a 'reasonable steps' test, it could find that Gallagher had not acted reasonably, as she had not taken action before her original appointment to the Senate or immediately thereafter, waiting more than a year before taking any action to renounce her foreign citizenship.

Until the issue is resolved, it would be prudent for any candidate for election to ensure all s 44 disabilities are removed and properly processed well before the nomination date.

Section 44 – Interpretative approach

In *Re Canavan,* the High Court, fulfilling its role as the Court of Disputed Returns, again applied a very strict approach in its constitutional interpretation. It chose to adhere closely to the ordinary and natural meaning of the language of the section.[48] The factor that seemed to influence the Court most was the need for stability and certainty.[49] This also influenced its approach in *Re Culleton,* as is particularly evident in the judgment of Nettle J,[50] and was an issue that was closely addressed in *Re Day,* particularly by Gageler J.[51] Where there are constructional choices in relation to the application of s 44, stability, certainty and the setting of a clear rule for the future will be given priority by the Court. As Gageler J said, Members of Parliament 'should know where they stand' and 'are entitled to expect tolerably clear and workable standards by which to gauge the constitutional propriety of their affairs'.[52]

In *Re Canavan,*[53] there was close adherence to the earlier authority of *Sykes v Cleary*[54] and little reliance was placed on the purpose of the provision.[55] In contrast, in *Re Day,* earlier authority was overturned and significant reliance was placed upon the identification of a broader purpose in doing so. So the influence of both purpose and authority will depend on the particular case and is unpredictable.

In all three cases – *Re Day, Re Culleton* and *Re Canavan* – the High Court took an approach that expanded, rather than narrowed, the potential circumstances in which s 44 applies. It gave little scope for excuses or exceptions. This suggests that legal advice in this area in the future should err on the side of prudence and caution. Apart from the judgment of Barwick CJ in *Re Webster,* all the successive cases on s 44 have involved strict and arguably harsh[56] interpretations of it. The High Court has regarded s 44 as an important provision to maintain the integrity of Parliament and has shown that it is prepared to enforce it, no matter how unpopular this makes it with politicians. What remains unknown is whether these assertions

[48] *Re Canavan* [2017] HCA 45, [19].

[49] *Re Canavan* [2017] HCA 45, [48], [54], and [57].

[50] *Re Culleton [No 2]* [2017] HCA 4, [57]-[59] (Nettle J).

[51] *Re Day [No 2]* [2017] HCA 14, [97] (Gageler J).

[52] *Re Day [No 2]* [2017] HCA 14, [97] (Gageler J).

[53] *Re Canavan* [2017] HCA 45, [23], [24], [39], [46], [53], [67].

[54] *Sykes v Cleary* (1992) 176 CLR 77.

[55] Historical material that was sought to be used to support a narrower purpose was rejected by the Court at [27]-[36] and the Court took a constrained and arguably artificial view at [24]-[26] of how the second limb of s 44 was intended to give effect to a purpose of preventing split allegiance.

[56] The Court in *Re Canavan* conceded that its interpretation of s 44(i) may be said to be 'harsh' but contended that diligence and serious reflection are required before nomination: *Re Canavan* [2017] HCA 45, [60]. See also: *Re Nash [No 2]* [2017] HCA 52, [45].

about the need to maintain the integrity of Parliament will develop into a more coherent underlying rationale for the interpretation of s 44 or provide a foundation for future constitutional implications.

Section 44(i)

In *Re Canavan,* the High Court approached s 44(i) as having two limbs.[57] The first limb, which deals with acknowledgement, adherence and obedience to a foreign power, was regarded as involving an 'exercise of the will of the person concerned'.[58] It required a voluntary act of allegiance on the part of the person concerned. The second limb, concerning being a subject or citizen of a foreign power or being entitled to the rights of such a citizen or subject, was regarded as involving questions of legal status or rights under the law of the foreign power. No act of will or even knowledge of the circumstances was required of the person who held such status or rights.[59] The Commonwealth's arguments about the need for knowledge or reasonable suspicion of foreign citizenship and the need for a reasonable time in which to renounce foreign citizenship once a person becomes aware of it, were swept away by the High Court as inconsistent with the application of the second limb of s 44(i).[60]

While the Court accepted that the purpose of s 44(i) was to ensure that members of Parliament do not have a 'split allegiance',[61] it saw this purpose as being achieved in different ways by the two limbs of s 44(i). While the first limb looked to that conduct of the person concerned, which would encompass knowledge of split allegiances, the second limb did not address conduct or a person's 'subjective feelings of allegiance'.[62] Instead, it was directed at the 'existence of a duty to a foreign power as an aspect of the status of citizenship',[63] regardless of whether or not the person knew of that status or was minded to act upon it.

Foreign Law

The Court confirmed that 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' because only a foreign law can be the source of that status of citizenship or the rights attached to it.[64] This has the unfortunate consequence that the application of a provision of the Australian Constitution is dependent upon the vagaries of foreign law—which might be changed without notice, or applied with retrospective effect, or be unclear in its application, as was the case in relation to the Italian law applicable to the citizenship status of Senator Canavan.[65]

Senator Canavan's survival is the great oddity of this case. The Court noted that Senator Canavan had been entered on the 'Register of Italians Resident Abroad' in 2006 which entitled him to vote in Italian elections and had been registered by the Municipality of Lozzo di Cadore on 18 January 2007.[66] Even though the Italian consulate described this as being registered as a citizen, the Court did not regard it this way.

The Court instead identified as the potential source of Senator Canavan's citizenship status, a decision of the Italian Constitutional Court in 1983. It had held that a law restricting the

[57] *Re Canavan* [2017] HCA 45, [21]-[23].
[58] *Re Canavan* [2017] HCA 45, [21].
[59] *Re Canavan* [2017] HCA 45, [21].
[60] *Re Canavan* [2017] HCA 45, [47]-[60] and [71].
[61] *Re Canavan* [2017] HCA 45, [24].
[62] *Re Canavan* [2017] HCA 45, [25].
[63] *Re Canavan* [2017] HCA 45, [26].
[64] *Re Canavan* [2017] HCA 45, [37].
[65] *Re Canavan* [2017] HCA 45, [74]-[87].
[66] *Re Canavan* [2017] HCA 45, [78].

inheritance of citizenship to the male line was invalid to the extent that it discriminated against female Italians. The effect of that decision was said to be retrospective, so that from 1948 children with a mother who was an Italian citizen were also Italian.[67] In this manner, Senator Canavan would have inherited Italian citizenship through his mother and grandmother, making him, with retrospective effect, an Italian at birth.

However, there was also evidence before the Court that Senator Canavan had not applied for a separate declaration of Italian citizenship.[68] There was uncertainty as to whether this positive act was required to activate what may otherwise have been 'potential' citizenship. A distinction was drawn in the evidence before the Court between registration as an Italian Resident Abroad for voting purposes, and the declaration of Italian citizenship. The Court concluded that on 'the evidence before it' it could not be satisfied that Senator Canavan was a citizen of Italy and it preferred an interpretation that positive steps were required as conditions precedent to citizenship, given the potential for Italian citizenship by descent to extend indefinitely.[69]

What it did not address was whether he satisfied the other part of the second limb of s 44(i) by being 'entitled to the rights or privileges of a subject or a citizen of a foreign power', as he was entitled to vote in Italian elections as a registered Italian resident abroad. Holding a right to vote, even without holding citizenship, should arguably trigger the application of the last part of s 44(i).[70] It is curious that this was not addressed by the Court. Perhaps the Court took the view that the right to vote was not, in this case, a privilege of citizenship or that Canavan was never validly registered to vote. The judgment is just not clear on this issue.

It is also curious that the Court did not seek to obtain further evidence and to hold a separate hearing to resolve the question of Canavan's status under s 44(i), as it had done in relation to Malcolm Roberts when there was contested evidence. While the Court was under time-pressure to deliver a speedy judgment, this ought not to have prevented it from obtaining the evidence necessary to resolve this aspect of the dispute. This part of the judgment raised the suspicion that an unsatisfactory compromise was reached to ensure the maintenance of a unanimous decision delivered in a short period of time. It does not make for a sustainable precedent.

What the judgment tells us about foreign law, however, is twofold. First, the fact that the law changed with retrospective effect was not regarded as a ground for excluding the application of s 44(i). Hence, Members of Parliament who currently are not dual citizens may need to be aware of whether they have the potential to acquire citizenship with retrospective effect. The most common circumstance in which this occurs is where citizenship through the maternal line has been previously denied and then later is corrected with retrospective effect due to the discriminatory nature of the law. Another circumstance is where past discriminatory laws, such as those revoking citizenship for Jewish people in European countries in the 1930s, are removed with retrospective effect.

The second is that while foreign law applies, it is the High Court that will interpret the foreign law and how it should be considered to apply to the Member in question. It was the High Court that concluded that a positive act of registration was required to activate Italian citizenship. While its finding may have been based upon expert evidence, it was the Court that took the policy view that it should adopt that particular interpretative choice, given the fact that

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[67] *Re Canavan* [2017] HCA 45, [81].

[68] *Re Canavan* [2017] HCA 45, [86].

[69] *Re Canavan* [2017] HCA 45, [86].

[70] Note, however, that s 44(i) refers to 'rights and privileges' in the plural, so there may be an argument that it must include, all or some, rather than one, of those rights and privileges.

citizenship could pass down for generations, which was described in the proceedings as an 'exorbitant' law.

The nature of citizenship

Despite these very limited exceptions to the strict application of s 44(i), there is another way by which its application may be avoided. This is when the nature of the citizenship held is such that it cannot be described as genuine citizenship. This was so in the case of Senator Nick Xenophon. His status as a 'British overseas citizen' was not regarded by the Court as sufficient to trigger the application of s 44(i) because it did not confer the main attributes of citizenship, such as the right of abode. This status did not allow Xenophon to enter or reside in the United Kingdom.[71] Nor did it impose a duty of loyalty to the United Kingdom, although there was still a duty of loyalty to the Queen.[72]

As the status of a British overseas citizen did not confer the rights or privileges normally attached to citizenship, such as the right of abode, and did not entail any reciprocal obligation of allegiance to the United Kingdom or to the Queen in right of the United Kingdom, the Court held that s 44(i) did not disqualify Senator Xenophon from being chosen.

Other aspects of s 44

While most of the recent controversy concerning s 44 has concerned dual citizenship, this is nowhere near its most difficult and potentially dangerous aspect. Far greater peril would appear to lurk in the uncertainties concerning offices of profit under the Crown in s 44(iv) and pecuniary interests in agreements with the public service in s 44(v).

Office of profit under the Crown – s 44(iv)

Phil Cleary's disqualification in 1992 for being a school teacher on leave without pay[73] shed some light on the ground of office of profit under the Crown. It confirmed that an office continued to be held, even when the officer was 'unattached' and on leave without pay. The office remained one of profit even though no profit was actually received, as long as a right to receive profit was attached to the office.[74] Thus the fact that Cleary was not being remunerated because he was on leave without pay was irrelevant.

Further, it did not matter that the office was under a separate Crown, the Crown of Victoria.[75] Even though the office was not within the gift or control of the Commonwealth executive, so that the rationale of preventing executive influence over parliamentarians could not apply, the Court recognised that there were other rationales for s 44(iv), such as the avoidance of incompatibility between offices, which might arise through conflicting duties or incompatible time commitments. Mason CJ, Toohey and McHugh JJ observed that there are three factors that give rise to incompatibility:

> First, performance by a public servant of his or her public service duties would impair his or her capacity to attend to the duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the Minister of his or her department and would not bring to bear as a member of the House a free and independent judgment. Thirdly,

[71] *Re Canavan* [2017] HCA 45, [132].

[72] *Re Canavan* [2017] HCA 45, [133].

[73] *Sykes v Cleary* (1992) 176 CLR 77.

[74] *Sykes v Cleary* (1992) 176 CLR 77, 97-8 (Mason CJ, Toohey and McHugh JJ) and 117-8 (Deane J).

[75] *Sykes v Cleary* (1992) 176 CLR 77, 98 (Mason CJ, Toohey and McHugh JJ) and 118 (Deane J).

> membership of the House would detract from the performance of the relevant public service duty.[76]

Their Honours concluded that the rationale for the disqualification of a State teacher from being a member in the Commonwealth Parliament was the incompatibility of office on the above three grounds. They added, in relation to State public servants, that the 'risk of a conflict between their obligations to their State and their duties as members of the House to which they belong is a further incident of the incompatibility of being, at the same time, a State public servant and a member of the Parliament'.[77]

Notwithstanding the explication of s 44(iv) in *Sykes v Cleary,* there is still a lot that is unknown about its operation. One particular question which has often been mooted, but not the subject of litigation until it arose in relation to the replacement of Jacqui Lambie, is whether the holding of an office as a local councillor amounts to an office of profit under the Crown. In earlier times, this issue did not arise as local councillors were unpaid. Today, however, even though it is often couched in terms of an 'allowance', local councillors receive a form of profit, being remuneration beyond the reimbursement of actual expenses.

As the office is now one 'of profit', the question is whether or not it is 'under the Crown'. One distinction from public servants is that local councillors are elected, rather than appointed by the Crown (although administrators may be appointed when a local council is dismissed from office). Is this distinction sufficient to exempt the office of local councillor from being an office of profit under the Crown, or could an executive power to remove councillors, instruct them or alter their remuneration, be sufficient to classify their offices as being 'under the Crown'?

This leads to the question of how the term 'under the Crown' is to be interpreted in light of the purposes of the provision? For example, if a Court were to regard the rationale for the provision to be prevention of members being influenced by executive appointments, then election to the office of local councillor would not be an office that is 'under the Crown' because it is not within the gift of the Crown. However, if, as in *Sykes v Cleary,* it is recognised that the purpose of the provision extends to preventing incompatible public offices from being held simultaneously, then there is a much stronger argument that the office of local councillor involves incompatible duties and obligations to that of a member of Parliament and that a broader approach should be taken to the term 'under the Crown', including incompatible public sector offices that are elective in nature.

It can only be hoped that some light will be shed on these issues when the High Court, as the Court of Disputed Returns, hands down its reasons for its unanimous decision[78] that Steve Martin did not hold an office of profit under the Crown for holding the office of local councillor and mayor in Tasmania.[79]

Another uncertain area is employment in a university. This is relevant to Andrew Bartlett, who replaced Larissa Waters, and who held a research position in a university at the time that he nominated as a candidate at the 2016 election. Such an office would be an office of profit. The question is whether it is 'under the Crown'. Public universities are established under statute and their employees are paid out of public sector funds. The question would be whether the relevant university was sufficiently independent from executive control that its officers would not be regarded as being 'under the Crown'. This may differ from State to State and in relation to different universities.

[76] *Sykes v Cleary* (1992) 176 CLR 77, 96 (Mason CJ, Toohey and McHugh JJ) (footnotes excluded).

[77] *Sykes v Cleary* (1992) 176 CLR 77, 98 (Mason CJ, Toohey and McHugh JJ).

[78] *Re Lambie* [2018] HCATrans 7 (6 February 2018).

[79] Note that the decision may be dependent upon the particular laws in Tasmania regarding executive control over local councillors and will not necessarily apply to local councillors in other States.

If one takes, as an example, the Australian National University,[80] it is established by statute as a body corporate[81] and is governed by a Council. Although a Commonwealth Minister has the power to appoint seven members of the 15 member Council, he or she acts upon the recommendation of the Nominations Committee of Council and is prohibited from appointing a current member of Parliament to the Council.[82] It is the University, not the Minister, which has the power to employ and dismiss staff.[83] The University is subject to the application of the *Public Governance, Performance and Accountability Act* 2013 (Cth) which imposes a degree of accountability to the government, but the Council is not required to 'do anything that will or might affect the academic independence or integrity of the University'.[84] On balance, employment at ANU is probably too remote from the Crown to amount to an office of profit under it and is less likely to give rise to a conflict of interest than an office as a local councillor. However, we cannot be completely sure of this until it is ruled upon by a court. The situation may also be different at other universities under different legislation.

Pecuniary interests in agreements with the Public Service – s 44(v)

The most difficult part of s 44 is disqualification for having a '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'.

The High Court in *Re Day [No 2]* extended the interpretative scope of this provision, both in relation to its purpose and its application. The Court rejected the narrow view of its purpose taken by Barwick CJ in *Re Webster,*[85] that it was confined to potential influence by the Commonwealth over members of Parliament.[86] Kiefel CJ, Bell and Edelman JJ observed that the object of s 44(v) is 'to ensure not only that the Public Service of the Commonwealth is not in a position to exercise undue influence over members of Parliament through the medium of agreements; but also that members of Parliament will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict'.[87]

Kiefel CJ, Bell and Edelman JJ observed that 'parliamentarians have a duty as a representative of others to act in the public interest' and that they have 'an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations.'[88] In a similar vein, Nettle and Gordon JJ said that the 'fundamental obligation of a member of Parliament is "*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community"'.[89]

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[80] Note, in contrast, that most universities are established by State legislation, although much of their funding comes from the Commonwealth. The Australian National University is an exception, being established by Commonwealth legislation.

[81] *Australian National University Act* 1991 (Cth), s 4. Note that the mere fact that the office is attached to a corporation is not necessarily enough to prevent it being an office of profit under the Crown. For example, in the United Kingdom the office of director of a corporation was found to be an office of profit under the Crown. It was a condition of the grant of a government loan to the corporation was that a minister could appoint two directors to the corporation while the loan was outstanding. When one of those directors became a member of Parliament he was found to be disqualified: UK, *Report from the Select Committee on Elections,* 12 July 1955, HC 35, p iii-iv.

[82] Australian National University Act 1991 (Cth), s 10.

[83] Australian National University Act 1991 (Cth), s 6.

[84] Australian National University Act 1991 (Cth), s 4A.

[85] *Re Webster* (1975) 132 CLR 270.

[86] *Re Day [No 2]* [2017] HCA 14, [51] (Kiefel CJ, Bell and Edelman JJ); [98] (Gageler J); [161] (Keane J); and [263]-[264] (Nettle and Gordon JJ).

[87] *Re Day [No 2]* [2017] HCA 14, [48] (Kiefel CJ, Bell and Edelman JJ).

[88] *Re Day [No 2]* [2017] HCA 14, [49] (Kiefel CJ, Bell and Edelman JJ). See also [183] (Keane J).

[89] *Re Day [No 2]* [2017] HCA 14, [269] (Nettle and Gordon JJ) [original emphasis].

This is the standard by which parliamentarians will be judged in relation to disqualification. Their Honours regarded s 44 as having a special status because it is 'protective of matters which are fundamental to the Constitution, namely representative and responsible government in a democracy'. This was considered more important than the effect of disqualification upon a particular Member.[90]

The Court also expanded the application of s 44(v) beyond legal interests. It looked to the 'practical effect' of the agreement upon a person's pecuniary interests.[91] 'Beneficiaries of a discretionary trust, which benefits from, or via its trustee is party to, an agreement' with the Public Service may be regarded as holding an indirect pecuniary interest in that agreement.[92] Hence, the common use of family trusts by Members of Parliament will not be sufficient to avoid the application of s 44(v).

However, agreements ordinarily made between the government and a citizen, such as paying for a passport, will not trigger s 44(v).[93] Kiefel, Bell and Edelman JJ observed that one must look to 'the personal financial circumstances of a parliamentarian and the possibility of a conflict of duty and interest' as this is the mischief towards which the provision is addressed.[94] Nettle and Gordon JJ described s 44(v) as applying only when by reason of the existence, performance or breach of the agreement with the Public Service, the person 'could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or that person could conceivably prefer their private interests over their public duty'.[95]

This leaves a lot of uncertainty about the application of s 44(v), as is evidenced by the case of *Alley v Gillespie.* The question there is whether the sub-lease of an Australia Post outlet in a shopping centre owned by the family company of a parliamentarian, David Gillespie, would be an agreement with the Public Service in which Dr Gillespie has an indirect pecuniary interest.

The first question is whether the sub-lease with Australia Post would amount to an agreement with the 'Public Service', or whether Australia Post, as a corporatised entity, would fall outside of the 'Public Service'.[96] In *Re Day,* both Gageler J and Keane J stressed that 'Public Service' does not mean the Executive Government or the Commonwealth as a polity.[97] On the other hand, Nettle and Gordon JJ did not regard it as necessary to give 'some narrow or limited operation to the notion of "the Public Service of the Commonwealth" that would exclude agreements specifically authorised by statute'.[98] Whether an agreement with Australia Post could trigger s 44(v) remains unclear.

The second issue is whether, assuming that the agreement was an ordinary standard contract which was entered into without any involvement or influence by Dr Gillespie, he could be regarded as having an indirect pecuniary interest in it. If no influence was involved in securing the contract, either by the Commonwealth seeking to influence Dr Gillespie or Dr Gillespie

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[90] *Re Day [No 2]* [2017] HCA 14, [72] (Kiefel CJ, Bell and Edelman JJ).

[91] *Re Day [No 2]* [2017] HCA 14, [54] (Kiefel CJ, Bell and Edelman JJ).

[92] *Re Day [No 2]* [2017] HCA 14, [62] (Kiefel CJ, Bell and Edelman JJ). See also Gageler J at [90] and [92]; Keane J at [190]-[192]; and Nettle and Gordon JJ at [253] and [287].

[93] *Re Day [No 2]* [2017] HCA 14, [69] (Kiefel CJ, Bell and Edelman JJ); [102] (Gageler J); [200] (Keane J).

[94] *Re Day [No 2]* [2017] HCA 14, [66] (Kiefel CJ, Bell and Edelman JJ).

[95] *Re Day [No 2]* [2017] HCA 14, [260] (Nettle and Gordon JJ).

[96] Note that in 1874, John Ramsay was disqualified from the House of Commons for holding 'four sixty-fourth shares in a steam vessel, the owners of which were under an agreement with the Postmaster General for the conveyance of Her Majesty's mails to and from the Island of Islay, in consideration of an annual allowance of £150.': UK, House of Commons Journals, 19 March 1874, Vol 129, p 12.

[97] *Re Day [No 2]* [2017] HCA 14, [105]-[106] (Gageler J) and [199] (Keane J).

[98] *Re Day [No 2]* [2017] HCA 14, [265] (Nettle and Gordon JJ).

seeking to use his position to influence the Commonwealth, then the risk of a breach of s 44 is diminished. Assuming, in the absence of the facts, that the contract between the tenant and Australia Post had nothing to do with Dr Gillespie or his status as a Member of Parliament and the contract was conducted on a normal commercial basis, this case is quite different from that of Senator Day, who actively lobbied the Commonwealth to enter into the contract regarding his electoral office.

Nonetheless, there remains the question of whether the performance of the contract could conceivably influence Dr Gillespie to prefer his private financial interest over his public duty. This will turn on the relevant facts of the situation and whether the rent that Dr Gillespie's family company received from its tenant in the shopping centre was dependent upon the performance of the contract between the tenant and Australia Post. The High Court's very strict interpretation of s 44(i) in *Re Canavan* may bode ill for Dr Gillespie to the extent that it indicates the Court is unwilling to take a flexible or pragmatic approach to the interpretation of s 44.

If Dr Gillespie is found to be disqualified as a result of the application of s 44(v), this could start a further wave of disqualifications, as the activities of family trusts and family companies are closely scrutinised for any agreements with government bodies, including corporatised entities, such as Australia Post.

Conclusion

There is a lot we still do not know about the intricacies of the application of s 44 of the Constitution. Nonetheless, nearly all of these problems can be avoided by candidates acting out of an abundance of caution to avoid all disqualifying disabilities well before they nominate for office. This may discourage some people from standing for office, particularly if they would not be contesting a safe seat and their chances of being elected are low. While a different approach to the meaning of 'chosen' by the High Court may have alleviated that problem to some extent by giving people the ability to take action to remove disqualifying disabilities after polling day but before the return of the writs, it now seems unlikely that the High Court will change course on that issue.

While the Commonwealth Parliament could legislate to prevent or restrict the circumstances in which disqualification cases may come before the courts and the Houses could refuse to refer matters of disqualification to the courts, this is not an adequate response to the current problem. Harbouring disqualified persons in Parliament, in breach of the Constitution, without any recourse to courts of law, would be an act that is likely to bring the Parliament and the Government into disrepute.

The only other option, apart from prudence, is a constitutional referendum to reform s 44. One approach would be to repeal s 44 and replace it with a power to legislate for disqualification, allowing for clearer rules and the passage of amendments to deal with anomalies where necessary. This would run the risk, however, of partisan legislation when one party controlled both Houses. It could potentially legislate in such a way as to disqualify persons who hold attributes connected with a political party, such as union membership. Another approach would be to retain constitutional disqualifications, but to permit legislation to provide exemptions from disqualification where appropriate, such as the exclusion of particular offices of profit from the application of s 44(iv). Such a legislative power, being limited to exemption from disqualification rather than permitting new grounds of disqualification, would be a less dangerous tool.

Alternatively, specific amendments could be made to clarify current uncertainties or difficulties in the interpretation of s 44. This could include an alteration as to the timing of being 'chosen'

and permitting the renunciation of foreign citizenship to be determined by Australian, not foreign, law.[99]

While a good case could be made for updating and clarifying aspects of s 44 of the Constitution, it remains doubtful that such a referendum would pass, particularly in the face of competing priorities for constitutional reform. It may well be that in the end, prudence and vigilance by candidates and parties is the best means of preventing a disqualification crisis from arising in the future.

[99] Note that the Joint Standing Committee on Electoral Matters, at the time of writing, was conducting an inquiry into possible legislative responses and constitutional reforms to s 44, which was scheduled to report in 2018.