

DUAL CITIZENSHIP AND AUSTRALIAN PARLIAMENTARY ELIGIBILITY: A TIME FOR REFLECTION OR REFERENDUM?

I INTRODUCTION

Recent events in Australia have laid bare a curious state of affairs in which, under the accepted interpretation of the *Australian Constitution*, foreign law is (in most cases) directly determinative of a given individual's eligibility to be elected and sit as a member of the Federal Parliament. Specifically, where the law of a foreign power dictates that an individual is a citizen of that foreign power, s 44(i) of the *Australian Constitution* is engaged to disqualify that individual from being elected or sitting as a member of the Federal Parliament. Lack of knowledge is no defence against this disqualification.¹ However, an individual will not be disqualified where they have taken all reasonable steps to renounce their foreign citizenship.²

Much debate has erupted in the wake of these events.³ Perhaps most notably, the Joint Standing Committee on Electoral Matters ('JSCEM') conducted an inquiry into s 44, and published a corresponding report titled 'Excluded: The Impact of Section 44 on Australian Democracy' ('JSCEM Report')⁴ — proposing radical, but necessary, constitutional reform.

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¹ *Re Canavan; Re Ludlam; Re Waters; Re Roberts (No 2); Re Joyce; Re Nash; Re Xenophon* (2017) 349 ALR 534, 539–40 [13]–[19], 546–49 [47]–[60], 551 [71] ('*Re Canavan*').

² *Ibid* 549–51 [61]–[69], 551 [72]; see also *Re Gallagher* (2018) 355 ALR 1.

³ See, eg, Matthew Stubbs and Adam Webster, 'Eligibility of Dual Citizens: The Coming-of-Age of Section 44' (2018) 40(1) *The Bulletin (Law Society of South Australia)* 6; H K Colebatch, *Enough is Enough on Section 44: It's Time for Reform* (10 September 2018) *The Conversation* <<https://theconversation.com/enough-is-enough-on-section-44-its-time-for-reform-102708>>.

⁴ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Excluded: The Impact of Section 44 on Australian Democracy* (2018).

II SECTION 44(I) OF THE AUSTRALIAN CONSTITUTION

Section 44 of the *Australian Constitution* provides several express restrictions on eligibility to sit as a member of the Federal Parliament — engaging to immediately and automatically disqualify⁵ any individual who breaches one of these restrictions. One such restriction is that of s 44(i), which provides that

[a]ny person who:

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;

...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.⁶

III THE HIGH COURT'S INTERPRETATION OF S 44(I)

Until recently, s 44(i) and the other s 44 disqualification provisions largely sat dormant over the post-Federation history of Australia.⁷ While there had been only fairly limited direct judicial consideration of the interpretation of s 44(i),⁸ the High Court of Australia notably held in *Sykes v Cleary*⁹ that an individual holding dual citizenship is ineligible for election to the Federal Parliament, save where they have taken all reasonable steps to renounce that citizenship. Despite this development, s 44(i) had, until recently, only very rarely been raised to question the eligibility of any candidate or parliamentarian. The last s 44(i) disqualification was contested in 1999 in *Sue v Hill*,¹⁰ in which Heather Hill, a One Nation Senate candidate, was held to be ineligible for election as a dual citizen of both the United Kingdom and Australia.

⁵ The practical reality of a federal parliamentarian being disqualified by s 44 may not be fully realised until the Court of Disputed Returns declares that individual to have been disqualified as at a given point in time. However, while it may remain unrecognised until a later date, a given person is disqualified both immediately and automatically by the operation of s 44 where they breach one of the restrictions therein.

⁶ *Australian Constitution* s 44(i).

⁷ For a comprehensive table of all matters before the High Court which have involved s 44(i) of the *Australian Constitution*, see generally Harry Hobbs, Sangeetha Pillai and George Williams, 'The Disqualification of Dual Citizens from Parliament: Three Problems and a Solution' (2018) 43 *Alternative Law Journal* 73, 77.

⁸ See generally *Crittenden v Anderson* (1950) 51 ALJ 171; *Nile v Wood* (1987) 167 CLR 133.

⁹ (1992) 176 CLR 77 ('*Sykes*').

¹⁰ (1999) 199 CLR 462.

That remained until 2017, when a considerable number of Commonwealth parliamentarians had their eligibility for election called into question under s 44(i), on the basis that they appeared to be dual citizens.¹¹ As a result, questions regarding the validity of the election of seven Commonwealth parliamentarians¹² were referred to the High Court.¹³

A Re Canavan (2017) 349 ALR 534

On 27 October 2017, the High Court, sitting as the Court of Disputed Returns, delivered judgment in the matter of these seven Commonwealth parliamentarians — *Re Canavan; Re Ludlam; Re Waters; Re Roberts (No 2); Re Joyce; Re Nash; Re Xenophon*.¹⁴ The Court unanimously held that five of the seven — specifically, Barnaby Joyce, Scott Ludlam, Fiona Nash, Larissa Waters and Malcolm Roberts — were disqualified from being elected or sitting in Parliament by s 44(i) as a result of their dual citizenship.¹⁵ Matt Canavan and Nick Xenophon were held to have not been disqualified by s 44(i).¹⁶

This is a remarkable case in many respects. It is a unanimous judgment of the High Court on a matter of constitutional interpretation, and immediately resulted in the simultaneous disqualification of an unprecedented number of Federal Parliament members (including the Deputy Prime Minister). In the wake of this judgment, many more members have resigned or been disqualified by the Court. Yet perhaps more importantly, *Re Canavan* has significant implications for representative government in Australia.

The judgment in *Re Canavan* is examined in significantly greater detail later in this volume by Kyriaco Nikias. For present purposes, it is sufficient to note that the Court's judgment in *Re Canavan* followed the majority's reasoning in *Sykes* and clarified the accepted interpretation of s 44(i). The Court in *Re Canavan* expressly rejected the approach of reading a mental element into s 44(i),¹⁷ which would have required that an individual must know of their foreign citizenship to be disqualified.¹⁸ It is now

¹¹ 'Fact File: The Dual Citizenship Crisis', *ABC News* (online), 6 December 2017 <<http://www.abc.net.au/news/2017-12-06/fact-file-the-dual-citizenship-scandal/9147418>>.

¹² The seven Commonwealth parliamentarians in question were: Matthew Canavan, Scott Ludlam, Larissa Waters, Malcolm Roberts, Barnaby Joyce (then the Deputy Prime Minister of Australia), Fiona Nash, and Nick Xenophon. Notably, Mr Ludlam and Ms Waters resigned immediately upon the issue of their foreign citizenship being raised (prior to any High Court determination).

¹³ See generally *Commonwealth Electoral Act 1918* (Cth) s 376.

¹⁴ (2017) 349 ALR 534.

¹⁵ *Ibid* 564–5 [141]–[145].

¹⁶ *Ibid* 564 [140], 565 [146].

¹⁷ *Ibid* 546–9 [47]–[60], 551 [70]–[71].

¹⁸ Notably, this rejected approach echoed the dissenting view of Deane J in *Sykes*, in which his Honour considered that s 44(i) should be read as incorporating a mental element such that it only applies 'where the relevant status, rights or privileges have

clear that s 44(i) will operate to disqualify citizens of a foreign power, *regardless of their knowledge of that citizenship*.¹⁹ Such individuals are only saved from disqualification where they have taken all reasonable steps to renounce that citizenship.²⁰

B *Re Gallagher* (2018) 355 ALR 1

In the wake of the 2017 judgment in *Re Canavan*, and the subsequent resignation of many more Commonwealth parliamentarians, questions regarding the validity of the election of Katy Gallagher were referred to the High Court.

On 9 May 2018, the High Court delivered judgment on these questions in *Re Gallagher*.²¹ The Court unanimously held that Ms Gallagher was, at the time of her election to the Senate, disqualified from being elected by s 44(i) due to her British citizenship.²²

The Court in *Re Gallagher* examined the reasonable steps exception to disqualification under s 44(i). The Court indicated that what constitutes reasonable steps to renounce foreign citizenship will necessarily depend on the requirements of the law of the foreign power,²³ and accepted the submission of the Commonwealth Attorney-General that

it is not enough for a candidate merely to have taken steps to renounce his or her foreign citizenship. Unless the relevant foreign law imposes an *irremediable impediment to an effective renunciation*, it is necessary that a candidate actually have divested himself or herself of his or her status as a foreign citizen before the commencement of the process of being chosen to which s 44(i) applies.²⁴

The Court's decisions in *Re Canavan* and later in *Re Gallagher* have made clear that this reasonable steps exception in fact has very limited scope, and defers primarily to the requirements of foreign citizenship law unless those requirements are untenably unreasonable.²⁵ In submissions to the JSCEM, Professor Tony Blackshield observed that

been sought, accepted, asserted or acquiesced in by the person concerned': *Sykes* (1992) 176 CLR 77, 127. The Court in *Re Canavan* expressly critiqued and rejected this dissenting view of Deane J: *Re Canavan* (2017) 349 ALR 534, 546–7 [49]–[53].

¹⁹ *Re Canavan* (2017) 349 ALR 534, 539–40 [13]–[19], 546–9 [47]–[60], 551 [71].

²⁰ *Ibid* 545–6 [44]–[46], 549–51 [61]–[69], 551 [72].

²¹ (2018) 355 ALR 1.

²² *Ibid* 11 [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 11 [41] (Gageler J), 18 [69] (Edelman J).

²³ See, eg, *ibid* 5 [9] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

²⁴ *Ibid* 7 [21] (emphasis added). See also *ibid* 7–10 [22]–[34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 11–12 [41]–[45] (Gageler J), 15–16 [58]–[60] (Edelman J).

²⁵ See generally Anne Twomey, 'Re Gallagher: Inconsistency, Imperatives and Irremediable Impediments' on Australian Public Law (28 May 2018) <<https://auspublaw.org/2018/05/re-gallagher-inconsistency-imperatives-and-irremediable-impediments/>>.

the Court will not defer absolutely to the foreign law; it will do so only if the operation of the foreign law is compatible with the reasonable expectations of our Constitution. So the point is not whether the actions of an individual member of Parliament have been *reasonable*, but whether the requirements of the foreign law are *unreasonable*. The old example was what would happen if a foreign country conferred its citizenship on *all* members of our federal Parliament, so as to clear it out entirely: we would simply take no notice. A newer example is what would happen if a foreign country required that renunciation of its citizenship must be carried out within its own territory: an Australian citizen might be entitled to ignore that requirement if travel to that territory was dangerous.

It's only in this sort of context that the question of 'reasonable steps' can arise. If the foreign country makes it impossible to renounce its citizenship, or imposes such onerous requirements or conditions that we find them unreasonable, then a person who has done *everything within their power* to effect a renunciation will be thought to have done enough. But 'everything within their power' may still be a much more onerous test than talk about 'reasonable steps' might suggest.²⁶

It is now clear that, with limited exceptions, a prospective federal parliamentarian must have fully and successfully renounced all foreign citizenships (under the laws of the respective foreign powers) prior to nomination, or else be immediately and automatically disqualified by s 44(i).

IV HOW DOES S 44(I) COMPARE INTERNATIONALLY?

By comparison to many similar democratic nations around the world, Australia's approach to dual citizens in the legislature is rather harsh. Whereas s 44(i) imposes a near total prohibition on dual citizens in the Federal Parliament, dual citizens are in fact quite welcome in the legislatures of many other common law countries. Amongst other countries, the United Kingdom, United States, Canada, and New Zealand do not prohibit dual citizens from election to their respective legislatures.

For example, a dual citizen of both Australia and the United Kingdom is free to be elected as a member of the Parliament of the United Kingdom,²⁷ yet is constitutionally barred from election to the Australian Federal Parliament. Indeed, many Australian dual citizens would find themselves in this situation — prohibited from taking on federal parliamentary duty in Australia, but legitimately able to do so in the country of their foreign citizenship.

²⁶ Tony Blackshield, Submission No 25 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into Matters Relating to Section 44 of the Constitution*, 4 (emphasis in original).

²⁷ See generally Latika Bourke, "Utterly Absurd": British MPs Question Australia's Ban on Dual Citizens' *Sydney Morning Herald* (online) 13 May 2018 <<https://www.smh.com.au/politics/federal/utterly-absurd-british-mps-question-australia-s-ban-on-dual-citizens-20180510-p4zed6.html>>.

Foreign elected representatives have sometimes chosen to renounce their other foreign citizenships, during or in advance of their time in office. For example, Ted Cruz, a Senator for Texas in the United States, renounced his Canadian citizenship in 2014.²⁸ However, Mr Cruz's decision to renounce his foreign citizenship, and similar decisions of others, merely reflect the personal ideology of individuals, and are not a result of express restrictions against dual citizens in their domestic legislatures.

Some countries do impose a degree of restriction on dual citizens in their legislature, but fall short of a total prohibition analogous to that in s 44(i). For example, in New Zealand, a member of the New Zealand Parliament loses their seat where they become a foreign citizen *after* being elected.²⁹ Nevertheless, dual citizens are still entitled to be elected to New Zealand Parliament.

In fact, this comparatively minor limitation on foreign citizens in the New Zealand Parliament has only been enlivened once — in 2003, when Harry Duynhoven, then a member of the New Zealand Parliament, took up Dutch citizenship by virtue of his Dutch-born father,³⁰ with the effect that his seat in Parliament became vacant.³¹ This event was largely not regarded with the same severity as have been comparable events in Australia,³² with some going as far as to consider it simply 'a gaff'.³³ Retrospective legislation³⁴ was subsequently passed which allowed Mr Duynhoven to keep his seat in Parliament³⁵ — a far more lenient approach to obtaining foreign citizenship than that seen in Australia.

²⁸ See, eg, Nolan Feeney, 'Ted Cruz Renounces Newly Discovered Canadian Citizenship', *Time* (online), 10 June 2014 <<http://time.com/2854513/ted-cruz-canadian-citizenship/>>.

²⁹ *Electoral Act 1993* (NZ) s 55(1)(c).

³⁰ See generally Privileges Committee, New Zealand Parliament, Question of Privilege Relating to the Application of Section 55(1)(c) of the Electoral Act 1993 to Hon Harry Duynhoven (2003) 3–5.

³¹ *Ibid* 8–10, 13.

³² The extent to which the people of New Zealand were unconcerned by Mr Duynhoven's foreign citizenship is perhaps best illustrated by the submissions made to the New Zealand Privileges Committee by Sir Geoffrey Palmer (constitutional lawyer and former New Zealand Prime Minister) on behalf of Mr Duynhoven. Sir Geoffrey attempted (albeit unsuccessfully) to invoke the principle of *de minimis non curat lex* — the law does not concern itself with trifling matters. Notably, the Privileges Committee declined to accept this submission on the basis that it was not open to the Speaker to disregard a statutory disqualification on the ground of it being 'of too trifling a nature to justify declaring a vacancy.' However, the Privileges Committee passed no express comment as to the extent to which a foreign citizenship based disqualification might be regarded as 'trifling': *ibid* 8, 10.

³³ Angharad O'Flynn, 'So, What's the Story with this Dual Citizenship?', *New Zealand Law Society* (online), 17 August 2017 <<https://www.lawsociety.org.nz/news-and-communications/latest-news/news/so,-whats-the-story-with-this-dual-citizenship>>.

³⁴ *Electoral Amendment Act 2004* (NZ) s 6, inserting *Electoral Act 1993* (NZ) s 55AA. See generally Privileges Committee, above n 30, 11–13.

³⁵ See, eg, O'Flynn, above n 33.

Very few democratic nations impose a restriction as severe as that in s 44(i) of the *Australian Constitution*. One of the only similar foreign examples is that of Israel, which prohibits dual citizens from being members of the Knesset (the unicameral legislature of Israel).³⁶ A dual citizen must renounce all foreign citizenships before they will be permitted to serve in the Knesset.

Even within Australia itself, this harsh approach to dual citizens is not applied to parliamentarians at the state and territory level. Nothing in the Australian state constitutions or statutory frameworks prohibit the election of dual citizens to the respective state level parliaments.³⁷ Whereas a citizen of Australia also holding foreign citizenship is constitutionally barred from election to the Federal Parliament, that same citizen is entirely free to take on parliamentary duty at the state and territory level with limited restriction.

Few democratic nations around the world treat dual citizenship with the level of concern, in respect of membership of the domestic legislature, as does Australia at the federal level. We should question then, is it necessary or desirable that Australia take such a severe approach to dual citizens' service in the legislature? Do dual citizens pose such a challenge in Australia that it is necessary to impose this unusual total restriction on their election to Federal Parliament (yet impose no restriction on their election to Australia's state and territory legislatures)?

V IS DISQUALIFYING DUAL CITIZENS DESIRABLE?

A *The Desirability of Disqualification Under s 44(i)*

In examining the desirability of the disqualification of dual citizens from parliamentary eligibility, it is important to note the central purpose behind s 44(i). In *Sykes*, the plurality remarked that the purpose of s 44(i) is to ensure 'that members of Parliament did not have a split allegiance and were not, as far as possible, subject to any improper influence from foreign governments.'³⁸ Certainly, there is merit in

³⁶ *Basic Law: The Knesset* (Israel) 1958, art 16A.

³⁷ However, similarly to New Zealand Parliament, a member of the Parliament of New South Wales, Queensland, South Australia, or Tasmania will lose their seat where they become a foreign citizen *after* being elected (or otherwise commit an act by which they acknowledge allegiance to a foreign power): *Constitution Act 1902* (NSW) s 13A(1)(b); *Parliament of Queensland Act 2001* (Qld) ss 72(1)(d), 72(2); *Constitution Act 1934* (SA) ss 17(1)(b)–(c), 31(1)(b)–(c); *Constitution Act 1934* (Tas) s 34(b)–(c). See generally Lorraine Finlay, 'Think the Dual Citizenship Saga Does Not Affect State Parliamentarians? It Might be Time to Think Again', (17 July 2018) *The Conversation* <<http://theconversation.com/think-the-dual-citizenship-saga-does-not-affect-state-parliamentarians-it-might-be-time-to-think-again-100020>>.

³⁸ *Sykes* (1992) 176 CLR 77, 107 (Mason CJ, Toohey and McHugh JJ), quoting Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *The Constitutional Qualifications of Members of Parliament* (1981) 10 [2.14]. Both Brennan and Deane JJ also remarked in *Sykes* on the purpose of s 44(i) in very similar

a constitutional guarantee to this effect — the elected representatives of Australia should not be torn between their duty to the people of Australia and allegiance to a foreign power.

On this point, giving evidence to the JSCEM, Simon Cowan, Research Fellow with the Centre for Independent Studies, remarked that

[f]or democracy to function as intended, the public must believe that politicians are acting in the public's best interest ... The appearance of a conflict of interest, even if it does not actually influence the behaviour of an individual, undermines that trust and confidence. The theme of s 44 is to disqualify persons in certain circumstances where conflicts of interest can be identified.³⁹

Yet it would seem an inherently odd proposition that the eligibility of an Australian citizen for parliamentary duty should be dependent on the law of a foreign power. In determining whether s 44(i) has disqualified a given individual, the law of foreign powers must be interpreted and applied to determine that person's foreign citizenship status.⁴⁰ The laws of foreign powers can therefore significantly limit which citizens of Australia are entitled to be elected and sit in the Federal Parliament.⁴¹

This is an issue exacerbated by such disqualification being possible without an individual having any knowledge of their foreign citizenship. It is difficult to contend that an Australian parliamentarian could be swayed from the proper discharge of their duties by allegiance to a foreign power, if they are themselves wholly unaware of that allegiance. Nor is it likely that the Australian people would lack confidence in such a parliamentarian's fidelity to Australia on the basis of their dual citizenship, if knowledge of their dual citizenship were not public.

The burden presently rests on any prospective federal parliamentarian to conduct all necessary enquiries of their citizenship status under the laws of any foreign power, and take all reasonable steps to renounce any foreign citizenships, prior to nominating for election. On this note, the Court in *Re Canavan* stated that

terms. Specifically, Brennan J noted that the purpose of s 44(i) 'is to ensure that no candidate, senator or member of the House of Representatives owes allegiance or obedience to a foreign power or adheres to a foreign power.' Justice Deane further considered that '[s]ection 44(i)'s whole purpose is to prevent persons with foreign loyalties or obligations from being members of the Australian Parliament': *Sykes* (1992) 176 CLR 77, 109 (Brennan J), 127 (Deane J).

³⁹ Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Sydney, 2 February 2018, 4 (Simon Cowan).

⁴⁰ See, eg, *Re Gallagher* (2018) 355 ALR 1, 5 [9] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

⁴¹ However, foreign law cannot *irremediably* prevent an Australian citizen from election to Australian Federal Parliament: *Re Canavan* (2017) 349 ALR 534, 551 [72]; *Re Gallagher* (2018) 355 ALR 1, 7–10 [22]–[34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 11–12 [41]–[45] (Gageler J), 15–16 [58]–[60] (Edelman J).

while it may be said that it is harsh to apply s 44(i) to disqualify a candidate born in Australia who has never had occasion to consider himself or herself as other than an Australian citizen and exclusively an Australian citizen, *nomination for election is manifestly an occasion for serious reflection on this question*; the nomination form for candidates for both the Senate and the House of Representatives requires candidates to declare that they are not rendered ineligible by s 44.⁴²

It could be said to be appropriate that the disqualification of dual citizens should operate in such a harsh manner. Certainly, one should expect a prospective parliamentary candidate to reflect very seriously on their suitability for a role as an elected representative of the Australian people — which must necessarily include turning their mind to the question of any potential allegiance to foreign powers.

Yet conducting enquiries to conclusively ascertain foreign citizenship status is not always a realistic expectation, particularly in circumstances where an individual lacks information about their parental background. The injustice of disqualifying Australians who are unknowingly dual citizens from service in the Federal Parliament, is perhaps best illustrated by an example set out in the JSCEM Report (said to be based on a real situation):

Liz has no records of her father's birth or childhood. Her father himself told various, contradictory stories about where he came from, including a suggestion that he changed his name as a teenager. Her father died over a decade ago and, despite searching, Liz has not been able to find any further records. She is having second thoughts about running for Parliament, knowing that she would be under constant threat of someone uncovering information about her father that might lead to her disqualification under s 44.⁴³

Furthermore, Australia is often regarded as an immigrant nation which is multicultural in nature.⁴⁴ Almost half of the Australian population were either born overseas or have at least one parent who was born overseas,⁴⁵ which can often be sufficient for citizenship under the laws of foreign powers.⁴⁶ Precise and definitive

⁴² *Re Canavan* (2017) 349 ALR 534, 549 [60] (emphasis added).

⁴³ Joint Standing Committee on Electoral Matters, above n 4, xxii.

⁴⁴ See, eg, Australian Government, *Multicultural Australia, Living Safe Together* <<https://www.livingsafetogether.gov.au/informationadvice/Pages/Multicultural-Australia.aspx>>.

⁴⁵ Australian Bureau of Statistics, 'Census Reveals a Fast Changing, Culturally Diverse Nation' (Media Release, 073/2017, 27 June 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3>>. Indeed, in *Sykes*, in the course of interpreting s 44(i), the High Court noted that both historically and at present, a high proportion of those who have adopted Australia as their home were born overseas: *Sykes* (1992) 176 CLR 77, 107 (Mason CJ, Toohey and McHugh JJ).

⁴⁶ For example, an individual who was born outside of the United Kingdom is a British citizen where their father or mother was, at the time of the individual's birth, a British citizen otherwise than by descent: *British Nationality Act 1981* (UK) c 61, s 2(1)(a).

statistics as to what proportion of the Australian population possess dual citizenship do not exist. However, currently available estimates indicate that the proportion is substantial — in the range of almost one half of the population, if not more.⁴⁷

That such a large (and unclear) proportion of the Australian people is disqualified from federal parliamentary service is itself cause for significant concern. But more than that, it is perhaps a disservice to both the Commonwealth of Australia and its multicultural history to disqualify so much of its population on the basis of foreign citizenship. The Federal Parliament can hardly be said to be a fair cross-section of the different people of Australia unless its membership includes dual citizens.

Indeed, reflecting on this topic extrajudicially, former Justice of the High Court, the Hon Michael Kirby, remarked that

[u]nless there is some other interpretive way to solve the problem then I think it should be changed, because Australia really has been successful as a multicultural society and that is challenged by this approach to disentitle a very large number of members of the Australian community being elected to the national parliament. That's not a good thing.⁴⁸

Preventing conflicts of interests of Australian parliamentarians, and the perception of such conflicts of interest, is a purpose of considerable importance to the integrity of the Australian democratic process. Nevertheless, to disqualify so large a proportion of the Australian people on the basis of the perceived conflict inherent in possessing foreign citizenship — many of whom have no knowledge of their foreign citizenship — is perhaps an overzealous pursuit of this purpose.

B *The Conclusions of the Joint Standing Committee on Electoral Matters*

In its report, the JSCEM stopped short of passing judgment on the question of whether, as a matter of principle, foreign citizens should be prohibited from election to the Federal Parliament.⁴⁹ As Senator Linda Reynolds, Chair of the JSCEM remarked, the appropriate qualifications and disqualifications for Australian parliamentarians are ‘for Australians to determine as part of a wider debate in what qualities we want in our candidates standing for election and for those who are elected to serve in Parliament’.⁵⁰

⁴⁷ See, eg, Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Nash, Re Xenophon* [2017] HCATrans 200 (11 October 2017) 4108–4117 (D M J Bennett QC).

⁴⁸ Latika Bourke, ‘Michael Kirby says Dual Citizens Should be Allowed in Parliament’, *Sydney Morning Herald* (online), 22 March 2018 <<https://www.smh.com.au/politics/federal/michael-kirby-says-dual-citizens-should-be-allowed-in-parliament-20180321-p4z5k4.html>>.

⁴⁹ Joint Standing Committee on Electoral Matters, above n 4, xxvi, 97 [5.13].

⁵⁰ *Ibid* x.

However, the JSCEM went on to observe that s 44 of the *Australian Constitution* — as it now stands under the High Court’s interpretation — leaves no scope for the Australian people to debate the appropriateness of existing parliamentary disqualifications.⁵¹ The disqualifications provided for by s 44 are strict and inflexible, and leave no scope for alteration in accordance with any possible changing expectations of the Australian people over time.

In particular, the JSCEM concluded — notwithstanding whether dual citizens should in principle be prohibited from election to the Federal Parliament — that the operation of s 44(i), in its current form, creates an untenable circumscription on Australian democracy.⁵² The JSCEM remarked that

[w]hat is clear is that the operation of s 44(i) allows the laws of other countries to create dual citizenships without the knowledge or consent of Australian citizens, or any active steps being taken by Australian citizens to accept that conferral of citizenship. Section 44 creates an ongoing cloud of uncertainty over those who have parents, grandparents or spouses born overseas. This cloud also covers those who do not have documentation about their family, including Indigenous Australians.

Because foreign citizenship laws can and do change, the evidence before the Committee suggests that only those with documented generations of wholly Australian forebears can be completely assured of their citizenship status for the duration of their parliamentary term. This creates two classes of Australian citizens for the purposes of engaging in representative democracy. The Committee considers that this is an unacceptable situation for Australian democracy.⁵³

VI THE WAY FORWARD

Provided that the accepted interpretation of s 44(i) remains valid,⁵⁴ there is only one way in which this restriction on dual citizens sitting in the Federal Parliament may be lifted or altered — a referendum under s 128 of the *Australian Constitution*. This

⁵¹ Ibid xxvi.

⁵² Ibid 97 [5.12]–[5.16].

⁵³ Ibid 97 [5.14]–[5.15].

⁵⁴ It is highly unlikely that the High Court’s interpretation of s 44(i) will be reversed (certainly at any point in the foreseeable future), particularly in light of its unanimous position. As Professor Helen Irving remarked in submission to the JSCEM: ‘the reality is that the Court has spoken — and spoken unanimously — and, although the Court sometimes (very rarely) overrules earlier judgments, it is highly unlikely to do so anytime soon on this matter’: Helen Irving, Submission No 33 to Joint Standing Committee on Electoral Matters, *Inquiry into Matters Relating to Section 44 of the Constitution*, 7 February 2018, 1.

requires a double majority, meaning a majority of the states of Australia in addition to the majority of the Australian population, to approve an amendment to s 44.⁵⁵

Indeed, the JSCEM concluded, with respect to addressing the untenable issues with s 44(i), ‘that there is no viable alternative other than amending the Constitution.’⁵⁶ Specifically, it concluded that a referendum should be held to either repeal s 44 altogether, or else to insert the words ‘[u]ntil the Parliament otherwise provides’ into s 44.⁵⁷ This phrase is utilised elsewhere in the *Australian Constitution* — such as in s 34, which provides for the qualifications required for members of the House of Representatives — allowing for these requisite qualifications to be altered over time following informed debate by the Australian people.

The JSCEM envisions that, following such a referendum, properly drafted legislation can ensure Australian federal parliamentarians’ allegiance to Australia — regardless of whether, after comprehensive public debate, it is determined that restrictions on foreign citizens are necessary for this purpose.⁵⁸ In the event that it is thought appropriate that some level of restriction on dual citizens should remain, this legislation can specifically account for any difficult or unusual situations, which presently fall within the scope of the blanket disqualification under s 44(i).⁵⁹

However, getting to this stage first requires a referendum, which have historically rarely been successful in Australia. Of the 44 Australian referenda which have been held, all but eight have failed.⁶⁰ History tends to indicate that a successful referendum being held on the issue of the parliamentary eligibility of dual citizens is unlikely, although not necessarily impossible. This is, after all, an issue which strikes at the heart of representative government in Australia, with s 44(i) potentially prohibiting approximately half of the Australian population from representing their fellows in the federal democratic process.⁶¹

It is worth noting that while s 44(i) has rarely been the subject of direct High Court consideration, by no means are the contemporary issues arising from its operation unanticipated. To the contrary, the potential dangers to Australian democracy posed by s 44(i) have been a matter of public debate since well before the more recent

⁵⁵ *Australian Constitution* s 128.

⁵⁶ Joint Standing Committee on Electoral Matters, above n 4, 98 [5.23].

⁵⁷ *Ibid* 98 [5.23], 102 [5.45]; see also *ibid* 84–9 [4.110]–[4.127].

⁵⁸ *Ibid* 97 [5.16].

⁵⁹ *Ibid*.

⁶⁰ Australian Electoral Commission, *Referendum Dates and Results* (24 October 2012) <https://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.

⁶¹ See, eg, Transcript of Proceedings, *Re Canavan, Re Ludlam, Re Waters, Re Roberts (No 2), Re Nash, Re Xenophon* [2017] HCATrans 200 (11 October 2017) 4108–4117 (D M J Bennett QC).

disqualifications. For example, in 1997, the House of Representatives Standing Committee on Legal and Constitutional Affairs concluded that, in respect of s 44(i)

the potential exists for challenges to the eligibility of a significant number of parliamentarians especially in view of the fact that a large number of Australian citizens possess dual citizenship. This represents a risk to the integrity and stability of the parliamentary system and to the government of the nation.⁶²

In fact, even as early as 16 years prior to this, in 1981, the Senate Standing Committee on Constitutional and Legal Affairs concluded that s 44(i) should be deleted from the *Australian Constitution*, contingent upon the implementation of formal safeguards,⁶³ remarking that

[i]t is highly desirable that Australian citizens with unsought dual nationality should be free to participate in the highest levels of political life in the Australian democratic system. To deny them this right of citizenship on the basis of a determination by a foreign system of law, which for every other purpose has no application in the municipal of Australia, would be most invidious.⁶⁴

Despite having only recently been thrust into the forefront of public consciousness, s 44(i) has long sat as a conspicuous and entirely unhidden ‘time bomb’. The corresponding fallout risks considerable damage to the integrity of the Australian democratic process. As the JSCEM cautioned,

[s]ection 44 has been the subject of many inquiries and much debate over the past 20 years. The problems identified in the report have been long foreseen but remain unaddressed. They are not going away. These issues have to be fixed some time. The Committee considers that time is now.⁶⁵

Any proposed referendum to the *Australian Constitution* is, by its very nature, a radical prospect requiring nothing less than the utmost mature and careful consideration. Yet the contemporary issues arising from s 44(i) are palpable, and perhaps even stifling, to the Australian democratic process. While s 44(i) is intended to ensure the fidelity of federal parliamentarians to their Australian democratic duties, in its current draconian form, it is itself a threat to that very same democratic integrity.

⁶² House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Aspects of Section 44 of the Constitution — Subsections 44(i) and (iv)* (1997) 37.

⁶³ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The Constitutional Qualifications of Members of Parliament* (1981) 11 [2.19].

⁶⁴ *Ibid* 11 [2.18].

⁶⁵ Joint Standing Committee on Electoral Matters, above n 4, 102 [5.43].

