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Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
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By email: section44@aph.gov.au

Dear Secretary

Re: Section 44 of the Australian Constitution

Thank you for the opportunity to make a submission to the Joint Standing Committee on Electoral Matters. We are writing this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law, at the Faculty of Law, University of New South Wales, and as Co-Lead and student intern to the UNSW Grand Challenge on Inequality. We are solely responsible for the views and content in this submission.

**SECTION 1: SUMMARY AND VIEWS ON THE
CURRENT INTERPRETATION OF SECTION 44**

Section 44 of the Australian Constitution serves the valid and important objectives of preventing conflicts of interest on the part of members of Parliament, and ensuring their loyalty, integrity and independence. In doing so it also preserves public confidence in

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Parliament, and the constitutionally prescribed system of representative and responsible government.¹

In 2017, the High Court ruled in relation to the qualification of nine Members of Parliament.² These most recent cases clarified its interpretative approach to the provision in respect of dual citizens (in the so-called “Citizenship 7 Case”);³ and also the provision that prevents a direct or indirect pecuniary interest in an agreement with the Public Service of the Commonwealth.⁴ Despite some important clarification provided by the Court, we believe that many aspects of the operation of s 44 remain uncertain, potentially over-inclusive, and discriminatory in their operation in such a way that points to the benefits of reform in this area. The provision is also, in our view, insufficiently tailored to, and therefore not sufficiently effective in, meeting its objective of promoting values of loyalty and integrity among members of Parliament.

Section 44(i): dual citizenship

With respect to s 44(i), the High Court, in a unanimous judgment in the Citizenship 7 Case, adopted the construction ‘which adheres most closely to the [section’s] ordinary and natural meaning’.⁵ Questions of foreign citizenship, the Court confirmed, were to be determined according to foreign law. A person would thus be deemed ineligible for the purposes of s 44 if they had become a citizen, and not validly renounced that citizenship, according to the requirements of foreign law. The only exception to this, the Court held following its prior decision in *Sykes v Cleary* (1992) 176 CLR 77, was if a person took ‘all reasonable steps’ to renounce their foreign citizenship, and foreign law did not recognise those steps as effective for this purpose.⁶ Neither a mental ingredient, such as actual allegiance, acquiescence or knowledge,⁷ nor a positive act to obtain or retain the rights and privileges of a foreign citizen, were adopted as requirements for disqualification under s 44(i).

This interpretation cuts a potentially wide swathe through parliamentary candidates. More than 28 per cent of Australians were born overseas,⁸ and a further 20 per cent have at least

¹ See Australian Electoral Commission, ‘Electoral Backgrounder: Parliamentary Report on Section 44 of the Constitution’ (8 April 2010) <http://www.aec.gov.au/About_AEC/Publications/backgrounders/s44-constitution.htm>.

² *Re Culleton [No 2]* [2017] HCA 4 (3 February 2017) (concerning s 44(ii)); *Re Day [No 2]* [2017] HCA 14 (5 April 2017) (concerning s 44(v)); *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (27 October 2017) (‘Citizenship 7 Case’, concerning s 44(i)). Judgment is reserved in the case of *Alley v Gillespie*, Case No S190/2017 (High Court of Australia), the first disqualification action brought under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) s 5 (and concerning s 44(v)). On 6 February 2018, the High Court, sitting as the Court of Disputed Returns, determined the eligibility of Steve Martin to replace Jackie Lambie.

³ *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (27 October 2017).

⁴ *Re Day [No 2]* [2017] HCA 14 (5 April 2017).

⁵ *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (27 October 2017) [19] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁶ *Ibid* [13]–[19].

⁷ Similar to the test proposed by Deane J in dissent in *Sykes v Cleary* (1992) 176 CLR 77 at 127.

⁸ Australian Bureau of Statistics, ‘Over 28 per cent of Australians Born Overseas’ (Media Release, 30 March 2017).

one parent who was born overseas.⁹ While it might be argued that dual nationals can simply renounce their foreign citizenship prior to standing for election, we do not believe this is a sufficient response. This requirement likely acts as a disincentive from running for federal office for a relatively high number of dual citizens. Not only does this reduce the pool of potential candidates, it also operates in a discriminatory manner, bearing down only on those Australian citizens with dual nationality. The provision operates in a further discriminatory manner, as, while most individuals will be able to relatively easily determine their citizenship status, because this relies upon foreign law it can often be far more complicated, and some individuals may have to commit significant time and money to determine this. This would operate in a discriminatory way, particularly against candidates from smaller parties and independents who might have to meet these time and financial commitments themselves.

Finally, it is our view that s 44(i) is not well-tailored to meet its objective. If the renouncement of citizenship is, often (although not always), a relatively easy process, those individuals who genuinely hold a dual allegiance and wish to undermine Australian democracy would be likely the *most* alive to the requirements of s 44(i), and a formal renouncement of citizenship seems unlikely to combat such intentions. Further, most attempts at foreign influence in Australia have been effected through other means entirely unconnected with dual citizenship, such as through political donations. Finally, most dual citizens are also entirely loyal to Australia: this is especially true for dual citizens who were not even aware at the time of nomination or service in Parliament of their foreign citizenship. However, the High Court, in the Citizenship 7 Case, declined to adopt the more ‘functionalist’, flexible approach to s 44(i) that would have restricted its operation to persons who are knowingly and voluntarily a dual citizen.¹⁰

Section 44(iv): office of profit under the Crown

The Court’s approach to s 44(iv) was also developed in the earlier case of *Sykes v Cleary*. In that case, Mason CJ, Toohey and McHugh JJ held, with Brennan, Dawson and Gaudron JJ agreeing, that ‘office of profit under the Crown’ applies to ‘at least those persons who are permanently employed by the government,’¹¹ including a Victorian school teacher who went on leave without pay before nominating for election.¹² While the High Court has recently clarified that this does not extend to local government officials, such as a mayor,¹³ the provision otherwise continues to have broad – indeed potentially over-broad – effect. In Section 3, we propose statutory reform to this requirement to draw a more realistic distinction

⁹ Australian Bureau of Statistics, ‘Cultural Diversity in Australia: Reflecting a Nation’s Stories from the 2011 Census’ (last updated 19 October 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>>.

¹⁰ See Rosalind Dixon, ‘The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term’ (2015) 43 *Federal Law Review* 455; Rosalind Dixon, ‘Why Barnaby Joyce Should Stay Put’, *Australian Financial Review* (online), 22 August 2017 <<http://www.afr.com/opinion/columnists/why-barnaby-joyce-should-stay-put-20170822-gy1dgv>>.

¹¹ *Sykes v Cleary* (1992) 176 CLR 77, 96.

¹² Ibid 97: ‘The taking of leave without pay by a person who holds an office of profit under the Crown does not alter the character of the office which he or she holds’ (Mason CJ, Toohey and McHugh JJ).

¹³ See further detail at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans//2018/7.html>

between levels of office-holder and to promote flexibility for public servants wishing to run for political office. Our proposal seeks to avoid unfair discrimination and promote equal opportunity for political participation.

Pursuant to the approach taken by the High Court in *Sykes v Cleary*, no distinction is drawn between higher-level office holders and lower-level government employees such as teachers or nurses in public hospitals. In our view, although it is appropriate that Australia places a high value on having an apolitical bureaucracy,¹⁴ this is only of real consequence at senior levels of the public service.¹⁵ There are little to no effective consequences if there is an appearance that a high school teacher has a ‘divided loyalty’ between their employer and their political affiliation. There is therefore little reason in principle why a teacher on leave without pay should be ineligible to run for office, as was the result in *Sykes v Cleary*.

The second problem with the provision as it currently operates is that the requirement for public employees to resign their position before contesting an election is a financial and personal disincentive which unfairly discriminates against those who lack independent wealth or who do not have the financial support of major parties. In this respect, Parliament has enacted a statutory ‘right of return for election candidates’ in the public service, in the event they lose.¹⁶ There are equivalent provisions in New South Wales, South Australia and Western Australia which apply to Commonwealth elections, but not in the other States.¹⁷ We acknowledge that these provisions provide some protection against the discriminatory and dis-incentivising effect we are concerned with, but believe it would be more appropriate either (a) to provide that resignation is never needed for a public servant to stand for election, as opposed to assume political office, and that all public servants should have a ‘right to return to work’ after a leave of absence; or (b) require the resignation only of high-level public office-holders, such as agency heads, judges, and senior police or defence officers before nominating for election. Acknowledging this difficulty, the Constitutional Commission in 1988 recommended that any person in such a position who became a Member of Parliament would simply ‘be deemed to have ceased to be so employed’ in their prior office, avoiding the dysfunctionality of disqualification and giving maximum effect to the electors’ right to choose their representatives.¹⁸

¹⁴ See, eg, *Public Service Act 1999* (Cth) s 10(5): ‘The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence’.

¹⁵ See Jeremy Gans, ‘The High Court Dismisses a Runner-Up Senator’ on Melbourne Law School, *Opinions on High: High Court Blog* (16 November 2017) <<http://blogs.unimelb.edu.au/opinionsonhigh/2017/11/16/news-the-high-court-dismisses-a-runner-up-senator/>>.

¹⁶ *Public Service Act 1999* (Cth) s 32.

¹⁷ *Government Sector Employment Act 2013* (NSW) s 72; *Public Sector Act 2009* (SA) s 66; *Public Sector Management Act 1994* (WA) s 103. In Victoria, public servants are not required to resign to contest state or local elections, however, there is no right of return for those who resign to contest a federal election: Victorian Public Sector Commission, *Guidance During Election Periods* (updated 28 November 2016) <<https://vpssc.vic.gov.au/html-resources/guidance-during-election-periods/>>. Similarly, in Queensland, public servants who resign and unsuccessfully contest a federal election are entitled to *seek* reappointment within three months of return of the writs, but the decision to reappoint them is discretionary: *Public Service Act 2008* (Qld) chapter 5, pt 2, div 2. Tasmania has a similar provision to Queensland: *Crown Servants Reinstatement Act 1970* (Tas) s 3.

¹⁸ *Final Report of the Constitutional Commission* (Australian Government Publishing, 1988) vol 1, 296.

Section 44(v): direct and indirect pecuniary interests with the Public Service of the Commonwealth

The purpose behind s 44(v), as the High Court has recently clarified in *Re Day (No 2)* [2017] HCA 14 (at [48]) 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.’ By this ruling, the Court overturned the earlier decision of *Re Webster* (1975) 132 CLR 270, in which Barwick CJ, sitting alone, had confined the operation of the provision to formal agreements between the executive government and parliamentarians, on the basis that the provision was directed to secure the independence of Parliament from the Crown.¹⁹ The Court adopted a wider view of s 44(v), holding that an ‘indirect pecuniary interest’ does not require that a person be a ‘party to an agreement’ provided they have an ‘interest in’ or ‘some personal connection’ to it.²⁰ While the decision in *Day* clarified, to some degree, the types of direct and indirect pecuniary interests that might engage s 44(v), there remains significant uncertainty. Indeed, the common informer action that has been brought against Mr David Gillespie is testament to the ongoing uncertainty as to the scope of the provision.

The current operation of s 44(v) is both over- and under-inclusive in achieving its objectives. It captures persons with relatively minor, indirect pecuniary relationships with the Commonwealth, which have no real capacity to influence their parliamentary behaviour. For example, and noting that the High Court is yet to hand down judgment in the case of *Alley v Gillespie*, in our view the relationship between Mr Gillespie and Australia Post, which rents retail space in a shopping centre he owns, is not one which should result in disqualification.²¹ Conversely, the focus on certain formal dealings under s 44(v) tends to underplay the significance of a broad range of more informal, indirect relationships, and do little to guard against many material conflicts of interest.

Legislative or constitutional reform?

These issues are currently extremely difficult to overcome by way of legislation, absent some change to the text of s 44 of the Constitution.²² In Sections 2-5, below, we thus propose removing s 44 of the Constitution, and the ancillary provisions in ss 45-46.²³ In their place, we suggest a reliance on a four-part approach:

¹⁹ (1975) 132 CLR 270 at 278; *Re Day [No 2]* [2017] HCA 14, [16], [36]–[52] (Kiefel CJ, Bell and Edelman JJ).

²⁰ *Re Day [No 2]* [2017] HCA 14, [66] (Kiefel CJ, Bell and Edelman JJ).

²¹ *Alley v Gillespie*, Case No S190/2017 (High Court of Australia)

²² See e.g. Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Sydney, 2 February 2018 (Helen Irving).

²³ Compare the reform proposals in Standing Committee on Legal and Constitutional Affairs, House of Representatives, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)* (1997).

- (i) introduction of a statutory mechanism for ensuring integrity of parliamentarians in the form of a federal integrity/anti-corruption commission;
- (ii) an expansion in the statutory grounds for disqualification under the *Commonwealth Electoral Act 1918* (Cth);
- (iii) a greater emphasis on and reliance on the loyalty requirements of s 42 of the Constitution; and
- (iv) an amendment to the process for determining qualification, particularly in periods more than 40 days after the return of the writs.

SECTION 2: FEDERAL INTEGRITY COMMISSION

Repeal s 44 (i), (iii), (iv) and (v), and replace with federal integrity commission

The intention of the disqualifications contained in many of the paragraphs of s 44, and particularly ss 44(i), (iii), (iv) and (v), is to reduce the probability that members of parliament will act in a corrupt manner, and particularly to reduce the possibility of a conflict of interest caused by holding another public office or a pecuniary interest.

In our submission there are other ways, proven to be more effective, to achieve this objective. **For this reason, we recommend that these sections are repealed and that the Federal Parliament move to establish a federal integrity/anti-corruption commission.** This is not the place to propose in any depth how such a commission might be structured and the precise jurisdiction and powers of such a commission; although we will note the significant work that has already been done in this area by parliamentary select committees and other experts.²⁴

The establishment of a federal integrity commission would have a number of advantages in dealing with conflicts of interest over the constitutionally entrenched disqualification mechanism, including:

- jurisdiction to receive complaints from any person so as to instigate an investigation into serious corruption, thus increasing the likelihood that such matters will be discovered and investigated;
- significant coercive powers – including to call witnesses and order the production of documents – to ensure possible issues are fully investigated;
- legislative jurisdiction to investigate a greater number of issues that might result in a conflict of interest, thus adding greater clarity around disqualification than the current position.

See also summary of prior reform proposals in Sarah O'Brien, 'Dual Citizenship, Foreign Allegiance and s 44(i) of the Australian Constitution' (Background Paper No 29, Parliamentary Research Service, 1992) 44–9; Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Sydney, 2 February 2018 (Rosalind Dixon).

²⁴ Senate Select Committee on a National Integrity Commission, Parliament of Australia, *Report* (2017); Senate Select Committee on the Establishment of a National Integrity Commission, Parliament of Australia, *Interim Report* (2016); Griffith University and Transparency International Australia, 'A Federal Anti-Corruption Agency for Australia?' (Discussion Paper No 1, 16–17 March 2017).

Upon the establishment of a federal integrity commission, we submit that two further reforms will be required, detailed in Section 3, below. The first is the enactment of a further provision under s 34 of the Constitution indicating which corruption offences that fall within the jurisdiction of a federal integrity commission would lead to disqualification if the individual was subsequently convicted of these offences. The second is the enactment of a new procedure that would bridge the intersection between the work of the new federal integrity commission and the new disqualification provision.

SECTION 3: EXPANDING QUALIFICATIONS PURSUANT TO S 34

We propose repealing s 44 in its entirety, and enacting a number of new disqualifications by way of ordinary legislation under s 34 of the Constitution, which allows for the Parliament to make laws affecting the qualifications of Members of Parliament.

Repealing s 44(i) and (ii), and replacing with statutory grounds of disqualification based on specific offences of disloyalty and serious criminal conduct

We propose that the constitutional prohibition against dual citizens nominating for election to the Australian Parliament (s 44(i)) be abolished, and be replaced by narrowly and specifically defined grounds for disqualification – based on specific and proven acts of disloyalty – under the *Commonwealth Electoral Act*. We note, although it is not the focus of this submission and is currently the subject of inquiry by another parliamentary committee, that this should be accompanied with reforms to the regulation of political donations by foreign donors.

We likewise suggest s 44(ii) be repealed and replaced by provisions under the *Electoral Act* that target serious criminal conduct as the basis for ineligibility for federal elected office. Section 44(ii) serves two distinct purposes. The first is to safeguard against injurious disloyalty to Australia by rendering ineligible those ‘attainted of treason’ from serving as Members of Parliament. The second is to preserve the reputability of Parliament by rendering ineligible those sentenced or subject to be sentenced for an offence that the drafters considered demonstrated the appropriate level of serious misconduct, those punishable by one year imprisonment or more. Again, we believe that these objectives are also best served by linking disqualification to serious and proven forms of criminal misconduct.

While we accept the desirability of both of the objectives underpinning ss 44(i) and (ii), at the same time, both community attitudes and principles of proportionate punishment do not seem to support disqualifying persons from office for relatively minor criminal offences.²⁵ The High Court has recognised this in the context of access to the franchise, and disqualifications on voting, with prisoners now being allowed to vote provided they are not serving a sentence

²⁵ Compare *e.g.*, KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 342 (2001); Rosalind Dixon, *Constitutional Dialogue and Deference in CONSTITUTIONAL DIALOGUE: DEMOCRACY, RIGHTS, INSTITUTIONS* (Gregoire Webber, Geoff Sigalet and Rosalind Dixon eds., Cambridge University Press, Forthcoming 2018).

of three years imprisonment or longer.²⁶ The same principles also ought to apply, in our view, to the eligibility of individuals to stand for office.

We therefore recommend that, in addition to the requirements for qualification currently set out in s 163, the *Electoral Act* should specify as grounds for disqualification:

- conviction for espionage as a crime that is disqualifying for this purpose;
- conviction for ‘treason’, as defined in s 44(ii) of the Constitution; and
- conviction for a serious criminal offence, especially those involving violence or dishonesty, or possibly all offences carrying a punishment of more than three years’ imprisonment, and/or if a person is still serving a sentence of this kind.

The Committee may also wish to give consideration to adding further, non-criminal grounds for disqualification including:

- if a person is subject to a counter-terrorism or counter-organised crime ‘control order’; and/or
- if a person is denied security clearance prior to nominating, or deemed by ASIO to be a clear security risk.

Repealing s 44(iv) and (v), and replacing with statutory grounds of disqualification relating to corruption and conflict of interest

We also propose the repeal of ss 44(iv) and (v) and the replacement of these provisions with an amendment to s 163 of the *Electoral Act*, disqualifying a person who is convicted of specified serious offences that pertain to corruption and conflicts of interest.

An alternative to this proposal would be to disqualify a person from office if the person is the subject of certain findings by a federal integrity body. We note in this context, however, that careful consideration would need to be given to the design of any additional grounds of disqualification of this kind, both so as to protect individual rights and liberties and so as to avoid creating problems of constitutional invalidity – i.e. the conferral of judicial power on Commonwealth executive bodies. A federal integrity commission, for example, would be an executive agency, and as such, would not be able to make determinations finding an individual guilty of corruption.²⁷ However, the Court has indicated that non-judicial bodies might make findings about whether a person has engaged in conduct that would amount to an offence, and that finding is part of an administrative process that leads to the imposition of regulatory sanctions.²⁸ Thus, it might be possible for the findings of a federal integrity commission to trigger a legislative disqualification provision.

While this might be possible, we believe it would be highly undesirable for an individual’s qualification as a member of Parliament to be determined in the absence of a conviction by a court. We therefore submit that it would be desirable and perhaps constitutionally necessary to provide for a process to require that the findings of a federal integrity commission to be filed in the Federal Court, with provision for these findings to be challenged within a set

²⁶ *Roach v Electoral Commissioner* (2007) 233 CLR 162.

²⁷ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

²⁸ *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 371 [33].

period. If such challenge was not forthcoming, the Court would make orders confirming the finding of the Commission, thus triggering disqualification. This procedure, we believe, would balance the desirability of efficiency with ensuring individuals have access to the full judicial protections of a fair trial if they wish to engage them.

Repeal of s 44(iii) without enactment

It is our submission that s 44(iii) be repealed, and *not* replaced in the form of a statutory disqualification provision. We do not believe that disqualifying individuals who are undischarged bankrupts or insolvents serves any useful purpose. While we accept that there remains good reason for excluding bankrupts and insolvents from positions responsible for financial management, such as company directors, we do not think it remains a relevant consideration in relation to qualification for parliament. To the extent that there are concerns that an undischarged bankrupt or insolvent member of parliament would be more likely to act in a way that abused his or her position, we believe it is better addressed through the introduction of legislation disqualifying members who have been convicted for serious offences relating to corruption and acting with a conflict of interest, coupled with the introduction of a new federal integrity commission to investigate such matters.

SECTION 4: REFORM TO PROCEDURE FOR DETERMINING DISQUALIFICATION

The substantive suggestions that we make above necessitate significant changes to the current procedure that presently relates to s 44.

First would be the necessity, on the repeal of s 44, of repealing ss 45 and 46 of the Constitution. The repeal of these sections would then necessitate the repeal of the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth). The capacity for the House to determine matters of qualification under s 49 of the Constitution, or refer such matters to the Court of Disputed Returns under s 376 of the *Commonwealth Electoral Act 1918* (Cth), and for petitions to be brought challenging qualifications as part of disputing an election or return under ss 353 and 355 of the *Commonwealth Electoral Act* should be retained.

Second, a new procedure should be instigated to replace the common informers jurisdiction. As we indicate above, we believe that individuals should retain the power to bring an action as a petitioner under ss 353 and 355 within 40 days of the return of the writs. The intention behind limiting this period to bring an action was to bring some certainty to the composition of the House. The current common informer jurisdiction, however, might undermine that intention, although the extent to which the High Court will make determinations of disqualifications in the course of a common informers actions is not yet settled and will be argued, and likely determined, in the *Alley v Gillespie* High Court challenge. If the Court accepts this jurisdiction, it would allow challenges to the composition of the Parliament at any time through a common informer action, thus increasing levels of uncertainty as the composition of the Parliament.

However, against the imperative for certainty must be balanced rule of law considerations, and the imperative to take out of Parliament's own hands the power to determine whether to refer matters as they arise to the Court of Disputed Returns. Further, it will often be the case that the matters of disqualification will occur more than 40 days after the return of the writs (for instance, conviction of an offence may occur after an individual has taken parliamentary office).

Accepting the importance of both of these imperatives, we recommend that s 355 of the *Commonwealth Electoral Act* be amended to allow for petitions to be brought outside the period of 40 days after the return of the writs in circumstances where the High Court has given leave. The Court should be directed in this discretion to give leave where it would otherwise bring the Parliament into disrepute.

SECTION 5: GREATER EMPHASIS ON SECTION 42 OF THE CONSTITUTION

One important way in which the Constitution currently encourages loyalty, from all Members of Parliament, is via section 42 of the Constitution, which requires MPs to give an oath of allegiance, to the effect of: 'the requirements of allegiance to the Commonwealth, and the consequences of breach of those requirements including ineligibility to remain in Parliament, may be defined by statute.'

We suggest that an important way in which to promote loyalty of all MPs, including MPs with dual nationality, is to place greater emphasis on this oath – or make it a more focal part of the process of assuming elected office.²⁹ Doing so would also have important benefits in reassuring the public about the requirements of loyalty imposed on all MPs under the Constitution.

We also submit, however, that consideration may wish to be given in this context to updating the language of the current oath: The present form of the oath, contained in the Schedule to the Constitution, does not actually contain a pledge of allegiance to Australia, but rather to 'the King or Queen of the United Kingdom of Great Britain and Ireland.' Updating the language of the oath so that MPs were required to make a constitutional oath of allegiance to Australia might be a useful psychic and symbolic counterpart to our proposed practical reforms in this area.

SECTION 6: FINAL REMARKS & ALTERNATIVE OPTIONS

Formal change to the Australian Constitution is extremely difficult to achieve: historically, there is a low rate of success for proposed referenda,³⁰ and many proposals for constitutional change have failed to pass Parliament, and thus even to reach the stage of being voted at a national referendum.

²⁹ See e.g. Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Wealth, Health and Happiness* (Yale University Press, 2008), on the value of making things come more readily to mind in 'nudging' certain behaviours.

³⁰ George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010), 88.

At the same time, proposals for change that have clear bipartisan support have tended to enjoy a higher rate of success than others,³¹ and there is a real likelihood of bipartisan support for some form of change to s 44.

We believe that the key to any successful change in this area, however, is a clear explanation to voters as to why change is required, and how it fits into a broader account of the role of the Constitution in this context.

One possible way in which to provide such an account would be to link change of this kind to changes designed to give more explicit recognition to our indigenous and multicultural heritage, such as changes designed to give First Nations a Voice in Parliament and make Australia a Republic.³² A linkage of this kind would also have the additional advantage of refuting any suggestion that MPs were simply seeking to enlarge their own freedom of action, by virtue of the relevant proposed changes.

Another, more cabined approach would be to simply focus on proposals to alter s 44, and explain to the Australian public that the proposal is designed to empower them to determine the suitability of candidates, and to ensure that candidacy is open equally to all Australian citizens, and not place as great an emphasis on costly legal processes in this context.³³

Arguments of this kind could also be clearly enhanced by linking proposals to repeal s 44 to more lengthy and detailed disclosure requirements on the part of candidates, including many of the same matters previously dealt with by s 44, and possibly some other related matters – such as requirements of a criminal background check and security clearance.

We acknowledge, however, that even with this broader context, there would be some risk that changes of this kind might not succeed at a referendum. We also note requests by members of the Committee for proposals for more modest change to s 44.

One proposal, by Dr Luke Beck, would be to add the words ‘Until the Parliament otherwise provides’ to be beginning of s 44.³⁴ We believe, however, that this would be functionally equivalent to our proposal, but less readily understandable to voters.

Another, more modest option canvassed by one MP would be to propose an amendment to s 44 to introduce some form of ‘grace period’ to allow candidates to take necessary measures to ensure eligibility (e.g. renouncing foreign citizenship, resigning from Commonwealth employment, or divesting certain pecuniary interests) after gaining office, rather than at the time of nominating. This would reduce the unfairness to candidates required to take these

³¹ Ibid 239. But see Rosalind Dixon, ‘Referendums Need a Big Idea to Stay Relevant’, *Sydney Morning Herald* (online), 17 May 2013, < <http://www.smh.com.au/comment/referendums-need-a-big-idea-to-stay-relevant-20130516-2jp2n.html>>.

³² See Referendum Council, *Final Report of the Referendum Council* (30 June 2017). Cf Noel Pearson’s view that indigenous recognition must be the referendum priority, ahead of the republic: ‘Prioritise Recognition before Republic or Four-year Terms’, *The Australian* (online), 11 August 2017 < <https://www.theaustralian.com.au/national-affairs/indigenous/prioritise-recognition-before-republic-and-four-year-terms-pearson/news-story/7880331ce1b92c86d5b1ca12de52cf14>>.

³³ For the argument that this helps return the question to voters, see e.g. Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Sydney, 2 February 2018 (Elisa Arcioni).

³⁴ Luke Beck, Submission No 16 to Joint Standing Committee on Electoral Matters, *Inquiry into Matters Relating to Section 44 of the Australian Constitution*, 9 January 2018, cited in Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Sydney, 2 February 2018 (Helen Irving).

measures at a time of uncertainty regarding their electoral prospects, and give candidates more time to understand the necessary processes required, and to seek advice on these questions. If linked to the kinds of procedural reform we suggest above, it could also help ensure that there was less chance of instability in the functioning of the Parliament, after the conclusion of the period.

We further note that several constitutional democracies making a distinction between the pre- and post-election period for the purposes of citizenship status and eligibility for Parliament.³⁵ In the Australian context, language could also simply be added to end of s 44, to replace the current language that provides that a person ‘shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives’, so that it reads something like:

‘... and does not within 3 months of being elected take all reasonable steps to renounce, discharge or discontinue this foreign citizenship; bankruptcy or insolvency; office of profit, pension, or pecuniary interest ... shall be incapable of taking their seat as a member of Parliament.’

While a clear improvement on the current operation of s 44, we also suggest however that change of this kind does not address all of the concerns set out above about the current over- and under-inclusiveness of the section and its operation.

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³⁵ See e.g. *Electoral Act 1993* (NZ) s 55AA.