

CHAPTER 8: REGISTRATION OF PARTIES, AND CANDIDATE NOMINATIONS

This chapter outlines the current arrangements for registration of political parties and nomination of candidates for elections, and discusses a number of options for reform.

THE CURRENT ARRANGEMENTS

Party Registration

Commonwealth arrangements

- 8.1 Political parties are the primary organised participants in Australia's electoral system. Political parties in Australia are not required to be legal entities, but are generally categorised as voluntary associations made up of members who have agreed to the internal rules of that association.
- 8.2 Despite the important role that political parties have played in Australian politics, Australian law largely ignored the existence of political parties until 1977.⁴⁷⁸ Registration of political parties for federal election purposes was introduced in 1984 to support the introduction of funding and disclosure arrangements and the printing of party affiliations of candidates on ballot papers.
- 8.3 The party registration scheme is set out in Part XI of the Electoral Act. To be eligible to register, a party must either have at least 500 members who are entitled to enrolment, or have at least one member who is a member of the federal Parliament (that is, be a 'Parliamentary party').⁴⁷⁹ It must also be established on the basis of a written constitution that sets out the aims of the party.⁴⁸⁰
- 8.4 Registration of political parties is not required, although it does give rise to the following benefits as well as responsibilities:
 - the names of registered political parties may be printed with the names of endorsed candidates on ballot papers for the House of Representatives and the Senate;⁴⁸¹
 - registered political parties may be provided with a copy of the Commonwealth electoral roll;⁴⁸² and
 - registered political parties may receive public funding (if endorsed candidates receive a sufficient number of votes)⁴⁸³ and are subject to the disclosure regime set out in Part XX of the Electoral Act.
- 8.5 In broad terms, the AEC must refuse to register a party if the name or abbreviation of the party:⁴⁸⁴
 - comprises more than six words;
 - is obscene;

⁴⁷⁸ In 1977, section 15 of the Australian Constitution was amended by referendum to require Senate casual vacancies to be filled by a new Senator from the same political party as the departed Senator.

⁴⁷⁹ Electoral Act, op. cit., section 123.

⁴⁸⁰ *ibid.*, paragraph 123(1)(b).

⁴⁸¹ *ibid.*, subsections 214(1) and 214(2).

⁴⁸² *ibid.*, section 90B.

⁴⁸³ *ibid.*, Division 3 of Part XX. Independent candidates and Senate groups are also entitled to election funding if they receive 4% of the vote: Electoral Act, section 297.

⁴⁸⁴ *ibid.*, section 129.

- is the name or abbreviation of the name of an unrelated ‘recognised’ party;⁴⁸⁵
 - closely and confusingly resembles the name or abbreviation of an unrelated ‘recognised’ party; or
 - comprises the words ‘Independent Party’, or contains the word ‘Independent’ together with the name of an unrelated registered party.
- 8.6 Applications for registration are made to the AEC’s National Office. A fee of \$500 is payable with applications for registration,⁴⁸⁶ change of party name or change of abbreviation.⁴⁸⁷ Applications for registration may be made by the party secretary or all the parliamentary members (for Parliamentary parties), or signed by ten members of the party including the party secretary (for other parties).⁴⁸⁸
- 8.7 When the AEC receives an application for party registration and its initial assessment indicates that the application would meet the criteria for registration, it publishes a notice in the Commonwealth Gazette and major newspapers in each state and territory.⁴⁸⁹ This notice invites written objections, to be lodged within one month.⁴⁹⁰ Objections may be made on the grounds that the application does not meet the legislative requirements, the party is not an eligible political party, or the name is one which should be refused by the AEC.⁴⁹¹ The AEC considers any objections before making its decision on an application, and its decision may be challenged in the Administrative Appeals Tribunal.⁴⁹² The register of political parties is published on the AEC website.⁴⁹³
- 8.8 The AEC may de-register a party for reasons including:
- the party has ceased to exist;⁴⁹⁴
 - the original registration was obtained by fraud or misrepresentation;⁴⁹⁵
 - a non-Parliamentary party has failed for a period of 4 years to endorse candidates for election;⁴⁹⁶ or
 - the party has less than 500 members and no Parliamentary members.⁴⁹⁷
- A party may also be de-registered at its own request.⁴⁹⁸

State and territory arrangements

- 8.9 All states and territories have broadly similar party registration schemes. Key differences across jurisdictions include:

⁴⁸⁵ The term ‘recognised’ refers to a party represented in the federal parliament; another federally-registered party; or a party registered or recognised in a state or territory that has endorsed candidates in the last five years: Electoral Act, subsection 129(2).

⁴⁸⁶ Electoral Act, op. cit., paragraph 126(2)(g).

⁴⁸⁷ *ibid.*, paragraph 134(2)(d).

⁴⁸⁸ *ibid.*, subsection 126(1).

⁴⁸⁹ *ibid.*, subsection 132(1).

⁴⁹⁰ *ibid.*, subsection 132(2).

⁴⁹¹ *ibid.*, paragraph 132(2)(b).

⁴⁹² See, for example, *Woollard and Australian Electoral Commission and Liberal Party of Australia (WA Division) Inc* [2001] AATA 166.

⁴⁹³ The current register is available at www.aec.gov.au/Parties_and_Representatives/Party_Registration/Registered_parties/index.htm.

⁴⁹⁴ Electoral Act, op. cit., paragraph 137(1)(a).

⁴⁹⁵ *ibid.*, paragraph 137(1)(c).

⁴⁹⁶ *ibid.*, paragraph 136(1)(aa).

⁴⁹⁷ *ibid.*, paragraph 136(1)(b) and 137(1)(b).

⁴⁹⁸ *ibid.*, section 135.

- the minimum number of party members required for registration – for example, NSW requires 750 party members, Victoria 500, South Australia 150, and Tasmania 100;
- the method for verifying membership of a registered political party – for example, NSW requires applications for party registration to be accompanied by individual declarations completed by each of the 750 members upon whom the party intends to rely upon for registration, whereas in Victoria, membership is verified on the basis of a statutory declaration by the party secretary;
- application fees – these range from \$2,000 in NSW and \$500 in the NT, to nil in Queensland, Western Australia, South Australia, Tasmania and the ACT;
- rules governing party names – while these are broadly similar to the Commonwealth arrangements, Western Australia does not allow the use of the word ‘royal’ in a party name; and
- requirements for party constitutions – for example, Queensland provides that a party’s constitution must set out the rules governing matters such as membership and candidate selection, whereas no constitution is required for party registration in Tasmania.

Key elements of party registration systems in the Commonwealth, states and territories are summarised at [Annex 9](#).

Candidate Nominations

Commonwealth arrangements

8.10 Candidate nominations are governed by Part XIV of the Electoral Act. A person who has reached the age of 18 years, is an Australian citizen, and is either ‘an elector entitled to vote at a House of Representatives election’ or eligible to become such an elector, is qualified to be elected to the Commonwealth Parliament.⁴⁹⁹

8.11 Section 44 of the Constitution sets out particular persons who are disqualified from being chosen or sitting as a member or Senator, including persons who:

- bear an allegiance to, or are citizens of, another country;
- have been convicted of treason, or are under sentence for any other offence punishable by imprisonment for more than one year;
- have been declared bankrupt and have not been discharged from bankruptcy;
- are public servants of the Commonwealth or of a state or territory; or
- have any financial interest in an agreement with the Commonwealth Government, other than as a member of an incorporated company consisting of more than twenty-five persons.

As outlined at paragraphs 8.47 – 8.60 below, section 44 operates in the light of interpretations laid down by the High Court.

8.12 Nominations close at 12 noon on a date fixed by the writs for an election, which must be between 10 and 27 days after issue of the writs.⁵⁰⁰ A candidate must be nominated by 50 persons entitled to vote at the election, or by the registered officer of a registered political party that has endorsed the candidate.⁵⁰¹ A person who is a sitting independent may be nominated by a single signature from a person (other than the candidate) entitled to vote in the election.⁵⁰² A registered officer of a political party may make a bulk nomination of all its endorsed House of Representatives candidates for a particular state or territory, to the

⁴⁹⁹ *ibid.* section 163.

⁵⁰⁰ *ibid.*, sections 156 and 175.

⁵⁰¹ *ibid.*, paragraph 166(1)(b).

⁵⁰² *ibid.*, subsection 166(1C).

Australian Electoral Officer (AEO) for the state or territory, at one time.⁵⁰³ Nominations (other than bulk nominations) must be made to the Divisional Returning Officer (DRO) for the division for which the election is to be held.⁵⁰⁴ Nominations of candidates for election to the Senate must be made to the AEO.⁵⁰⁵ Candidates must nominate using the name under which they are enrolled, or entitled to be enrolled.⁵⁰⁶

- 8.13 There is a nomination deposit per candidate of \$500 for the House of Representatives and \$1,000 for the Senate.⁵⁰⁷ Deposits are refunded if the candidate is elected, if the candidate gains 4% or more of the formal first preference vote, or if he or she is in a Senate group which polls at least 4% of the vote.⁵⁰⁸
- 8.14 Nominations are declared, and random draws for positions on the ballot papers are held, 24 hours after the close of nominations.⁵⁰⁹ Nominations are publicly disclosed before the conduct of the draw.⁵¹⁰ No one can nominate for more than one election to be held on the same day.⁵¹¹
- 8.15 The AEC will only reject a nomination if the relevant procedural requirements for nominating have not been satisfied.⁵¹² Questions about whether a candidate satisfies the legal qualifications for election must be raised in the Court of Disputed Returns, which is discussed in more detail in chapter 13. Examples of reasons for which candidate nominations have been rejected by the AEC in the past include:
- the candidate name given was not the name under which the person was entitled to be enrolled;
 - the nomination form was signed by less than 50 persons entitled to vote at the election;⁵¹³ and
 - the nomination was accompanied by a nomination deposit which was not in a form acceptable under the Electoral Act.

State and territory arrangements

- 8.16 Variations in candidate nomination requirements across the states and territories include:
- residence requirements – WA requires candidates to have been resident in WA for one year, candidates for Tasmanian elections must have resided in Tasmania for five years at any one time or for two years immediately preceding their nomination, and candidates for NT elections must have resided in Australia for at least six months and in the NT for at least three months;
 - in the NT, a nomination must be accompanied by a photograph of the candidate; and
 - nomination deposits range from \$200 in the NT to \$450 in SA; in all states and territories, these are returned if a candidate is elected or receives a specified number of votes.
- 8.17 A table comparing key elements of candidate nomination requirements in the Commonwealth, states and territories is at [Annex 10](#).

⁵⁰³ *ibid.*, subsection 167(3).

⁵⁰⁴ *ibid.*, subsection 167(2).

⁵⁰⁵ *ibid.*, subsection 167(1).

⁵⁰⁶ *ibid.*, subsection 166(2).

⁵⁰⁷ Under subsection 170(3) of the Electoral Act, these deposits are required to be in legal tender (banknotes) or a bank cheque or equivalent. Personal cheques, money orders, electronic funds transfers, credit card payments and business cheques are not accepted.

⁵⁰⁸ Electoral Act, *op. cit.*, section 173.

⁵⁰⁹ *ibid.*, sections 175 and 213.

⁵¹⁰ *ibid.*, section 176.

⁵¹¹ *ibid.*, section 165.

⁵¹² *ibid.*, section 172.

⁵¹³ See, for example, *Noah v Campbell* [2007] FMCA 2128.

CHALLENGES, OPPORTUNITIES AND OPTIONS FOR CHANGE

8.18 The current arrangements for party registration and candidate nominations, and options for reform, can be considered against a number of the key principles outlined in chapter 2. For example, from the perspective of ensuring representation, it might be argued that registration and nomination systems should be accessible to a broad range of parties and candidates, and should not of themselves present an unreasonable barrier to persons who wish to stand for election to Parliament. To ensure neutrality, it could be contended that registration and nomination systems should be applied equally and should not favour one party or candidate over another. To foster a civic culture, some might argue that parties should be required to conduct themselves democratically, responsibly and professionally.

8.19 Particular options examined below are:

- options for party registration, including better regulation of political parties and party names, issues concerning ‘party-hopping’ for registration, and a national scheme for party registration;
- options for candidate nominations, including nomination requirements and the disqualifications in section 44 of the Australian Constitution; and
- e-business options for registration and nomination procedures.

Party registration and regulation

8.20 The benefits of a party registration scheme include:

- it provides a mechanism for verifying the claim of a candidate that he or she is the endorsed nominee of a particular party;
- it identifies a single point of contact to represent a party in dealings with the election administration and has ‘helped professionalise party relationships with the [electoral] Commissions’;⁵¹⁴
- by setting ‘minimum standards for official recognition of parties’, it can protect the community from ‘confusion created by bogus groups’;⁵¹⁵ and
- it can minimise elector confusion, as the name and abbreviation of a registered party cannot be used by a rival group.⁵¹⁶

8.21 Options to amend current arrangements are focused on four areas:

- regulation of the structure or conduct of political parties;
- regulation of party names;
- the prevention of ‘party-hopping’ for registration; and
- a national scheme for party registration.

Regulation of political parties

8.22 Some have argued that despite the benefits that registered parties receive over their unregistered electoral competitors, there are ‘minimal requirements placed on how parties are to be structured or organised’.⁵¹⁷

⁵¹⁴ S Tully, ‘Party Registration and Preselection: A Minefield for Electoral Administrators?’, in G Orr, B Mercurio and G Williams (eds.), *op. cit.*, pp. 146-147.

⁵¹⁵ *ibid.*, p. 146.

⁵¹⁶ *ibid.*

⁵¹⁷ Democratic Audit of Australia, submission no. 45 to JSCEM, *Inquiry into the 2007 Federal Election*, *op. cit.*, p. 13.

- 8.23 In support of additional regulation, it might be argued that political parties are fundamental and influential players in Australia's electoral and political processes, and that further regulation could make their operations more open and transparent, which could assist voters in making an informed voting choice⁵¹⁸ and may also assist in attracting high calibre persons to engage in party politics. Against this, it has been argued that further regulation would be an inappropriate intrusion into the activities of political parties.⁵¹⁹ It might also be argued that it is ultimately up to the voters to express at the ballot box any concerns they may have about the way in which a particular party operates. The burden of more stringent requirements for registration could also potentially discourage new and smaller parties from registering.
- 8.24 Options for better regulation of political parties include the following possible changes to the party registration regime:⁵²⁰
- amendments to require that a non-Parliamentary party have 500 members who are on the electoral roll (rather than just entitled to be on the roll), which could assist the AEC in determining whether the names provided with registration applications are genuine by allowing it to check them against the electoral roll;⁵²¹
 - to increase transparency, a requirement that the constitutions of registered political parties be published on the AEC website;⁵²²
 - minimum requirements for registered political parties' constitutions, such as membership requirements, party structure and arrangements for amending the constitution,⁵²³ which could ensure a certain level of 'internal democracy' within parties;
 - requirements that registered parties comply with privacy guidelines developed by the AEC to govern their handling of personal information (for example, donors' personal information, or personal information obtained from the electoral roll);⁵²⁴ or
 - requirements for registered parties to undertake activities that could have broader benefits for society, such as participating in civic education activities.
- 8.25 Two additional options that have received particular attention are the option of requiring parties to become legal entities, and proposals for regulation of candidate preselections.

⁵¹⁸ A Murray, submission no. 5, *Australian Government Electoral Reform Green Paper - Donations, Funding and Expenditure*, 2009, pp. 2, 12-13, accessed at www.pmc.gov.au/consultation/elect_reform/submissions.cfm.

⁵¹⁹ On 30 August 2006, the former government responded to a number of JSCEM's recommendations for party registration in its *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto* by indicating that it considered that implementation of the recommendations would be an 'unwarranted intrusion into the internal affairs and activities of political parties' (pp. 11-12).

⁵²⁰ Additional options for regulation of electoral funding and financial disclosure were canvassed in the Government's *Electoral Reform Green Paper - Donations, Funding and Expenditure*, December 2008.

⁵²¹ JSCEM, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, op. cit., p. 94.

⁵²² *ibid.*, p. 95.

⁵²³ *ibid.*, pp. 94-95; see also Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007, which was introduced into the Senate by Senator Andrew Murray on 1 March 2007.

⁵²⁴ Australian Government Office of the Privacy Commissioner, submission no. 23 to Australian Government *Electoral Reform Green Paper - Donations, Funding and Expenditure*, 2009. Registered political parties are exempt from the application of the Privacy Act 1988. The Australian Law Reform Commission report no. 108, *For Your Information: Australian Privacy Law and Practice*, released in May 2008, recommended that the exemption for political parties be removed; the Australian Government's response to this recommendation is being considered through a separate process: see Volume 2, p. 1433. This recommendation will be considered as part of the Australian Government's second stage response to the report. Guidelines could be an on-going or interim measure depending on the Government's response to this recommendation.

*Requiring parties to become legal entities*⁵²⁵

- 8.26 A precondition for or consequence of registration that required political parties to become legal entities could have a number of benefits: they would be subject to certain transparency and financial reporting requirements, and there may be benefits for the enforcement of the offences in the Electoral Act.
- 8.27 As a legal entity, a political party would be responsible for the actions of its members and office bearers. It would be required to keep financial records and could be subject to legal action. In order to be, or continue to be, registered a political party could be required to incorporate in one of the following ways:
- become an incorporated association under state or territory legislation;
 - become a company under the *Corporations Act 2001*; or
 - be deemed, once registered under the Electoral Act, to be a body corporate with perpetual succession, with the power to own property and capacity to sue and be sued.
- 8.28 A benefit of the second and third options is that they would ensure that all registered political parties would be incorporated in the same way and subject to the same conditions. Under all options, action could be taken to pursue a registered party for a breach of the law, which would be an improvement on the current arrangements in which a party's agent is liable for any offences the party may commit under the Electoral Act. As noted in the *Electoral Reform Green Paper - Donations, Funding and Expenditure*, since 1983 prosecutions of party agents have been largely unsuccessful.⁵²⁶ However, the effectiveness of pursuing enforcement action against an incorporated party could be compromised by the fact that most registered political parties do not hold assets in their own name and may not have the means to pay the sums sought for recovery. While action could be taken to deregister a political party, fines and penalties may not be able to be enforced because the party holds no assets.

Regulation of candidate preselections

- 8.29 It has been argued that since approximately a third of all House of Representative seats are classed as 'safe',⁵²⁷ a large number of Parliamentarians are effectively chosen by a small number of party members who may or may not even be electors of that district and may, in some cases, not even be Australian citizens.⁵²⁸ In these safe seats, the preselection of the candidate for the party likely to win is the crucial election. Some have argued that the potential for branch-stacking and preselection fraud poses 'great dangers for political standards'.⁵²⁹
- 8.30 Against greater regulation of candidate preselections, it has been contended that such regulation would erode freedom of association and 'naively' attempt to reinvent parties as 'paragons of internal democracy', rather than political entities in pursuit of power.⁵³⁰ It has also been argued that preselection problems are isolated and overstated, and that 'parties are probably the cleanest they have ever been in terms of their rules and procedures'.⁵³¹

⁵²⁵ This option was discussed in the Australian Government's *Electoral Reform Green Paper - Donations, Funding and Expenditure*, December 2008, pp. 70-71.

⁵²⁶ *ibid.*

⁵²⁷ 'Safe' seats are categorised here as seats in which the winning candidate secured more than 60% of the two-party preferred vote: see AEC, 'Glossary', 2009, available at www.aec.gov.au/footer/Glossary_N_Z.htm.

⁵²⁸ CA Hughes and B Costar, *op. cit.*, p. 86.

⁵²⁹ Senators A Bartlett and A Murray, Australian Democrats, 'Minority Report' in JSCEM, *1998 Federal Election: Report of the Inquiry into the 1998 Federal Election and Matters Related Thereto*, *op. cit.*, p. 178.

⁵³⁰ G Orr, 'Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?', *Public Law Review*, vol. 12, 2001, p. 94.

⁵³¹ G Johns, 'Parties, probity and preselection', *Institute of Public Affairs Review*, vol. 53, no. 1, 2001, p. 18.

- 8.31 Potential options to impose greater regulation on the way in which candidates are selected by parties include the following.
- A requirement could be introduced that the constitutions of registered political parties include minimum standards regarding the preselection of candidates. For example, Queensland requires the constitution of registered political parties to ensure that all party preselection ballots satisfy ‘the general principles of free and democratic elections’,⁵³² and in New Zealand, all registered parties are required to ‘follow democratic procedures in candidate selection’.⁵³³
 - The current offences prohibiting inducements or threats at ordinary elections could be extended to preselection ballots.⁵³⁴
 - The AEC could play a role in either supervising or conducting party preselection ballots, as currently performed for trade unions. Again, Queensland has enacted legislation empowering the Electoral Commission of Queensland (ECQ) to oversee preselection ballots by randomly auditing preselection ballots after polling day, conducting inquiries and reporting to Parliament any contraventions of the model preselection procedures or the party’s constitution itself.⁵³⁵ However, it has been noted that resource limitations and logistical difficulties may limit the practicality of this option at the federal level.⁵³⁶
 - The idea of party preselection ballots being replaced by party primary elections, as run in the United States, has also been floated.⁵³⁷ Under this model, ‘instead of a party’s candidate being chosen by intra-party processes, this would be done by a public vote’.⁵³⁸ Against this option, it has been argued that adopting primary elections as a preselection process could introduce different problems, given that they rely on ‘mass media coverage, massive expenditure and large donors’.⁵³⁹ The New South Wales Nationals recently announced that they would trial community preselection to select one Nationals candidate for the New South Wales state election in 2011.⁵⁴⁰ Under the trial, preselection would be open to all voters on the electoral roll for the chosen electorate.⁵⁴¹

Regulation of party names

- 8.32 If party names that are very similar to each other appear on the ballot paper at an election, there may be a risk that some voters confuse one party for the other party, or that some voters mistakenly believe that a relationship exists between two parties. It might be argued that electors who are first-time voters, have low levels of English literacy, or are from culturally and linguistically diverse communities may have particular difficulties in distinguishing between different parties with similar names.

⁵³² *Electoral Act 1992* (Qld) paragraph 73A(1)(f).

⁵³³ *Electoral Act 1993* (NZ) section 71.

⁵³⁴ CA Hughes and B Costar, op. cit., p. 88.

⁵³⁵ *Electoral Act 1992* (Qld) s148J; the revised Queensland electoral legislation also outlines model procedure to be followed in preselection ballots.

⁵³⁶ CA Hughes and B Costar, op. cit., p. 88.

⁵³⁷ K Coghill, ‘Let the People Decide: Primaries for Preselections’, paper presented to *Good Governance Conference: Fair Elections and Ethical Parties*, Monash University, Melbourne, 2001, pp2-3, as cited in S Bennett, ‘Australia’s Political Parties: More Regulation?’, *Research Paper No. 21 2001-02*, Parliament of Australia Parliamentary Library, p. 19.

⁵³⁸ S Bennett citing K Coghill, *ibid.*

⁵³⁹ CA Hughes and B Costar, op. cit., pp. 87-88.

⁵⁴⁰ N Ralston, ‘Electorate to Choose Own Candidate in Poll’, 12 June 2009, available at <http://www.news.com.au/story/0,27574,25626539-29277,00.html>. See also The Nationals, ‘Nationals Make Australian Political History’, 19 June 2009, available at <http://nsw.nationals.org.au/news/nationals-make-australian-political-history.aspx>; and The Nationals, ‘A Party of Community Champions—A New System for the Nationals’, January 2009, available at <http://nsw.nationals.org.au/policies/community-preselections-briefing-paper.aspx>.

⁵⁴¹ N Ralston, *ibid.*

- 8.33 The Electoral Act provides that a party can be refused registration if its name (or acronym) so clearly resembles the name (or acronym) of a recognised political party that 'it is likely to be confused with or mistaken for that political party'.⁵⁴² In a 2001 decision that the political party 'liberals for forests' should be registered for the purposes of the Electoral Act, the AAT made the following comments on paragraph 129(1)(d):

'The confusion or mistake that is relevant...is that of the elector preparing to vote by marking the ballot paper at an election. It is the judgment of the elector in that brief time in the polling booth that is to be protected.'⁵⁴³

'There is however a tension between the protective function of [paragraph] 129(d) and the freedoms of association and political expression that are incidents of representative democracy. Political parties in Australia use, and historically have used, in their names generic words such as "Australia", "liberal", "labour", "democrat", "national", "christian", "progressive", "socialist" and the like. Absent clear language to contrary effect, the disqualifying provision is not to be construed so as to lock up generic words as the property of any organisation when it comes to names that can be used on the ballot paper. And it is significant that there is no registration requirement conditioning the wider use of party names outside the polling booth. This suggests that the language of [paragraph] 129(d) should be read according to the ordinary meaning of its words and not strained beyond them.'⁵⁴⁴

- 8.34 Amendments were enacted in 2004 to address public concerns that the political party registration provisions in the Electoral Act could have been open to exploitation by parties seeking to confuse voters by registering under a name that implied a relationship with a well-known party in an attempt to 'siphon' votes. Under paragraph 129(1)(da) of the Electoral Act, a party can now be refused registration, or deregistered, if its name is so closely associated with another well-known party that a 'reasonable person' would think that a relationship exists between the parties that does not in fact exist.⁵⁴⁵ To ensure that these new requirements applied to all political parties without current or past representation in the Commonwealth Parliament, these parties were automatically deregistered in 2006, and were required to re-register under the new requirements if they wished to remain registered.⁵⁴⁶
- 8.35 While the AEC has applied the existing provisions to refuse registration of some party names,⁵⁴⁷ it has noted in other decisions that the provisions are 'not completely without doubt'.⁵⁴⁸ In a submission to JSCEM, the AEC stated that:⁵⁴⁹

⁵⁴² Electoral Act, op. cit., paragraph 129(1)(d). Under subsection 129(2), 'recognised political party' is defined as a Parliamentary party, a party that is federally registered, or a party that is registered under state or territory law and has endorsed a candidate for a state or territory election in the previous five years.

⁵⁴³ *Woollard and Australian Electoral Commission and Liberal Party of Australia (WA Division) Inc* [2001] AATA 166 at 23.

⁵⁴⁴ *ibid.*, at 40.

⁵⁴⁵ Paragraph 129(1)(da) and section 134A of the Electoral Act, inserted by the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004*.

⁵⁴⁶ *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*, Schedule 3.

⁵⁴⁷ In a recent example, the AEC refused an application for the Northern Territory Country Liberal Party to change its registered name to 'Country Liberals' because 'it is likely to be confused with or mistaken for the registered abbreviation "Liberal" as used by branches of the Liberal Party of Australia as a ballot paper affiliation'. The AEC's full decision is available at www.aec.gov.au/Parties_and_Representatives/Party_Registration/Registration_Decisions/nt-clp.htm.

⁵⁴⁸ AEC, *Party Registration decision: Liberal Democratic Party*, available at www.aec.gov.au/Parties_and_Representatives/party_registration/Registration_Decisions/liberal_democratic.htm.

⁵⁴⁹ AEC, submission no. 169 to JSCEM, Inquiry into the Conduct of the 2007 Federal Election, Annex 10, p. 75.

'Considering the result of the AAT case on 'liberals for forests' and the advice sought from several Senior Counsel it appears that these provisions [paragraphs 129(1)(d) and (da) of the Electoral Act] would not stop parties with similar words as existing parties from being registered. The application of these provisions is impossible due to the subjective test in the provisions. Recommended solution is to repeal the section or to provide a regulation making power to prescribe certain words that may not be used, for example, 'Labor'.⁵⁵⁰

- 8.36 Noting that the repeal of these provisions would mean that there would be no basis in the Electoral Act for refusing to register a party name that was very similar to another party name, an alternative approach could be to seek to develop more workable provisions. For example, as suggested by the AEC, regulations could prescribe certain words that would not be accepted in applications for registration of new parties.⁵⁵¹ On the other hand, such a move may be criticised if it prevented parties from using generic words that have commonly been used in party names, and might be criticised if it were perceived to erode freedom of political communication. Alternatively (noting the potential limits of existing provisions), the existing provisions could be extended to cover all registered political parties (that is, to cover parties that are already registered, in addition to those applying to be registered). A national scheme for party registration (as discussed at paragraphs 8.39-8.42 below) could potentially remove confusion between the names of parties registered in different jurisdictions, and ensure consistency in decision-making across jurisdictions as to the registration of party names.
- 8.37 One additional area of potential concern is that there are no rules prohibiting registration of party names that might mislead voters regarding the policies or ideologies of a party. However, any such rules may be difficult to enforce, and it has been argued that 'neither the Electoral Commission nor the courts should be drawn into ruling on questions of ideological fidelity'.⁵⁵²

Party-hopping for registration

- 8.38 A further concern that has been raised is that the present arrangements allow a member or Senator to change allegiances during their term and register another party. It has been argued that this practice 'subverts the intention that registered parties should be representative of a group of people sharing common political beliefs and goals',⁵⁵³ which is measured by either having 500 members, or having parliamentary representatives. To address this concern, the Electoral Act could be amended to preclude a member or Senator from being able to use their position to register a political party which is different to the party for which they were elected.

A national system for party registration

- 8.39 As demonstrated at [Annex 9](#), while there are a number of differences between the party registration schemes across the Commonwealth, states and territories, there are also fundamental commonalities. For example, all party registration systems specify mechanisms for:
- confirming that a prospective party can demonstrate at least a minimal level of support, either by being already represented in a legislature, or by meeting a membership threshold;
 - preventing parties from adopting names or abbreviations which would be deceptively similar to those of another party; and
 - identifying the recognised representatives or office-holders of a party.

⁵⁵⁰ JSCEM recently indicated that it favoured the repeal of paragraphs 129(1)(d) and 129(1)(da) of the Electoral Act in its *Report on the conduct of the 2007 federal election and matters related thereto*, op. cit., p. 283.

⁵⁵¹ AEC, submission no. 169 to JSCEM, *Inquiry into the Conduct of the 2007 Federal Election*, Annex 10, p. 75.

⁵⁵² T Round, 'Parties, Candidates and their Ballot Labels', in G Orr, B Mercurio and G Williams (eds.), op. cit., p. 163.

⁵⁵³ Democratic Audit of Australia, submission No. 45 to JSCEM, *Inquiry into the 2007 Federal Election*, op. cit., p. 14.

- 8.40 One commentator has noted that for political parties, 'it is something of a burden to face different or overlapping legislative requirements [for party registration] at each level [of government]...They may also have to find several registration fees, a not inconsiderable burden on new and small parties.'⁵⁵⁴
- 8.41 There may be significant opportunities for greater efficiencies if there were a single party registration scheme within Australia for federal, state and territory purposes. The larger parties in Australia tend to operate on both a state/territory and national basis, and they could benefit from having a 'one stop shop' for managing their registrations for all electoral purposes. Having up to nine different party registration systems has the potential to give rise to significant overheads both for the parties and for electoral administrations. It can also produce situations in which rules are applied inconsistently across jurisdictions: for example, a party name may be rejected as potentially confusing in one jurisdiction, but accepted in another.
- 8.42 A national scheme would require jurisdictions to reach agreement on uniform registration requirements and could either be based on:
- states and territories recognising federally registered parties for their purposes, or
 - complementary legislation enacted at the federal, state and territory levels, providing for the various schemes to be administered by one body.

Options for candidate nominations

- 8.43 The increasing number of candidate nominations for federal elections has a number of implications. Some might see increasing nominations as reflecting engagement with the political process, and argue that nomination procedures should be accessible to a wide range of prospective candidates. However, others might contend that increasing numbers of candidates can result in larger or more unwieldy ballot papers, which can increase the cost and difficulty of producing and distributing ballot papers, and can lead to increased levels of informal voting (as discussed in chapter 5).
- 8.44 Arguments for more reform of candidate nomination requirements have generally focused on:
- proposals for more stringent nomination procedures; and
 - amendments to section 44 of the Australian Constitution.

More stringent requirements for nomination procedures

- 8.45 At the 2007 federal election, 46 of the 79 Senate candidates for NSW polled less than 200 first preference votes; together, they polled less than 0.2% of the more than 4 million formal votes cast. While some candidates were from parties which attracted votes above this level, this suggests that there may be scope for strengthening nomination requirements, at least for the Senate, in a way which may not seriously compromise the choice available to voters. Options that might be considered include:
- the number of nominators required for non-party candidates who wish to be grouped above-the-line on a Senate ballot paper could be increased to 500, to put it on par with the number of members required to register a political party; or
 - deposit requirements could be set much higher, to discourage groups from nominating numbers of candidates which bear no relationship to their prospects of success.

Against these options, it might be argued that they could present a barrier to new candidates or smaller parties standing for election.

⁵⁵⁴ S Tully, op. cit., p. 147.

8.46 For the House of Representatives, one possible option could be to require candidates to have been enrolled in the division for which they are standing for a minimum period of time (such as 12 months prior to an election being called), to demonstrate a degree of local knowledge or support. Against this, it could be argued that it should be left to the voters to decide whether their representative should be a 'local', and that their available choice of candidates should not be reduced on the basis of a presumption about the importance of 'local' experience or background. One option that would not restrict voters' choice could be for ballot papers to indicate the electorates in which candidates are enrolled, as occurs for Victorian Legislative Council elections.

Candidate qualifications: section 44 of the Australian Constitution

8.47 As outlined at paragraph 8.11, section 44 of the Australian Constitution prevents certain categories of people both from nominating and from sitting as members of Parliament. The aim of section 44 is to protect the integrity of the parliamentary system by disqualifying candidates 'who are at risk of allowing conflicts of loyalty to affect their performance'.⁵⁵⁵

8.48 Section 44 has been the topic of regular review and debate.⁵⁵⁶ Criticisms of the section include that:

- it is both 'unclear' and 'largely ineffective',⁵⁵⁷
- it prevents a large number of Australians from standing for public office, particularly under subsections 44(i) (foreign citizenship) and 44(iv) (office of profit under the Crown) – these two subsections alone are estimated to affect more than five million Australians;⁵⁵⁸
- it is questionable whether the section continues to service its original purpose of preventing conflicts of interest – it has been asserted that political advisers and electoral practitioners have come to view the restrictions as 'more a trap for the guileless rather than a danger to the guilty',⁵⁵⁹ and
- such prescriptive restrictions on candidates are 'in general not suited for inclusion in the rigid parts of the Constitution', as changing social conditions and laws may give rise to problems of interpretation as they 'rapidly become out of date and irrelevant'.⁵⁶⁰

8.49 Broad options for reform, both of which would require a referendum to amend the Constitution, include:

- amendments to the section to ensure the language is appropriate and adapted for contemporary purposes; or
- complete repeal of the section, with Parliament able to enact ordinary legislation on the topic of candidate qualifications.

⁵⁵⁵ P Dawson, *Electoral Backgrounder No 2: Parliamentary Report on Section 44 of the Constitution*, Australian Electoral Commission, 1997.

⁵⁵⁶ See, for example House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Constitutional Reform*, 2008, pp. 26-32; Constitutional Commission, Commonwealth Parliament, *Final Report of the Constitutional Commission*, 1988, vol. 1, pp. 274-307.

⁵⁵⁷ B Bennett, 'Candidates, Members and the Constitution', *Research Paper 18 2001-02*, Parliament of Australia Parliamentary Library, p. iii.

⁵⁵⁸ In evidence to a 1997 inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs, the then Department of Immigration and Multicultural Affairs estimated that up to five million Australians had dual nationalities (House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)*, 1997, p. 13). There are an estimated 1 million public servants in the Commonwealth, states and territories (estimates based on public sector workforce publications in each jurisdiction).

⁵⁵⁹ B Bennett, *op. cit.*, p. iii.

⁵⁶⁰ G Sawyer, evidence to the Senate Standing Committee on Legal and Constitutional Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, as cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)*, *op. cit.*, p. 34.

- 8.50 Arguments against constitutional reform in this area include that:
- as the High Court has substantially clarified the meaning of section 44 in recent years, prospective candidates can now take steps to avoid having their nomination disqualified;⁵⁶¹ and
 - administrative solutions could be an effective alternative to constitutional reform, such as greater candidate education or issuance of guidelines emphasising the possible circumstances where candidates might be disqualified.⁵⁶²

8.51 Specific options for reform of section 44 have largely focused on subsections 44(i) and 44(iv).

Subsection 44(i) – ‘allegiance to foreign power’

8.52 When the Australian Constitution was formulated, there was no concept of Australian citizenship in Australian law. Today, several million Australians are dual citizens, reflecting the multicultural nature of contemporary Australian society. Under Australian law, a person is not required to renounce any other citizenship on assuming Australian citizenship; any migrant who becomes an Australian citizen will be a dual citizen if the citizenship laws of the other country allow the person to retain that prior citizenship. Given the complexity of citizenship laws internationally, it has been noted that many Australians do not even know they are dual citizens.⁵⁶³

8.53 The High Court has found that section 44(i) operates to exclude from nomination both persons failing to hold Australian citizenship⁵⁶⁴ and persons holding dual citizenship of Australia and another country.⁵⁶⁵ The High Court did state that a candidate may be able to seek election as a dual citizen if they have taken ‘reasonable steps’ to renounce their foreign citizenship. It is unclear what will amount to ‘reasonable steps’ in any given case, particularly because the steps towards renunciation will always depend on the laws of the country to which the person’s other citizenship belongs.

8.54 Given that a large and growing number of Australian citizens also hold foreign citizenship, it might be argued that reform of subsection 44(i) is appropriate. The most common reform proposal calls for the subsection to be repealed and replaced with a simple requirement that candidates must hold Australian citizenship.⁵⁶⁶ Others argue that the requirement should be that candidates hold *only* Australian citizenship.⁵⁶⁷ Other proposals call for candidates to pledge their allegiance to Australia when nominating for election, or to ensure that they do not take advantage of any rights, privileges or entitlements available by virtue of their foreign citizenship whilst they hold public office.

Subsection 44(iv) – ‘office of profit under the Crown’

8.55 All public servants (both federal and state) are disqualified from standing as candidates by subsection 44(iv). Public servants must resign before filing their nomination application in order to avoid the operation of this provision. Government teachers and members of the armed forces have both been held to be ineligible for election, even where they are on leave without pay.⁵⁶⁸ It remains unresolved as to whether persons working for elected Parliamentarians (including ministers) are also disqualified under subsection 44(iv).⁵⁶⁹

⁵⁶¹ B Bennett, op. cit., pp. 1-2.

⁵⁶² P Dawson, op. cit.

⁵⁶³ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)*, op. cit., p. 22.

⁵⁶⁴ *In Re Wood* (1988) 167 CLR 145.

⁵⁶⁵ *Sue v Hill* (1997) 199 CLR 462.

⁵⁶⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)*, op. cit., p. 39.

⁵⁶⁷ Commonwealth Senate, *Debates*, 3 December 1998, p. 1250 (Senator Bill O’Chee).

⁵⁶⁸ *Sykes v Cleary* (1992) 176 CLR 77 (government secondary school teacher); *Free v Kelly* (1996) 185 CLR 296 (member of the Australian Defence Force)

⁵⁶⁹ B Bennett, op. cit., p. 11.

- 8.56 The purpose of subsection 44(iv) is to ensure separation between the executive and the legislature. It is well accepted that to avoid conflicts of interest, elected parliamentarians should not be able to hold any other 'office of profit under the Crown'. However, as the disqualification applies to both elected parliamentarians and those standing for election, it has been argued that 44(iv) is unfair and discriminatory because it places a 'heavier burden on public sector employees than on their private sector counterparts'.⁵⁷⁰
- 8.57 Alternatively, it might be argued against reform that the subsection offers no real bar to federal public servants seeking to enter Parliament, particularly since the introduction of section 32 of the *Public Service Act 1999 (Cth)*. This section gives public servants a legislated right of return to their jobs, if they resign to stand unsuccessfully as a parliamentary candidate, and may therefore be argued to have removed much of the discriminatory effects of subsection 44(iv).⁵⁷¹ However, given that the section only applies to federal public servants, it does not remove the effects of subsection 44(iv) on public servants from the states or territories, or others who hold an 'office of profit under the Crown'.
- 8.58 Two proposals have been suggested to reform subsection 44(iv):
- section could be amended to provide that the words 'of being chosen or' do not apply to subsection 44(iv), which would mean that a person holding an 'office of profit' would only be required to resign if elected, and unsuccessful candidates would not have to resign at all;⁵⁷² or
 - the subsection could be repealed and replaced with a provision allowing certain persons who hold an 'office of profit' to be deemed to have vacated the office either before nomination or before the taking a seat in Parliament,⁵⁷³ which would not require a candidate to take any positive action to resign their position before nomination.
- 8.59 Within this second proposal, there is debate as to which public officials should be deemed to have resigned on nomination and which public officials should be deemed to have resigned on election. It has been argued that some offices, for example judicial offices, are considered to be 'so sensitive that if the holders of such offices become embroiled in political controversy the offices themselves may be damaged'.⁵⁷⁴ Holders of such offices should resign as soon as there is any indication that they will be getting involved in the political process.⁵⁷⁵ Options to address this issue are:
- to insert into the Constitution a list of offices or categories of office that are to be deemed vacant as soon as an incumbent nominates for election; or
 - to allow the Parliament to specify which offices are to be deemed vacant as soon as the incumbent nominates, and which are to be deemed vacant only if the incumbent is elected to parliamentary office.
- 8.60 Other concerns have been raised about the expression 'office of profit under the Crown', particularly given the growing complexity in determining the scope of the public sector in the face of increasing privatisation and corporatisation.⁵⁷⁶ The legislative listing of public sector employees falling within the scope of subsection 44(iv) would assist in this regard.

⁵⁷⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)*, op. cit., p. 53.

⁵⁷¹ Similar arrangements apply in some states: for example, sections 102 and 103 of the *Public Sector Employment and Management Act 2002 (NSW)* provides equivalent arrangements for NSW public servants who stand as candidates in either Commonwealth or state elections.

⁵⁷² *ibid.*, pp. 75-81.

⁵⁷³ Senate Standing Committee on Legal and Constitutional Affairs, *The Constitutional Qualification of Members of Parliament*, 1981, pp. 45-46.

⁵⁷⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution: Subsections 44(i) and (iv)*, op. cit., p. 54.

⁵⁷⁵ *ibid.*, p. 78.

⁵⁷⁶ *ibid.*, p. 66.

E-business options for registration and nominations

8.61 Technology could potentially assist in making registration and nomination processes more efficient and accessible. A system for modernising registration and nomination processes could include:

- submission of party registration applications and candidate nominations through a secure website;
- payment of application fees and candidate deposits online, using methods similar to internet banking transactions (though undue delays in processing such transactions may need to be avoided);
- automatic checking of the identity of party members and candidate nominators against electoral roll data (for both the AEC and, potentially, applicants utilising the online submission system); and
- automatic linking of online registration applications and candidate nominations to other systems that use the same data, such as those for ballot paper production, election results tallying, and public notification.

Appropriate privacy and security safeguards would need to be built into any new systems adopted.

DISCUSSION POINTS

8.62 Submissions are invited on the issues addressed in this chapter, in particular:

- Is the current system for registration of political parties appropriate for Australia's contemporary conditions?
- Are there any changes that you think should be introduced to party registration arrangements, such as:
 - requirements regarding the conduct or organisation of political parties, such as requiring them to become legal entities?
 - different rules for party names?
 - rules to address 'party-hopping' for registration?
- What options are there for greater harmonisation of party registration arrangements across the Commonwealth, states and territories?
- Is the current system for candidate nominations appropriate?
- Are there any changes that you think should be introduced to candidate nomination arrangements, such as different nomination requirements?
- Noting the requirement for a referendum, are there any amendments that you think should be made to section 44 of the Australian Constitution? Alternatively, are there any administrative solutions that you think could be introduced to support compliance with section 44?
- What options are there for e-business solutions to improve party registration and candidate nomination systems?