

DISCLOSURE, NOT DISQUALIFICATION: A DEMOCRATIC PROPOSAL TO PROMOTE THE FIDELITY OF ELECTED REPRESENTATIVES TO THE PEOPLE

Matthew Stubbs* and Adam Webster**

Abstract

What is the appropriate role for public law in promoting the fidelity of elected representatives to the people? We examine the qualification (and disqualification) of representatives in five common-law jurisdictions: Australia, Canada, New Zealand, the United Kingdom, and the United States. We identify requirements seeking to ensure integrity and competency, and avoid conflicts of interest. We argue all are undemocratic, because courts do not need to intervene where electors could make their own judgements as to the suitability of their representatives. To facilitate informed electoral – not judicial – choices, we propose a regime of compulsory public disclosure by candidates.

Key words: qualification, disqualification, disclosure, election, parliament, representative, public law

1. Introduction

The fundamental obligation of a member in relation to the Parliament ... is the *duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community.¹

The ultimate guarantee of the fidelity of elected representatives to those who elect them is the system of representative democracy itself. However, the ballot box does not stand alone

* Associate Professor, Law School, University of Adelaide.

** Departmental Lecturer in Law and Public Policy, Blavatnik School of Government, University of Oxford.

¹ *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ) (emphasis in original); cited in *Re Day [No 2]* [2017] HCA 14, [49] (Kiefel CJ, Bell and Edelman JJ), [179] (Keane J), [269] (Nettle and Gordon JJ).

– the public law of many jurisdictions specifies eligibility criteria for candidates for election, and additional criteria which will disqualify elected representatives. Such criteria include age, nationality, financial links to the government, status as a bankrupt and liability to or currently serving a sentence of imprisonment.

In 2017-18, Australia endured ‘the world’s most ridiculous constitutional crisis’ when it was revealed that a significant number of members of the Parliament were ineligible on the basis of s 44 of the *Australian Constitution*, which (amongst other things) precludes dual citizens from holding parliamentary office.² In over a century, s 44 of the *Constitution* had been invoked in only a handful of cases to find candidates or representatives ineligible to sit in the Commonwealth Parliament.³ Eighteen supposed members (out of 226) of the 45th Commonwealth Parliament which opened on 30 August 2016 have been found ineligible by the High Court of Australia sitting as the Court of Disputed Returns⁴ or have resigned in the face of apparent ineligibility arising from the Court’s interpretation of s 44 of the *Australian Constitution*.⁵

Australia is not the only jurisdiction where eligibility requirements for candidates have recently caused controversy. In the UK, since the Brexit referendum there have been a number of MPs and members of the House of Lords who have applied for Irish citizenship so as to retain citizenship of a member state of the European Union after the UK leaves the EU.⁶ In direct contrast to the position in Australia, dual citizenship of MPs is permitted in the UK. However, some MPs have suggested that an application for Irish citizenship by an

² David Fickling, ‘The World’s Most Ridiculous Constitutional Crisis’ (Bloomberg) <<https://www.bloomberg.com/view/articles/2017-08-16/australia-faces-the-world-s-most-ridiculous-constitutional-crisis>>.

³ See, eg, *Sykes v Cleary* (1992) 176 CLR 77; *Free v Kelly (No 2)* (1996) 185 CLR 296; *Sue v Hill* (1999) 199 CLR 462. See generally Matthew Stubbs (ed), Jack Richardson, *Australia’s Constitutional Government* (LexisNexis, 2016) 78-81.

⁴ Rodney Culleton (*Re Culleton [No 2]* (2017) 341 ALR 1); Robert Day (*Re Day [No 2]* [2017] HCA 14); Barnaby Joyce, Scott Ludlam, Larissa Waters, Malcolm Roberts, and Fiona Nash (*Re Canavan* [2017] HCA 45); Hollie Hughes (*Re Nash [No 2]* [2017] HCA 52); Stephen Parry and Jackie Lambie (*Re Parry* [2017] HCATrans 254 (8 December 2017)); Skye Kakoschke-Moore (*Re Kakoschke-Moore* [2018] HCATrans 2 (24 January 2018)); Katy Gallagher (*Re Gallagher* [2018] HCA 17). The Court concluded it lacked jurisdiction to entertain an additional claim: *Alley v Gillespie* [2018] HCA 11 (21 March 2018). Three representatives whose eligibility has been challenged have been found eligible: Matthew Canavan and Nick Xenophon (*Re Canavan* [2017] HCA 45); Steven Martin (*Re Lambie* [2018] HCA 6).

⁵ John Alexander, David Feeney, Justine Keay, Susan Lamb, Rebekha Sharkie and Josh Wilson.

⁶ Sam Coates, ‘MPs and peers join growing queue for an Irish passport’, *The Times* (online), 29 September 2016, <<https://www.thetimes.co.uk/article/mps-and-peers-join-growing-queue-for-an-irish-passport-gq6ncj0bn>>.

MP shows a level of disloyalty and that those MPs should stand down.⁷ In the United States, the requirement that the President be a ‘natural born Citizen’⁸ has led to questions being raised as to the eligibility of presidential candidates John McCain and Ted Cruz, who were both born outside of the United States.⁹ This requirement was also the source of the spurious ‘birther’ controversies regarding President Barack Obama.¹⁰

Little attention is devoted in electoral law and scholarship to the question of eligibility for candidature.¹¹ Areas that are well traversed include: the right to vote;¹² campaign financing;¹³ rules regulating the ability of a candidate to have their name placed on a ballot paper;¹⁴ the drawing of electoral boundaries,¹⁵ and the imposition of term limits.¹⁶ By comparison, there are few detailed considerations of eligibility for candidacy.¹⁷ However,

⁷ Tom Peck, ‘MPs Are Applying for Irish Passports After Brexit’, *Independent* (online), 29 September 2016 <<https://www.independent.co.uk/news/uk/politics/how-to-apply-for-an-irish-passport-brexit-latest-news-mps-peers-a7336911.html>>.

⁸ *United States Constitution* art II § 1.

⁹ See, eg, Neal Katyal and Paul Clement, ‘On the Meaning of “Natural Born Citizen”’ (2015) 128 *Harvard Law Review Forum* 161.

¹⁰ See, eg, Eugene D Mazo, ‘Rethinking Presidential Eligibility’ (2016) 85 *Fordham Law Review* 1045, 1061-3.

¹¹ See, eg, ‘disqualifying provisions have received little attention’: Caroline Morris, ‘On becoming (and remaining) a Member of Parliament’ [2004] *Public Law* 11, 12. For notable exceptions see below n 17. Indeed, at least in some of our jurisdictions, electoral law itself has traditionally been paid little attention: Graeme Orr, ‘The Cinderella Status of Electoral Law as a Field of Study in Australia’ (1998) 7 *Griffith Law Review* 166; Michael Pal, ‘Breakdowns in the Democratic Process and the Law of Canadian Democracy’ (2011) 57 *McGill Law Journal* 299, 301, 304.

¹² See, eg, Michael Dimino, Bradley Smith and Michael Solimine, *Voting Rights and Election Law* (LexisNexis, 2nd ed, 2015) 1-104; Samuel Issacharoff, Pamela Karlan, Richard Pildes and Nathaniel Persily, *The Law of Democracy: Legal Structure of the Political Process* (Foundation Press, 5th ed, 2016) 15-156; Daniel Lowenstein, Richard Hasen, Daniel Tokaji and Nicholas Stephanopoulos, *Election Law: Cases and Materials* (Carolina Academic Press, 6th ed, 2017) 29-82; David Schultz, *Election Law and Democratic Theory* (Ashgate, 2014) 83-118.

¹³ See, eg, Dimino et al, above n 12, 787-1030; Issacharoff et al, above n 12, 383-608; Lowenstein et al, above n 12, 807-1098; Schultz, above n 12, 229-68;

¹⁴ The United States situation has been memorably described as ‘a nationwide crazy quilt of ballot access laws’: Barry C Burden, ‘Multiple Parties and Ballot Regulations’ in Bruce E Cain, Todd Donovan and Caroline J Tolbert (eds), *Democracy in the States: Experiments in Election Reform* (Brookings Institution Press, 2008) 161, 161. See also: Dimino et al, above n 12, 497-548; Issacharoff et al, above n 12, 282-91; Lowenstein et al, above n 12, 623-58; Schultz, above n 12, 197-228;

¹⁵ See, eg, Dimino et al, above n 12, 265-418; Issacharoff et al, above n 12, 157-258; Lowenstein et al, above n 12, 83-140; Schultz, above n 12, 137-98;

¹⁶ See, eg, Thad Kousser, ‘Term Limits and State Legislatures’ in Cain et al (eds), above n 14, 117; Dimino et al, above n 12, 549-70.

¹⁷ There are, of course, some notable exceptions. In the UK context, see, eg Robert Blackburn, *The Electoral System in Britain* (1995, MacMillan) ch 5; Caroline Morris, *Parliamentary Elections, Representation and the Law* (2012, Hart); Michael Maley, ‘Candidates’ in Richard Rose (ed), *International Encyclopedia of Elections* (CQ Press, 2000) 31. In the Australian context, see Gerard Carney, *Members of Parliament: Law and Ethics* (2000, Prospect) chs 2-4; Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (2019, 2nd ed, Federation Press) ch 5; Graeme

the importance of a ‘full scale’ review of the law governing eligibility and disqualifications was recently acknowledged in a report by the Law Commission for England and Wales (in a project conducted jointly with the Scottish Law Commission and the Northern Ireland Law Commission).¹⁸ Further, the Joint Standing Committee on Electoral Matters of the Australian Parliament has recently called on Australians ‘to engage in a debate’ and reform eligibility requirements ‘to reflect the values of a modern Australia’,¹⁹ having reached the alarming conclusion that the Constitution presently disenfranchises ‘potentially half of all Australians’, denying ‘what should be their fundamental right in a democracy – nominating to stand for election’.²⁰ This article seeks to add to the understudied area of candidate eligibility and responds to these calls for national debates about eligibility.

The article is arranged as follows. First, we survey existing criteria for eligibility and disqualification across the common law democracies that form the basis of our study: Australia, Canada, New Zealand, the United Kingdom and the United States. These jurisdictions have been chosen because, while they all find their roots in the common law world, have taken made different choices when it comes to candidate eligibility. Despite the laws relating to candidate eligibility differing considerably across these jurisdictions, a

Orr, ‘Does an Unqualified but Losing Candidacy Upset an Election?’ (2015) 14 *Election Law Journal* 424. See also: Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament* (Commonwealth of Australia, 1981); Constitutional Commission, *Final Report of the Constitutional Commission, 1988: Volume One* (Australian Government Publishing Service, 1988) 274-307; House of Representatives Legal and Constitutional Affairs Committee, *Aspects of Section 44 of the Australian Constitution* (Commonwealth of Australia, 1997); Joint Standing Committee on Electoral Matters, *Excluded: The Impact of Section 44 on Australian Democracy* (Commonwealth of Australia, 2018). In the US, the issue has been given some limited consideration: Derek T Muller, ‘Scrutinizing Federal Electoral Qualifications’ (2015) 90 *Indiana Law Journal* 559; .On the related issue of the power of legislatures to expel members elected to them, see: Hugh B Rogers, ‘Power of Legislature to Disqualify Members-Elect’ (1967) 45 *North Carolina Law Review* 524; *Powell v McCormack*, 395 U.S. 486, 496 (1969).US (); Terrance Sandalow, ‘Comment on *Powell v. McCormack*’ (1969) 17 *University of California at Los Angeles Law Review* 164; Benjamin Cassady, ‘You’ve Got Your Crook, I’ve Got Mine: Why the Disqualification Clause Doesn’t (Always) Disqualify’ (2014) 32 *Quinnipiac Law Review* 209.

¹⁸ Law Commission of England and Wales, *Electoral Law*, Interim Report (4 February 2016) 175 [13.40]-[13.42]. Further, a review of disqualification from the Welsh National Assembly has also recently been conducted: National Assembly of Wales, Constitutional and Legislative Affairs Committee, *Inquiry into the Disqualification from Membership of the National Assembly of Wales* (July 2014).

¹⁹ Joint Standing Committee on Electoral Matters, above n 17, xxv.

²⁰ Ibid 2, 49-50. Similarly: ‘It is very important to the democratic life of Australia that ... [t]he Constitution should guarantee ... that persons are not arbitrarily prevented from putting themselves forward as candidates for election’: Constitutional Commission, *Final Report of the Constitutional Commission, 1988: Volume One* (Australian Government Publishing Service, 1988) 281.

common theme does emerge: eligibility requirements have often developed to address a specific undesirable characteristic of potential candidates or to respond to particular unforeseen events. While it might be expected that these jurisdictions would take a consistent approach, the piecemeal development that has actually occurred is instructive.

Secondly, we examine the underlying rationale for each of the main barriers to being an elected representative in our case study jurisdictions. Thirdly, we critique the existing situation on the basis of its poor democratic credentials, and advance our own proposal for reducing legal barriers to standing as a representative, whilst simultaneously implementing a comprehensive disclosure regime to empower and enable voters to serve a more effective role in ensuring the fidelity of their elected representatives.

Ultimately, in our view, an appropriate regime of legal disclosure obligations can place voters in a position to decide for themselves if a particular candidate will be impaired in their performance as an elected representative. Technological advances mean that information about candidates can be made available to electors more easily and more effectively than ever before. This ability to make information available to voters removes the need for blanket disqualifications. We argue that the approach we advance in this article can enhance democratic decision-making by the voters, and assist to ensure that public law facilitates political choice by the people, without running the risk of usurping the people's democratic choice through the enforcement of legal barriers to candidacy and service as an elected representative.

2. Existing Barriers Across the Five Jurisdictions

The criteria for eligibility and disqualification vary considerably across jurisdictions. In this section, we examine the eligibility and disqualification criteria for election to the national parliaments of Australia, Canada, New Zealand, the United Kingdom and the United States.²¹

²¹ The situation becomes vastly more complicated – although the common requirements and rationales remain generally consistent – if consideration is extended to the parliaments of constituent elements of each nation examined. As an example, for tables addressing eligibility and disqualification criteria in the Australian States, see: Joint Standing Committee on Electoral Matters, above n 17, 54-6.

This review reveals that the criteria are commonly expressed in two parts. First, there are laws setting qualifying criteria that a person must possess to be nominated as a candidate to be elected. Secondly, there are laws identifying disqualifying characteristics which either prevent the person from nominating or from being elected. These disqualifying characteristics often also apply to elected representatives, so that if they acquire one of these disqualifying characteristics after being elected, they will be disqualified from continuing as a representative.

Three Common Requirements: Registered Voter, Minimum Age and Citizenship

The three most common eligibility requirements are that the candidate must: be registered to vote; be a citizen of the country in which they are standing for election; and have attained a certain age. However, there are considerable differences in the use of these eligibility requirements across the five jurisdictions.

Registered Voter

In three of the jurisdictions surveyed, eligibility for candidacy is connected to a person's right to vote: a person is not eligible to become a candidate unless registered to vote²² or qualified to become registered to vote.²³ The effect of making eligibility to vote a criterion to be nominated as a candidate is that conduct that makes a person ineligible to vote will also thereby disqualify them as a candidate. Exceptions to this, where there is no requirement for a candidate to be registered to vote, are the United Kingdom²⁴ and the United States.

²² This is the case in Canada and New Zealand: see respectively *Canada Elections Act*, SC 2000, c 9, s 65(a) and *Electoral Act 1993* (NZ) s 47(1).

²³ In Australia, a candidate must be entitled to vote or 'qualified to become' entitled to vote to be nominated: *Commonwealth Electoral Act 1918* (Cth) s 163.

²⁴ In the UK, the criteria for voter eligibility and candidate eligibility are dealt with in separate pieces of legislation (although there is some similarity between the two). In the UK, candidates for parliamentary elections must be 18 years of age and must be either a 'qualifying Commonwealth citizen' or citizen of the Republic of Ireland, which are also requirements to be registered to vote: Compare *Electoral Administration Act 2006* (UK) c 22, ss 17 and 18 and *Representation of the People Act 1983* (UK) c 2, s 4. Section 18(2) of the *Electoral Administration Act 2006* sets out when a 'Commonwealth citizen' will be a 'qualifying Commonwealth citizen'. The definition of 'Commonwealth citizen' is defined in the *British Nationality Act 1981* and includes 'British citizen': see *British Nationality Act 1981* s 37.

Age

In most of the jurisdictions, the minimum age requirement placed on candidacy aligns with the minimum voting age.²⁵ The main exception is the United States. While the *United States Constitution* provides that all citizens 18 years or older have a right to vote,²⁶ the *Constitution* sets higher age limits to be eligible to be President (35 years of age),²⁷ a senator (30 years)²⁸ or member of the House of Representatives (25 years).²⁹ In Canada, there is a minimum age of 30 for the Senate,³⁰ but no minimum age for the lower house.

Interestingly, of the jurisdictions surveyed in this article, the only upper age-limit on candidates or members of the legislature is the 75 year compulsory retirement for senators in Canada.³¹ This general lack of an upper age-limit may be contrasted with the position in respect of judicial office in Australia,³² New Zealand,³³ and the United Kingdom,³⁴ where judicial retirement ages of 70 are enforced, and Canada which has a judicial retirement age of 75.³⁵ In contrast, with the exception of the Canadian Senate, an assessment of the suitability or senility of older candidates for election is left to the voters in the countries we examine.

Citizenship

The citizenship requirements vary considerably across jurisdictions. In Australia, Canada, New Zealand and the United States, a candidate must be a citizen of their respective country.³⁶ The *United States Constitution* places an additional requirement on members of the House of Representatives and senators, requiring them to have been a citizen for seven

²⁵ In all five jurisdictions the age to be eligible to vote is 18 years. See *Commonwealth Electoral Act 1918* (Cth) ss 93 and 163; *Canada Elections Act*, SC 2000, c 9, ss 3 and 65; *Electoral Act 1993* (NZ) ss 3, 47, 74; *Electoral Administration Act 2006* (UK) c 22, s 17 and *Representation of the People Act 1983* (UK) c 2, s 1. It was only relatively recently that the age for candidacy in the United Kingdom was lowered from 21 to 18 years of age: see *Electoral Administration Act 2006* (UK) c 22, s 17.

²⁶ *United States Constitution* amend. XXVI.

²⁷ *United States Constitution* art II § 1.

²⁸ *United States Constitution* art I § 3.

²⁹ *United States Constitution* art I § 2.

³⁰ *Constitution Act 1867* (Can) s 23(1).

³¹ *Constitution Act 1867* (Can) s 29(2).

³² *Australian Constitution* s 72.

³³ *Senior Courts Act 2016* (NZ) s 133.

³⁴ *Judicial Pensions and Retirement Act 1993* (UK) s 26.

³⁵ *Constitution Act 1867* (Can) s 99(2).

³⁶ *Commonwealth Electoral Act 1918* (Cth) s 163; *Canada Elections Act*, SC 2000, c 9, ss 3 and 65(a); *Electoral Act 1993* (NZ) s 47(3); *United States Constitution* art I §§ 2 and 3.

and nine years respectively.³⁷ In the case of the President, the *Constitution* requires that he or she be a ‘natural born Citizen’.³⁸ As noted above, this requirement was the source of the spurious ‘birther’ controversies regarding President Barack Obama,³⁹ and has led to questions being raised as to the eligibility of other potential candidates for President who were born outside the United States, including John McCain and Ted Cruz.⁴⁰

In the United Kingdom, it is not necessary to be a British citizen to be a member of parliament. Candidates in a parliamentary election need only be a ‘qualifying Commonwealth citizen’ or a citizen of the Republic of Ireland. The definition of ‘Commonwealth citizen’, which includes a British citizen, extends candidate eligibility to citizens of over 50 Commonwealth countries.⁴¹

Candidates in Australian federal elections are subject to an additional requirement beyond being an Australian citizen. Section 44 of the *Australian Constitution* states that a person who ‘is under any acknowledgement 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 citizen of a foreign power’ is not eligible to be chosen as a Senator or a member of the House of Representatives. The effect of s 44 is to prevent dual citizens from entering parliament. Of the countries surveyed in this article, Australia is the only country to prohibit dual citizens sitting in the national legislature. This requirement has recently caused considerable controversy in Australia, as noted above, when a significant number of sitting members and senators discovered they were dual citizens and thus ineligible. Because citizenship is a matter of foreign law,⁴² the possibility of unanticipated foreign citizenship being discovered is not insignificant, as the recent Australian experience indicates.

In New Zealand and Canada, a person will not be precluded from running as a candidate by virtue of dual citizenship. However, if a member of Parliament in New Zealand, *applies* for citizenship of another country or nominates as a candidate for election in another

³⁷ *United States Constitution* art I §§ 2 and 3.

³⁸ *United States Constitution* art II § 1.

³⁹ See, eg, Mazo, above n 10, 1061-3.

⁴⁰ See, eg, Katyal and Clement, above n 9.

⁴¹ *Electoral Administration Act 2006* (UK) c 22, s 18. The definition of ‘Commonwealth citizen’ is defined in the *British Nationality Act 1981* and includes ‘British citizen’: see *British Nationality Act 1981* s 37 and Schedule 3. Schedule 3 of the *British Nationality Act 1981* provides a list of countries whose citizens are ‘Commonwealth citizens’.

⁴² *Re Canavan* [2017] HCA 45, [37].

country *after* they are elected, they will be disqualified and their seat will be vacated.⁴³ Similarly, if a senator in Canada declares allegiance to a foreign power or takes up a new foreign citizenship they will become ineligible.⁴⁴ In New Zealand (and the Canadian upper house) therefore, a member of Parliament will only become ineligible to continue to sit as a member where they have taken positive steps to acquire citizenship of another country. This avoids the problems observed in Australia where members of parliament are ineligible when they ‘discover’ they are in fact dual citizens without having taken any active steps to become so.

The UK has no such restrictions. Indeed, New York-born former British Foreign Secretary Boris Johnson held both UK and US citizenships while in that role (although he has since renounced his US citizenship). Likewise, foreign citizenship alone is not a barrier to eligibility in Canada (although there is a further citizenship-related criterion discussed below for the Senate).⁴⁵ Even the US, with its requirements of periods of citizenship before eligibility (or, in the case of the President, birth as a citizen), has no barrier to dual citizens serving in the Congress.

While citizenship is an eligibility criterion in all jurisdictions (in one form or another), residency – and, in particular, residency in the electorate or constituency that the candidate represents – is not a common eligibility criteria. Although the idea of a requirement of residency has an ancient pedigree, Blackstone noted that the concept that ‘all members ought to be inhabitants of the places for which they are chosen ... is intirely disregarded’.⁴⁶ In Australia, New Zealand, Canada (for the lower house) and the United Kingdom, there are no residency requirements for candidates. In the United States, members and senators must ‘be an inhabitant of the *state* for which [they] shall be chosen’, however members need not live in the congressional district that they represent.⁴⁷ In Canada, senators (but not members of the lower house) must be resident in the Province they represent.⁴⁸ In Australia and New Zealand, residing outside the country will in some circumstances

⁴³ *Electoral Act 1993* (NZ) ss 55(1)(b)-(cb) and 55AA. See: Morris, above n 11.

⁴⁴ *Constitution Act 1867* (Can) s 31(2).

⁴⁵ See: *Canada Elections Act*, SC 2000, c 9, s 65.

⁴⁶ William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (Chicago: University of Chicago Press, 1979) 169-70.

⁴⁷ *United States Constitution* art I §§ 2 and 3 (emphasis added).

⁴⁸ *Constitution Act 1867* (Can) s 23(5).

indirectly exclude a person from being a candidate by virtue of the fact that overseas residency can potentially remove them as a voter from the electoral register.⁴⁹

Common Disqualifications

As well as setting out general eligibility requirements, each jurisdiction also has rules relating to the disqualification of candidates. These disqualifications identify certain characteristics or behaviour of candidates that are deemed to make them unsuitable for election. There are five common disqualifications that feature in a number of the jurisdictions surveyed: criminal conduct; bankruptcy; being of unsound mind; employment as a civil servant; and having a pecuniary interest deriving from the Crown. While each of these disqualifications is common to more than one of the jurisdictions surveyed, there is still considerable divergence across the five jurisdictions.

Criminal Conduct

Each jurisdiction deals with candidates who have engaged in criminal conduct quite differently. The rationale for disqualifying candidates on this basis appears to stem from two distinct underlying principles. The first is based upon a judgement of character: that those who have engaged in certain criminal conduct are unsuitable for election to office. The second is informed by the fact that those serving a term of imprisonment will not physically be able to attend the sittings of parliament nor engage in electoral activities.

In New Zealand, a person serving a term of imprisonment is disqualified from voting, and is thereby also disqualified as a candidate.⁵⁰ New Zealand electoral law also creates a ‘Corrupt Practices List’.⁵¹ The list provides the names of persons who have been convicted of a corrupt practice or ‘reported by the High Court on the trial of an election petition to have been proved guilty of a corrupt practice’. A person whose name appears on this list is disqualified from voting, and thereby also barred from being a candidate, for a period of three years.⁵²

⁴⁹ See *Commonwealth Electoral Act 1918* (Cth) s 94 and *Electoral Act 1993* (NZ) s 80.

⁵⁰ *Electoral Act 1993* (NZ) s 80(1)(d). For a discussion of s 80(1)(d), see *Taylor v Attorney-General* [2015] NZHC 1706. A sitting member who is convicted of an offence punishable by a term of imprisonment of 2 or more years will have their seat vacated: *Electoral Act 1993* (NZ) s 55(1)(d).

⁵¹ *Electoral Act 1993* (NZ) s 100. The Act expressly defines certain electoral offences as ‘a corrupt practice’.

⁵² *Electoral Act 1993* (NZ) s 80(1)(e).

In Australia, a person convicted of treason or treachery or serving a sentence of imprisonment of three years or longer is not entitled to vote, and is therefore also ineligible to be nominated as a candidate.⁵³ However, the *Constitution* extends these legislative provisions in some respects by disqualifying any person who has been ‘attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer’⁵⁴ from being chosen as a senator or member. In addition, a person convicted of certain electoral offences – related to bribery and undue influence – is prevented from becoming a member of either House of the Commonwealth Parliament for a period of two years from the date of that conviction.⁵⁵

In Canada, ‘a person who is imprisoned in a correctional institution’ is ineligible to be elected.⁵⁶ Interestingly, although disenfranchisement of convicted felons (in some cases for life) is extremely widespread in the United States,⁵⁷ there is no barrier to the election to Congress of a person on the basis of their criminal convictions.

In the United Kingdom, a person sentenced to a term of imprisonment of more than one year is ineligible to sit as a member of the House of Commons during the period of imprisonment.⁵⁸ A person found to have engaged in corrupt practices or illegal practices in relation to certain electoral offences is prevented from being elected to the House of Commons for periods of five and three years respectively.⁵⁹

The current prohibition on prisoners being ineligible to sit in the House of Commons was introduced in 1981 following the election of Bobby Sands in the by-election for the seat of Fermanagh and South Tyrone in Northern Ireland.⁶⁰ Sands was a member of the Provisional IRA and was a prisoner at HM Prison Maze at the time of his election. The prohibition against persons serving a period of imprisonment of more than one year was

⁵³ *Commonwealth Electoral Act 1918* (Cth) sub-ss 93(8)(b) and 93(8AA).

⁵⁴ *Australian Constitution* s 44(ii).

⁵⁵ *Commonwealth Electoral Act 1918* (Cth) s 386.

⁵⁶ *Canada Elections Act*, SC 2000, c 9, s 65(g).

⁵⁷ See, eg, Afi S Johnson-Parris, ‘Felon Disenfranchisement: The Unconscionable Social Contract Breached’ (2003) 89 *Virginia Law Review* 109; Jason Schall, ‘The Consistency of Felon Disenfranchisement with Citizenship Theory’ (2006) 22 *Harvard Blackletter Law Journal* 53.

⁵⁸ *Representation of the People Act 1981* (UK) c 34, s1.

⁵⁹ *Representation of the People Act 1983* (UK) c 2, ss 160 and 173.

⁶⁰ See, eg, Navraj Singh Ghaleigh, ‘The Alleged Incapacities of Mr. Sheridan’ (2011) 15 *Edinburgh Law Review* 243.

introduced to disqualify Sands. The prohibition was justified on the basis that it had previously been the law in the UK that prisoners were disqualified from membership of the House and that the 1981 amendments were simply reverting back to this long-established position. The reform was also justified on the basis that the law already provides a rather lengthy list of exclusions⁶¹ and that this amendment simply ‘adds another group to that long list’.⁶² There was some opposition to the prisoner disqualification on the basis that this sort of discrimination diminishes the citizen’s right to choose their representative in Parliament. As one MP argued:

It is wrong to say that if people elect an imprisoned candidate it the same as not having any election or any Member of Parliament. An imprisoned Member of Parliament can influence events. Indeed he may be able to do so because of his imprisonment. The constituency may prefer to elect a Member of Parliament who is a token of their opinion—and who, as such, can influence events—rather than a Member of Parliament who asks written questions and who goes to local constituency meetings.⁶³

Central to this argument was the view that Parliament should not substitute its view for what constituted a suitable MP with that decided by the electorate; it is for the electorate to decide who is best suited to represent them.

Bankruptcy

In Australia and the United Kingdom, undischarged bankrupts are disqualified from sitting in parliament,⁶⁴ whereas there is no such restriction in New Zealand or the United States. In Canada, bankruptcy is a disqualification in the Senate,⁶⁵ but not in the lower house.

Being of Unsound Mind

In Australia and New Zealand, voters of ‘unsound mind’ will be ineligible to register to vote, and by virtue of that fact, are also ineligible to be nominated as a candidate for

⁶¹ Including: ‘aliens, bankrupts, ... civil servants, members of the Armed Forces, policemen, judges, holders of various offices which Parliament has held to be incompatible with membership of this House, and clergymen and peers’: see *Hansard*, House of Commons, 22 June 1981, vol 7, col 29 (William Whitelaw, Secretary of State for the Home Department). The list of disqualifications is set out in *House of Commons Disqualification Act 1975* (UK) c 24, s 1 and Schedule 1.

⁶² *Ibid.*

⁶³ *Hansard*, House of Commons, 22 June 1981, vol 7, col 34 (Roy Hattersley, Birmingham, Sparkbrook).

⁶⁴ *Australian Constitution* s 44(iii); *Insolvency Act 1986* (UK) c 45, s 426A.

⁶⁵ *Constitution Act 1867* (Can) s 31(3).

election.⁶⁶ There is no such provision in the United Kingdom, and while there was previously provision for members of parliament suffering from a mental illness to be removed,⁶⁷ this is no longer the case.⁶⁸ Similarly, Canada removed a mental illness disqualification in 1993. The United States has not ever had such a disqualification in federal law, although various State laws contain provisions to similar effect.⁶⁹

Government Employees and Contractors

There is considerable divergence across the jurisdictions as to whether government employees and holders of contracts with the government can nominate as candidates for election. The strictest approach is taken in Australia. First, a person who ‘holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth’ (effectively a government employee) is prevented from becoming a senator or member of the House of Representatives.⁷⁰ The effect of the provision is to exclude public servants and statutory office holders from running for election to the federal parliament. This provision has been applied to disqualify a State school teacher,⁷¹ a member of the Royal Australian Air Force,⁷² and a member of the Commonwealth Administrative Appeals Tribunal,⁷³ from the federal Parliament. Second, persons are also ineligible if they have ‘any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons’.⁷⁴ This provision has been used to disqualify a senator who enjoyed, albeit through company and trust structures, an entitlement to be paid rent by the Commonwealth.⁷⁵

⁶⁶ *Commonwealth Electoral Act 1918* (Cth) s 93(8)(a); *Electoral Act 1993* (NZ) s 80(1)(c).

⁶⁷ *Mental Health Act 1983* (UK) c 20, s 141.

⁶⁸ *Mental Health (Discrimination) Act 2013* (UK) c 8, s 1(1).

⁶⁹ See, eg, Jennifer A Okwerekwu, James B McKenzie, Katherine A Yates, Renee M Sorrentino and Susan Hatters Friedman, ‘Voting by People with Mental Illness’ (2018) 46(4) *Journal of the American Academy of Psychiatry and Law* 1.

⁷⁰ *Australian Constitution* s 44(iv).

⁷¹ *Sykes v Cleary* (1992) 176 CLR 77.

⁷² *Free v Kelly (No 2)* (1996) 185 CLR 296.

⁷³ *Re Nash [No 2]* [2017] HCA 52.

⁷⁴ *Australian Constitution* s 44(v).

⁷⁵ *Re Day [No 2]* [2017] HCA 14.

In the United Kingdom, employees of the civil service, police officers, members of the armed forces, and judicial officers are all disqualified from membership of the House of Commons.⁷⁶ In addition, members of some statutory bodies and some statutory office holders are also prevented from becoming a member of the House of Commons.⁷⁷ Members of the House of Lords are also unable to sit as members of the Commons.⁷⁸ Membership of the European Parliament is also incompatible with being a member of the House of Commons.⁷⁹ '[M]ember[s] of the legislature of any country or territory outside the Commonwealth (other than Ireland)' ⁸⁰ are also not able to sit in the House of Commons. However, it does create the situation where members of the House of Commons could also be a member the Irish Parliament or the legislature of a Commonwealth country.⁸¹

New Zealand takes a very different approach to civil servants standing for election. Rather than precluding them from standing, the civil servant is placed on a leave of absence during their candidature.⁸² The only exception to this is that some electoral officials are disqualified from candidacy.⁸³ In Canada, the two most senior electoral officials are the only government employees made ineligible;⁸⁴ no equivalent disqualifications exist in the United States for Congressional aspirants.

Of the five jurisdictions, therefore, Australia has the most elaborate provisions addressing the potential conflict of interest arising from employment or contract with the government.⁸⁵ The UK also has provisions disqualifying government employees, whilst

⁷⁶ *House of Commons Disqualification Act 1975* (UK) c 24, s 1.

⁷⁷ *House of Commons Disqualification Act 1975* (UK) c 24, s 1.

⁷⁸ This applies to both Lords Spiritual and Lords Temporal: see respectively *House of Commons Disqualification Act 1975* (UK) c 24, s 1(za) and *House of Lords Act 1999* (UK) c 34, s 3.

⁷⁹ *European Parliamentary Elections Act 2002* (UK) c 24, s 10(8).

⁸⁰ *House of Commons Disqualification Act 1975* (UK) c 24, s 1(e)

⁸¹ Caroline Morris, *Parliamentary Elections, Representation and the Law* (Hart, 2012) 51.

⁸² *Electoral Act 1993* (NZ) s 52.

⁸³ An Electoral Commissioner, a Deputy Electoral Commissioner, a Returning Officer, a Registrar of Electors and a Deputy Registrar of Electors are all disqualified from becoming a candidate: *Electoral Act 1993* (NZ) s 47A. Presumably this is felt necessary to preserve the integrity of the electoral process more generally.

⁸⁴ *Canada Elections Act*, SC 2000, c 9, sub-ss 4(a) and (b).

⁸⁵ The inability of judges to be elected varies across jurisdictions. Judges are expressly excluded from eligibility in the United Kingdom (see above n 76) and Canada (*Canada Elections Act*, SC 2000, c 9, s 65(f)). In Australia, High Court judges are not able hold any other office of profit: *High Court of Australia Act 1979* (Cth) s 10. A judge would likely be ineligible under s 44(iv) as a holder of an office of profit under the Crown. Judges in New Zealand are not permitted to hold office or other

New Zealand addresses the potential conflict from a different viewpoint – enforcing a leave of absence from the government employment, which preserves the eligibility of the employee to be elected.

Property

Surprisingly, eligibility for election to the Senate in Canada still requires a property qualification,⁸⁶ although the effects of inflation have rendered this a low barrier in practice.

United States Exceptionalism

One jurisdiction stands out in this analysis: the United States. Aside from its requirements of age, citizenship and State residence, the *Constitution* erects no other barriers to candidature nor further grounds for disqualification. This was not accidental –⁸⁷ as Madison wrote in *The Federalist No. 52*:

Under these reasonable limitations, the door of this part of the federal government is open to men of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth or to any particular profession of religious faith.

Our other case study jurisdictions are all notably more interventionist, paralleling the more extensive British history of disqualification provisions which can be traced back at least as far as the *Act of Settlement* (1701).⁸⁸

3. The Underlying Rationale for Barriers to Candidacy

Having examined the detail of the various barriers to candidacy in our five case study jurisdictions, we now seek to understand the rationales that underly these. As we noted at the outset, barriers to eligibility to serve as a representative have at their foundation a noble aim: ‘to secure, on the part of the representatives, fidelity, sound judgment, competent information, and incorruptible independence.’⁸⁹ In this section of our paper, we examine

employment without approval from the appropriate head of court: *Senior Courts Act 2016* (NZ) s 142.

⁸⁶ *Constitution Act 1867* (Can) sub-ss 23(3) and (4).

⁸⁷ See, eg Rogers, above n 17; Cassidy, above n 17.

⁸⁸ 12 & 13 Will III c 2, s 3: ‘no Person born out of the Kingdoms of England Scotland or Ireland or the Dominions thereunto belonging (although he be ... made a Denizen...) shall be capable to be ... a Member of either House of Parliament’, ‘no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons’.

⁸⁹ Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard, Gray & Co, 1833) [612].

the justifications advanced for the barriers identified in our study, considering illustrative individual examples before reflecting collectively on the barriers as a whole.

An Integrity Rationale: The Australian Bankruptcy Example

As noted above, Australia and the UK disqualify undischarged bankrupts from candidacy. During the drafting of the *Australian Constitution*, the arguments for and against a bankruptcy disqualification were exemplified by two of the leading contributors – Premier of New South Wales George Reid, and former Premier of South Australia Sir John Downer. Downer supported a bankruptcy disqualification on moral grounds:

it will be a bad day for Australia, as it would be for any country, if bankruptcy is considered merely a venial matter, and not one that involves great disgrace. ... We are becoming thinner and thinner in regard to our commercial morality, and our morality in other directions is also becoming thinner. ... It is a good condition to start with that a man shall have to pay his way if he is to be a member of the Federal Parliament.⁹⁰

Reid opposed a bankruptcy disqualification on the grounds that it was a matter for the electors:

a man who falls into financial trouble – and many do, not from dishonesty, but from sheer misfortune – perhaps the roguery of others – should be able to submit himself to his constituency for their judgment, to be re-elected. We sufficiently vindicate the cause of honesty if we leave him in their hands. If his conduct has been disgraceful, we can expect that the constituency will deal with him.⁹¹

Joseph Carruthers went further in claiming a right for the people to make the choice:

The electors of the country have a right to make their choice, and if they choose to be represented by a man who is compelled by the necessities of his life to become bankrupt or insolvent, surely it is not our business to take away that choice from them.⁹²

In this snapshot, we see three distinct perspectives on the bankruptcy disqualification. First, that it should be a legal barrier, justified on moral grounds. Second, that it should be a political consideration, *capable* of being solved by the electorate. Third, that it should be a political consideration, which *must* properly be left to the people. It is the third of these

⁹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 7 March 1898, 1934 (Sir John Downer).

⁹¹ *Ibid* 1934 (George Reid).

⁹² *Ibid* 1933 (Joseph Carruthers).

perspectives – which did not command majority support in the drafting of s 44 of the *Australian Constitution* – that aligns with our argument in this article. For the reasons we address later, bankruptcy should not be a legal barrier to candidacy, but is a relevant fact that voters should be informed of in making their electoral choice.

A Competency Rationale: The US Age Requirement

A century earlier on the other side of the world, similar perspectives were aired at the Federal Convention in Philadelphia. As reported by James Madison, debates as to whether to include the minimum age of 25 for election to the House of Representatives saw leading minds advocate on both sides of the issue. George Mason, the great Virginian statesman, supported the inclusion of the age requirement on two bases. First, consistency with other laws regarding capacity: it was ‘absurd that a man to day should not be permitted by the law to make a bargain for himself, and tomorrow should be authorized to manage the affairs of a great nation’.⁹³ Second, lack of experience: he conceded that ‘his political opinions at the age of 21. were too crude & erroneous to merit an influence on public measures’.⁹⁴

James Wilson, who would later be in the first group of Associate Justices appointed to the Supreme Court of the United States, opposed the requirement, expressing his opposition to:

abridging the rights of election in any shape. It was the same thing whether this were done by disqualifying the objects of choice, or the persons chusing. The motion tended to damp the efforts of genius, and of laudable ambition. There was no more reason for incapacitating youth than age ... Many instances might be mentioned of signal services rendered in high stations to the public before the age of 25.⁹⁵

In part, this is a disagreement about a minimum age qualification, and it is interesting that one of the rationales advanced is based on the competence of candidates for election. However, these exchanges reveal two more fundamental points. First, Wilson advocates leaving matters of competence to the electors, and not imposing legal requirements to supplant the voters’ choice. Second, Wilson expressly links the right to vote with eligibility

⁹³ Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press, 1911) vol 1, 375, 22 June 1787.

⁹⁴ Ibid.

⁹⁵ Ibid.

to be a candidate, arguing that interference with either voting or candidacy is equally undemocratic. Each of these facets of the debate is relevant to the argument we articulate in the following section of this article.

A Conflict of Interest Rationale: The Australian ‘Office of Profit’ Barrier

Debates surrounding the insertion of the Australian disqualification of any person holding an ‘office of profit under the Crown’ demonstrate the conflict of interest rationale for barriers to eligibility. Again, leading figures can be found on each side of the issue. Advocating for this disqualifying factor, Victorian Attorney-General (and later Justice and Chief Justice of the High Court of Australia) Isaac Isaacs explained that:

We should be careful to do all that is possible to separate the personal interests of a public man from the exercise of his public duty ... The public are interested in seeing and ensuring, so far as it is possible to ensure it, that no member of Parliament shall for his own personal profit allow his judgment to be warped in the slightest when he is called upon to decide on questions of public moment.⁹⁶

In contrast, Henry Higgins (also a future Justice of the High Court) thought this an insufficient reason to interfere with the free electoral choice of the voters, explaining that: ‘the object is to prevent political appointments. At the same time the danger is infinitesimal as compared with the advantage of having a free selection’.⁹⁷

Again, we see – in Higgins’ opposition to a barrier to eligibility to avoid a conflict of interest – a democratic objection: that the democratic advantage of avoiding the potential for conflicts of interest is outweighed by the disadvantage of interfering with the free choice of the voters.

A Classification of Justifications for Barriers to Eligibility

Having now seen examples of the justifications advanced for some of the key barriers to eligibility (one each arising from concerns of morality, competency and conflict of interest), we now consider more generally how the various barriers fit together. Reviewing the parliamentary system in Britain, Robert Blackburn explained that a ‘fundamental

⁹⁶ *Official Report of the National Australasian Convention Debates*, Adelaide, 21 April 1897, 1037-8, cited in *Re Day [No 2]* [2017] HCA 14, [33] n 28 (Kiefel CJ, Bell and Edelman JJ), [174] (Keane J), [270] (Nettle and Gordon JJ).

⁹⁷ *Official Report of the National Australasian Convention Debates*, Sydney, 21 September 1897, 1031.

principle of candidature is that the electorate should be as free as possible to choose whomsoever they wish to represent them.’⁹⁸ These remarks are apposite to all of the jurisdictions examined in this article. However, given the numerous eligibility requirements and disqualifying criteria that apply to candidates in each of the jurisdictions we surveyed, it might be questioned whether the electorate is, in fact, ‘as free as possible’ to choose their preferred candidate.

Against the overarching principle that the electorate should be as free as possible to choose their representative is an assumption that there are some characteristics that would make a person unsuitable for election, which necessitates making them ineligible for candidacy. Michael Maley has suggested that candidate eligibility rules fall broadly into five categories:

1. ‘[C]ertain minimal and basic requirements that do little more than define membership of the body politic’;
2. ‘Pragmatic judgments as to the qualities that a person will need in order to function effectively as a representative’;
3. ‘Requirements ... that reflect a desire to enhance the image or effectiveness of the body for which members are chosen’, for example, having a certain level of education;
4. ‘Candidates who advocate political positions that are generally held inconsistent with the basic political norms of society or of the international community’, for example, candidates advocating racial hatred;
5. ‘Disqualifications that reflect moralistic rather than pragmatic judgments’, for example, disqualifying undischarged bankrupts from being a candidate.⁹⁹

Noting that the third and fourth categories do not feature in the United Kingdom’s eligibility requirements for candidates,¹⁰⁰ Caroline Morris has reformulated these categories, explaining that candidate eligibility rules fall into three categories:

1. competency;
2. conflict of interests; and

⁹⁸ Robert Blackburn, *The Electoral System in Britain* (MacMillan, 1995) 157.

⁹⁹ Michael Maley, ‘Candidates’ in Richard Rose (ed), above n 17, 31.

¹⁰⁰ Nor do they feature in the other jurisdictions surveyed in this article.

3. personal and systemic integrity.¹⁰¹

The eligibility requirements in all of the jurisdictions surveyed in this article broadly fall into these three categories. However, while Morris' tripartite categorisation (competency, conflicts, integrity) might be helpful in grouping the various types of disqualifications, there are significant differences across jurisdictions as to the rules in each category.

Moreover, the way in which each country has addressed the underlying rationale for eligibility requirements is not always internally consistent. For example, why is it that an undischarged bankrupt is ineligible for election in the Australia, but there is no similar restriction on candidacy for a disqualified company director?¹⁰² If the rationale for making an undischarged bankrupt ineligible for election is based on the individual failing to have the necessary competency or personal integrity to hold office, there seems little distinction between the mismanagement of personal finances and the mismanagement of a company while acting as a director.

Further, the inclusion of a minimum age requirement for candidates (such as in the United States) on the basis of age bringing with it expertise and experience seems difficult to reconcile where there is no requirement for the candidate to be literate and (generally) no upper age limit (in case a candidate's mental acuity might decline with advanced age).

The result is that some matters of 'personal integrity' or 'competency' are legislated so as to prohibit candidacy, while other matters of integrity and competency are left to the voter to determine whether the candidate's character makes them unsuitable for election (if, indeed, the voter is aware of the issue). There is no obvious underlying rationale for this piecemeal and internally inconsistent approach. Nor is there a compelling explanation for why each barrier is justified in being erected as a legal impediment to eligibility, rather than as a factor relevant to the political choice of the electorate. As we have explained in this section of the article, candidacy eligibility requirements have often developed to address a specific undesirable characteristic of potential candidates (such as those holding an 'office of profit under the Crown') or to respond to particular unforeseen events (such as the case of the election of Bobby Sands).

¹⁰¹ Caroline Morris, *Parliamentary Elections, Representation and the Law* (Hart, 2012) 50.

¹⁰² The Australian Securities and Investment Commission (ASIC) has the power to disqualify a person from managing a corporation for up to 5 years: see *Corporations Act 2001* (Cth) s 206F.

We now turn to consider how this existing situation might be remedied by pursuing a more democratic solution to guard against threats to the integrity, competence and public-mindedness of elected representatives.

4. A Proposal to Facilitate a More Democratic Solution

In this final substantive section, we articulate a proposal for a democratic solution to the difficulties of candidate eligibility. We first consider the issue from a human rights perspective. We then seek to develop a principled understanding of representative democracy which can be used in the articulation of a democratic solution..

A Human Rights Perspective

One means of approaching the issue in this article is to consider a human rights perspective on eligibility for candidacy. Article 25 of the *International Covenant on Civil and Political Rights (ICCPR)* enshrines a right not only to vote but also ‘to be elected at genuine periodic elections’.¹⁰³ In its General Comment on this article, the Human Rights Committee interprets this right to mean that the right to be elected may only be restricted in the application of ‘objective and reasonable criteria’.¹⁰⁴

It may be noted that this is not a particularly impressive democratic standard. The Committee gives the example that ‘it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote’, without offering any justification for why this should be so. The Committee expresses its general guidance on eligibility for candidacy in the following terms:

The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be

¹⁰³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 25.

¹⁰⁴ Human Rights Committee, *General Comment 25*, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996), [4].

excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.¹⁰⁵

In assuming that an age restriction may be justified, and in focussing on what seem to us to be gross violations of the right which are of scant relevance to our case study jurisdictions, the Human Rights Committee in its General Comment appears to us to offer little guidance on the issues we have identified. It might be noted, however, that the list of ‘unreasonable or discriminatory requirements’ may be capable of invalidating disqualifications on the basis of dual nationality, which have been the main source of ineligibility in Australia.

In its individual communications jurisprudence, the Human Rights Committee has provided some additional guidance as to the requirements of art 25 of the *ICCPR*. It has upheld a 12-month ban from candidature after breaching electoral laws,¹⁰⁶ but struck down a 7-year ban after conviction for contempt of court.¹⁰⁷ It has also struck down a language proficiency requirement for eligibility on the ground it had been arbitrarily applied, whilst implying the requirement may have been impermissible in any event on the grounds of discrimination.¹⁰⁸

Greater insights are available from the jurisprudence of the European Court of Human Rights on art 3 of Protocol I to the *European Convention on Human Rights*,¹⁰⁹ which requires States parties: ‘to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. The Court has expressly held that this creates an individual ‘right to stand for election to the legislature’.¹¹⁰ Indeed, the Court has held that ‘[t]he right to stand as a candidate in an election ... is inherent in the concept of a truly democratic regime’.¹¹¹ This right may be limited only by law where:

¹⁰⁵ Ibid [15].

¹⁰⁶ *Crippa v France*, UN Doc CCPR/C/85/D/993-995/2001 (28 October 2005).

¹⁰⁷ *Dissanayake v Sri Lanka*, UN Doc CCPR/C/93/D/1373/2005 (22 July 2008).

¹⁰⁸ *Ignatane v Latvia*, UN Doc CCPR/C/72/D/884/1999 (25 July 2001).

¹⁰⁹ *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, (1952) ETS 9 (entry into force 18 May 1954).

¹¹⁰ *Mathieu-Mohin and Clerfayt v Belgium* (European Court of Human Rights, Application No 9267/81, 2 March 1987) [51]. See also: *Ždanoka v Latvia* (European Court of Human Rights – Grand Chamber, Application No 58278/00, 16 March 2006) [102].

¹¹¹ *Podkolzina v Latvia* (European Court of Human Rights, Application No 46726/99, 9 April 2002) [35].

the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate ... In particular, such conditions must not thwart “the free expression of the opinion of the people in the choice of the legislature”.¹¹²

This establishes an important baseline against which restrictions on eligibility for candidature can be assessed. However, the Court has noted the margin of appreciation enjoyed by parliaments in prescribing restrictions:

Contracting States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with the historical and political factors specific to each State. The multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area.¹¹³

Moreover, the Court has also indicated that restrictions on eligibility for candidacy may be stricter than those on the right to vote.¹¹⁴

In applying these principles to individual cases, the Court has upheld a ban on former communist party members being elected in Latvia,¹¹⁵ but struck down a ban on former KGB officials being elected in Latvia,¹¹⁶ upheld a requirement for the payment of a deposit by candidates in the Ukraine,¹¹⁷ struck down disqualifications of members of particular ethnic groups in Bosnia-Herzegovina,¹¹⁸ upheld the disqualification of a candidate who

¹¹² *Mathieu-Mohin and Clerfayt v Belgium* [52]; see also: *Ždanoka v. Latvia* [103].

¹¹³ *Ždanoka v. Latvia* [106].

¹¹⁴ *Etxebarria v Spain* (European Court of Human Rights, Application No 35579/03, 30 June 2009) [50]: ‘le droit de se présenter aux élections législatives peut être encadré par des exigences plus strictes que le droit de vote’; *Davydov v Russia* (European Court of Human Rights, Application No 75947/11, 30 May 2017) [286] ‘A broader margin of appreciation can be afforded to States where the measures prevent candidates from standing for election’.

¹¹⁵ *Ždanoka v Latvia*.

¹¹⁶ *Ādamsons v Latvia* (European Court of Human Rights, Application No 3669/03, 24 June 2008).

¹¹⁷ *Sukhovetsky v Ukraine* (European Court of Human Rights, Application No 13716/02, 26 March 2006).

¹¹⁸ *Sejdić and Finci v Bosnia-Herzegovina* (European Court of Human Rights – Grand Chamber, Application No 27996/06, 22 December 2009); *Zornić v Bosnia-Herzegovina* (European Court of Human Rights, Application No 3681/06, 15 July 2014).

lied about their occupation in nomination paperwork,¹¹⁹ struck down a language test (which might prima facie have been permissible) that was applied in a discriminatory manner in Latvia,¹²⁰ and struck down a residence requirement (which might prima facie have been permissible) that was applied in an arbitrary manner in the Ukraine.¹²¹

However, as appears from the above, and as the Court has acknowledged, it is difficult to draw general conclusions from these individual instances, as ‘any electoral legislation must be assessed in the light of the political evolution of the country concerned’¹²² and therefore the Court has gone so far as to hold that ‘features unacceptable in the context of one system may be justified in the context of another’.¹²³

Nonetheless, of particular relevance is the decision in *Tănase v Moldova*,¹²⁴ where the Grand Chamber held that a Moldovan law preventing dual citizens from being elected was in breach of the *European Convention on Human Rights*. The Court did not reach a final conclusion on whether such a measure could be justified on the basis of seeking to ensure loyalty of elected representatives, but noted pointedly that ‘the Government have been unable to provide a single example of an MP with dual nationality showing disloyalty’.¹²⁵ It was not necessary to finally resolve that issue because the Court concluded that the laws were in any event disproportionate, pointing to the availability of ‘other means of protecting Moldova’s laws, institutions and national security’¹²⁶ and particularly criticising the impact of the laws which were ‘solely, or principally, to the disadvantage of the opposition’.¹²⁷ The reasoning of the Grand Chamber in *Tănase* leaves little doubt that Australia’s ban on dual citizens would be found to be in breach of the *European Convention on Human Rights*, if its provisions applied to Australia.

International human rights law therefore provides an important perspective on the right to be a candidate for elections. Jurisprudence in both the international and European systems

¹¹⁹ *Krasnov and Skuratov v Russia* (European Court of Human Rights, Application No 17864/04, 19 July 2007).

¹²⁰ *Podkolzina v Latvia*.

¹²¹ *Melnychenko v Ukraine* (European Court of Human Rights, Application No 17707/02, 19 October 2004).

¹²² *Ždanoka v Latvia* [106].

¹²³ *Ibid* [115].

¹²⁴ European Court of Human Rights – Grand Chamber, Application No 7/08, 27 April 2010.

¹²⁵ *Ibid* [169].

¹²⁶ *Ibid* [175].

¹²⁷ *Ibid* [179].

requires that limitations on eligibility for candidacy be justified as pursuing a legitimate aim and doing so in a proportionate manner. However, we also agree that a human rights lens should not be determinative of itself: ‘a singular focus ... on the constitutional harm to the individual claimant is insufficient for election law because the real concerns to be addressed are systemic harms’.¹²⁸ We turn, therefore, to an investigation of a democratic conception of the importance of wide eligibility for candidacy.

The Basis for a Democratic Solution: Linking the Franchise with Eligibility for Candidature

Pitkin’s definition of representation as ‘acting in the interest of the represented, in a manner responsive to them’¹²⁹ offers a useful starting point in considering how to treat issues that bear on a candidate’s ability to serve faithfully and effectively as an elected representative. On one view, anything that would prevent a representative acting in the way Pitkin describes *could* be a reasonable ground for ineligibility for candidacy. However, before it can be concluded that such factors *should* be grounds for legal ineligibility, there is an equally important issue that must be addressed – whether such factors are properly relevant to the electoral choice of the public, or to an individual’s eligibility for candidacy. For it may be, as Thomas Jefferson argued when resisting the imposition of a requirement of residency, that ‘the partialities of the people are a sufficient security’ against imprudent electoral choice.¹³⁰

For us, as for some other scholars in the field, the starting point for any examination of eligibility requirements for candidacy is that voters should generally be able to choose whoever they want as their representative.¹³¹ It should also be recalled that restrictions on the eligibility of candidates are not only a restriction on the candidates themselves, but also

¹²⁸ Pal, above n 11, 305-6.

¹²⁹ H F Pitkin, *The Concept of Representation* (University of California Press, 1967) 209.

¹³⁰ Thomas Jefferson to Joseph C Cabell (31 Jan 1814) in Paul Leicester Ford (ed), *The Works of Thomas Jefferson* (G P Putnam’s Sons, 1905) vol 11, 380-1.

¹³¹ Robert Blackburn, *The Electoral System in Britain* (MacMillan, 1995) 157; Richard Katz, *Democracy and Elections* (Oxford University Press, 1997) 246. See also National Assembly of Wales, Constitutional and Legislative Affairs Committee, *Inquiry into the Disqualification from Membership of the National Assembly of Wales* (July 2014) 19; the comment of the Electoral Reform Society Wales: ‘We would view any kind of restriction on people’s ability to stand ... as a restriction on their democratic freedom’: at 20.

a restriction on voters' freedom to 'choose whomsoever they wish to represent them'.¹³² Barriers to eligibility limit the voters' choice by not letting the voter determine which characteristics make a candidate (un)suitable for election.¹³³

There are a number of reasons for our argument that restrictions on candidate eligibility should generally mirror voter eligibility. First, as is explained above, the existing disqualifications for candidates are piecemeal and provide no assurance that those elected will necessarily possess the characteristics required to undertake their position in elected office. Second, restrictions on eligibility undermine the democratic process: they restrict the freedom of the voter both in terms of *who* they elect and also by restricting voter choice as to *what* characteristics they think relevant to determining a person's suitability for elected office. Third, it creates two tiers to membership of the community and a situation where some members of the community are able to 'participate in the community's self-governance',¹³⁴ through voting but not participate as a candidate. If granting someone the right to vote is allowing them to participate in the community's self-governance, then that participation should extend equally to the representation of that community (through being elected to public office). The interrelationship of voting and standing for election as hallmarks of democratic participation has been recognised by the Supreme Court of Canada in its relevant Charter jurisprudence. In *Figueroa v Canada (Attorney General)*,¹³⁵ the majority judgment stated that:

the electoral process is ... the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the

¹³² Robert Blackburn, *The Electoral System in Britain* (MacMillan, 1995) 157. A similar argument has been made by the UK Electoral Commission: 'Disqualifications are a limit on people's freedom to stand for election and indeed limit voters' choice of as many candidates as possible': National Assembly of Wales, Constitutional and Legislative Affairs Committee, above n 131, 20.

¹³³ As Richard Katz noted: 'Qualifications for office differ from qualifications for voting in one additional respect: where suffrage qualifications restrict only *who* may decide, qualifications for candidacy restrict the freedom of those deciders with regard to *what* they may decide.' See Richard Katz, *Democracy and Elections* (Oxford University Press, 1997) 247.

¹³⁴ *Roach v Electoral Commissioner* (2007) 233 CLR 162, 175 (Gleeson CJ).

¹³⁵ [2003] 1 SCR 912.

opportunity to express support for the ideas and opinions that a particular candidate endorses.¹³⁶

For these reasons, the right to candidacy is – for us – inextricably linked to the right to vote.

As has been accepted in Australian electoral law, ‘the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community’.¹³⁷ Restrictions on the right to vote reflect ‘an understanding of what [i]s required for participation in the public affairs of the body politic’.¹³⁸ There should not be two classes of such participation. In our view, the fundamental choice about where the boundaries of entitlement to participate in the political life of the nation has already been made – and it is reflected in the criteria for eligibility to vote.¹³⁹

Both the right to vote and the right to candidacy stem from membership of the community. Our starting point, therefore, is that if you are eligible to vote, you are eligible to be nominated as a candidate.¹⁴⁰ The eligibility requirements for candidacy should generally mirror voter eligibility. There will, of course, be questions about defining voter eligibility: including, for example, age, citizenship, residency. However, this is a separate question and one that we do not address in this article. We note, however, that in some jurisdictions parliamentary discretion in this respect is not unlimited – in Australia, for example, disqualifications from voting must be ‘reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government’.¹⁴¹

¹³⁶ Ibid [29] (McLachlin CJ, Iacobucci, Major, Bastarache, Binnie and Arbour JJ). Similarly, ‘citizenship ... the status essential to the possession of political rights, most centrally the right to vote and the right to be a candidate for public office’: Nicholas Aroney, ‘Democracy, Community and Federalism in Electoral Apportionment Cases: The United States, Canada and Australia in Comparative Perspective’ (2008) 58 *University of Toronto Law Journal* 421, 442.

¹³⁷ Ibid [7] (Gleeson CJ).

¹³⁸ Ibid [62] (Gummow, Kirby and Crennan JJ).

¹³⁹ We note that an existing distinction in New Zealand does not accord with our argument – there, permanent residents are entitled to vote (*Electoral Act 1993* (NZ) s 74(1)(a)(ii)), but only citizens are eligible for candidacy (s 47(3)).

¹⁴⁰ See also: ‘A robust and well-functioning democracy requires that all qualified citizens are able to nominate for election on an equal basis - with as few barriers to nominating as possible’: Joint Standing Committee on Electoral Matters, above n 17, 95.

¹⁴¹ Ibid [85] (Gummow, Kirby and Crennan JJ). *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [161] (Gummow and Bell JJ).

In some ways, our argument is more republican than liberal. In treating eligibility for election as of equivalent importance in principle to eligibility to vote, our conception of democracy is undoubtedly participatory. As such, it aligns with republican political thought: ‘Without political participation, there is no citizenship. The essence of republican citizenship lies in the actualizing of civic bonds through involvement in public life.’¹⁴² We concur with Pettit’s observation that members of the legislature must come ‘not just from a restricted set of privileged viewpoints, but from the full range of social perspectives’.¹⁴³ Barriers to eligibility, particularly those motivated by considerations of competency or integrity, are inimicable to such representation.¹⁴⁴ Moreover, we do not see involvement in representative democracy as only consisting of a vote every election cycle,¹⁴⁵ but as inherently involving the possibility of standing for election as a representative. We agree with Beiner that it is necessary that ‘individuals have some possibility of being politically involved in ... larger political structures that shape social existence’.¹⁴⁶ For us, eligibility to stand as a candidate, unhindered by requirements (however well-intentioned) intended to ensure *ex ante* competency, integrity or the avoidance of conflicts of interest, is an essential part of democracy.

However, there are two qualifications to this general principle linking eligibility to vote with eligibility for candidacy that should be noted. First, it may be appropriate to disqualify a very limited group of persons from candidacy (whilst still permitting them to vote) on grounds related to the integrity of the electoral process itself, not as an *ex ante* attempt to ensure the fidelity of elected representatives outside of the democratic process. In this

¹⁴² Schall, above n 57, 85.

¹⁴³ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1999) 191. See also: ‘To fully represent the diversity of those they represent in the Federal Parliament, Australians of all backgrounds must have an equal opportunity to nominate for election’: Joint Standing Committee on Electoral Matters, above n 17, 102.

¹⁴⁴ In essence, it is a question of who the ultimate arbiter should be. ‘If a candidate’s constituents knowingly look past his [or her] faults’, then in our view we, ‘must impute an electoral pardon,’ for it is the electors whose views should be determinative: Cassady, above n 17, 218. See also: ‘minimal constitutional qualifications for elected office ... ensure the people’s broad freedom to pick the candidate of their choice, which may not be second guessed’: at 295.

¹⁴⁵ Curiously, the ability to stand as a candidate is often overlooked. For example, it is omitted from the following list of means of participation other than voting: ‘inclusion in the political system could include a range of activities—such as attending rallies, volunteering for a candidate, raising money for a candidate or cause – and also actually giving money to support a candidate or a cause’: Schultz, above n 12, 55.

¹⁴⁶ Ronald Beiner, *Liberalism, Nationalism, Citizenship: Essays on the Problem of Political Community* (UBC Press, 2003) 198.

category would be returning officers and other officials involved in conducting the election. In order to preserve the integrity of the electoral process, such persons would need to distance themselves from the electoral process before they could be a candidate – a statutory scheme modelled on the broader New Zealand provisions for public servants (which impose a statutory leave of absence during candidature) could address this issue.¹⁴⁷

Second, there may be some governmental positions which require political impartiality and are therefore inconsistent with the status of election candidate (even though occupants of such positions can still vote). Examples would include judges, Auditors-General and Ombudspersons.¹⁴⁸ The issue in these situations is not one of disqualification from candidature, but that choosing to become a candidate is incompatible with continued tenure in the other office – so the legal impediment should relate to the other office, not electoral candidature.¹⁴⁹

In our view, these two situations, because they are very limited exceptions, do not detract from our argument that the right to candidacy should generally mirror the right to vote.

¹⁴⁷ *Electoral Act 1993* (NZ) s 52. See above at 14.

¹⁴⁸ We would not, however, consider including as many statutory office-holders as recommended by a committee of the Welsh National Assembly: National Assembly of Wales, Constitutional and Legislative Affairs Committee, above n 131, 49-50. However, human rights jurisprudence from the European system has upheld wide bans on the eligibility of holders of particular offices, including: public servants (*Gitonas v Greece* (European Court of Human Rights, Application No 18747/91, 1 July 1997)); members of the police, armed forces and security services (*Rekvényi v Hungary* (European Court of Human Rights – Grand Chamber, Application No 25390/94, 20 May 1999)); local government officials (*Ahmed v United Kingdom* (European Court of Human Rights, Application No [22954/93](#), 2 September 1998)); and judges (*Brike v Latvia* (European Court of Human Rights, Application No [47135/99](#), 29 June 2000)). In the international system, the Human Rights Committee has stated its view that ‘If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected’: *General Comment 25*, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) [16]. The Human Rights Committee has upheld a ban on public servants who report to a municipal authority from being elected to its council: *Debreczeny v Netherlands*, UN Doc CCPR/C/53/D/500/1992 (4 April 1995).

¹⁴⁹ We note there is a potential third category. Parliament might take the view that extensive outside obligations would be incompatible with membership – not, as the situation currently stands, because they are government positions, but because full-time employment (whether in the private or public sphere) is likely to be incompatible with the service required of a member. However, this should be a matter of the relevant House regulating the service of its own members, and not something to be contained in electoral law. The only case law of which we are aware addressing such a limitation is *Lykourazos v Greece* (European Court of Human Rights, Application No 33554/03, 15 June 2006), which did not decide on the validity of a ban on all professional activity by parliamentary representatives (despite pointedly observing that it was ‘a disqualification that is rarely encountered in other European States’: [53]), because it held that it had in any event been applied arbitrarily in breach of art 3 of Protocol 1 to the European Convention on Human Rights.

Facilitating Democratic Decisions as to Competency, Conflicts and Integrity

However, this is only half of the democratic solution. For voters to be able to make an informed decision, information about the candidate needs to be available to the voter.¹⁵⁰

The wider the eligibility for candidacy, the more information the voter may need to make a decision as to the suitability of the candidate. As Justice Brandeis famously argued: ‘Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.’¹⁵¹

The central question that must be asked is: what information is relevant to a person’s ability to serve faithfully and effectively as an elected representative? For these matters, we propose a regime of compulsory disclosure to facilitate choice by the people. In our view, questions of whether a candidate has the necessary competencies, whether they may be influenced by a potential conflict of interest, or whether they have sufficient integrity to perform their role as representative appropriately, are best left to the people – providing they are appropriately informed.¹⁵²

Gutmann and Thompson suggest that representatives should ‘take special care to ensure that all citizens have sufficient information to assess their decisions’.¹⁵³ They extend this obligation of disclosure to personal factors capable of influencing decisions, arguing that:

Public officials exercise power over us on our behalf, and we must know a great deal about them if we are to trust them with the discretion their offices confer. ... information relevant to the performance of their legislative functions should be open to scrutiny. ... this principle may entail disclosure of a wide range of quite intimate information, such as the medical condition or even the psychological state of legislators.¹⁵⁴

Accordingly, the second aspect of our proposal is the creation of a real-time regime of compulsory disclosures by candidates for elections, which are intended to facilitate public

¹⁵⁰ ‘The whole notion of electoral pardon – that the voters have the sovereign power to look past a candidate’s faults and elect him anyway – depends crucially on one assumption: that the voters had enough facts on which to base an informed pardon decision’: Cassady, above n 17, 259.

¹⁵¹ Louis D Brandeis, ‘What Publicity Can Do’, *Harper’s Weekly* (20 December 1913) 10, 10.

¹⁵² A committee of the Australian Parliament recently reached a similar conclusion: ‘it should be up to voters themselves to determine the qualities they want to see in their elected representatives’: Joint Standing Committee on Electoral Matters, above n 17, 95.

¹⁵³ Amy Gutmann and Dennis Thompson, ‘The Theory of Legislative Ethics’ in Bruce Jennings and Daniel Callahan (eds), *Representation and Responsibility: Exploring Legislative Ethics* (Plenum Press, 1985) 167, 176.

¹⁵⁴ Ibid 177.

access to information relevant to the electors' choice at the election. Perhaps in the past it would have been difficult to provide the voting public with information regarding the suitability of a candidate, and as such a blanket disqualification was imposed. However, technology today makes it easier than it has ever been to make this information accessible and it is, therefore, now possible to place this decision back in the voters' hands.

Rather than having a larger number of disqualifications, candidates for election should be required to disclose a range of matters that may properly influence the choice of electors.¹⁵⁵ These would be likely to fall into the three categories identified by Morris – factors relating to competence, conflict of interest and integrity. Such matters might include:

- Any foreign citizenship(s) held;
- Any previous criminal convictions, bankruptcies or disqualifications as a company director;
- Whether the candidate is serving a term of imprisonment (and, if so, the length of that term);
- Any direct or indirect pecuniary interest deriving from the Crown (including employment in the civil/public service);
- Any adverse findings of professional bodies of which the candidate is a member (eg Medical Council, Bar Standards Board, Solicitors Regulatory Authority, etc)
- Information relating to the candidate's health (eg any pre-existing long-term medical conditions) or financial status (eg disclosure of tax returns or tax information).

We do not necessarily argue that a disclosure regime should include all of these matters, but the disclosure regime would ideally include information that would materially affect the voters' decision. The appropriate scope of any such disclosure regime would ultimately be a question for the legislature to determine.

¹⁵⁵ Our argument extends beyond the recommendation made by the Joint Select Committee on Electoral Matters, which advocated (consistently with our submission to its inquiry: Matthew Stubbs and Adam Webster, Submission No 37 to the Joint Standing Committee on Electoral Matters, *Inquiry into matters relating to Section 44 of the Constitution* (February 2018)) disclosure of matters relevant to disqualifications under *Australian Constitution* s 44 as an interim measure: Joint Standing Committee on Electoral Matters, above n 17, 60.

If an approach is taken whereby candidates must declare they are serving a term of imprisonment (but would be not disqualified by virtue of the fact that they are serving a term of imprisonment), there is a possibility that a prisoner could be elected to the legislature, as was the case with Bobby Sands. If the electorate, properly informed, make such a decision then, in our view, the decision of the voters should be respected.¹⁵⁶ Of course, because some jurisdictions can remove a member of Parliament for failing to attend,¹⁵⁷ prisoners can be treated in exactly the same way as any other member who fails to attend.

The matters required to be disclosed could be declared by the candidate at the time of nomination, with changes of circumstances to be disclosed within 7 days. The information could be filed and made publicly accessible online on a register kept by the electoral commission. The disclosures would need to be contemporaneous with the election (and so too the making of the information publicly accessible) to meaningfully inform electors' choices. An effective example of financial disclosures is now employed for State elections in Queensland (Australia), where donations must be disclosed within 7 days, and are publicly available on the internet immediately when made.¹⁵⁸

With any disclosure regime there would be a question of how to deal with candidates who make a false declaration. These might fall into two categories. First, where a candidate intentionally makes a false declaration – the deliberate attempt to deceive the voter. For example, where the candidate deliberately tries to hide the fact they had previous criminal convictions. This could itself be made a criminal offence. Second, where the candidate makes a false declaration, but there is no evidence of an intention to deceive. For example, the candidate is a dual citizen but was unaware of this fact (and therefore did not declare it). In our view, this type of failure would be better suited to the imposition of a civil penalty

¹⁵⁶ See also the discussion of later Sinn Féin electoral successes in Clive Walker, 'Political Violence and Democracy in Northern Ireland' (1988) 51 *Modern Law Review* 605.

¹⁵⁷ See, eg, *Australian Constitution* ss 20 and 38.

¹⁵⁸ See Electoral Commission of Queensland, *Disclosure Returns* <<https://www.ecq.qld.gov.au/candidates-and-parties/funding-and-disclosure/disclosure-returns>>. As has recently been asked about financial disclosures, 'What possible reason can there be to oppose real time disclosure of donations?': Bret Walker, 'The Information that Democracy Needs' (Whitlam Oration, Western Sydney University, 5 June 2018) 6. Scholarship has also explored the potential for the internet to enhance democratic deliberation: see, eg, Antje Gimmter, 'Deliberative Democracy, the Public Sphere and the Internet' (2001) 27 *Philosophy and Social Criticism* 21; Yasmin Dawood, 'Second-Best Deliberative Democracy and Election Law' (2013) 12 *Election Law Journal* 401.

(in those jurisdictions which adopt this option),¹⁵⁹ or a lesser fine in jurisdictions without such an option.

When introducing a disclosure regime, legislation could also be introduced prohibiting non-disclosure and penalising candidates who fail to disclose the required information. In addition to being a criminal offence (as proposed above), conviction of the offence of intentional failure to disclose could be made grounds for disqualification as a member of parliament. Alternatively, a failure to disclose (and any associated penalty) could be made a matter that must also be disclosed by candidates, the effect of which would be that the fact of the non-disclosure and the non-disclosed information would need to be disclosed to voters at subsequent elections. Voters could then decide whether the fact of the non-disclosure and the non-disclosed information are matters that might influence their decision at the subsequent elections.

It might be suggested that a move towards the disclosure regime suggested in this article (and away from disqualification criteria) does not solve the ‘dual citizenship problem’ seen recently in Australia. The vast majority of those Australian MPs who were deemed ineligible as MPs did not believe they were dual citizens. As such, if they were asked to disclose this information at the time of nomination they would presumably not have done so. On the disclosure-model that we propose in this article, the failure to disclose would not necessitate the member to resign. Instead, there would be a civil penalty for failing to disclose and both the fact that the member was a dual citizen and the failure to disclose would then need to be disclosed at subsequent elections. It would then be for the people to decide at the next election whether the fact that the member is a dual citizen is a matter that will influence their choice at that election.

In our view, this two-tier approach, with disqualification arising only from intentional failures to disclose, achieves a better balance. For unintentional breaches of the disclosure requirements, it vindicates the integrity of the process through imposing a civil penalty, but respects the democratic choice of voters, promotes electoral certainty and saves costs by not invalidating the election (which leads to by-elections, special recounts or other processes to fill a vacancy being required).

¹⁵⁹ The Electoral Commission in the UK has recently sought the ability to impose civil penalties for breaches of election law: Law Commission of England and Wales, above n 18, 153-4, 165.

5. Conclusion

In this article, we have examined legal barriers to the eligibility of individuals to be elected or serve as representatives in the legislature in five jurisdictions. Our survey of existing barriers reveals an inconsistent patchwork of provisions, which may nonetheless be grouped into three broad justifications: matters bearing on the competence of a candidate, factors relating to any potential conflict of interest, and issues concerning personal or systemic integrity. Two critical failings of the existing situation have been identified. First, the identification of those factors that are legal barriers in any given jurisdiction appears to us to be based more on historical accident than coherent policy. Second, the grounds of disqualification are overinclusive, and accordingly cross over the line that should be maintained between law and politics.

Ultimately, while our argument draws on the perspective of an individual's human right to be elected, its main thrust is from a systemic perspective: that, in a representative democracy, it is fundamentally a matter for the people to determine whether a particular candidate for election is suitably qualified to be elected, not a matter to be determined by the imposition by law of general disqualifying factors. Of course, we recognise that some limits, consistent with conceptions of representative democracy, will need to be placed on the ability of individuals to be candidates in an election. However, our starting point is that membership of the body politic – defined by eligibility to vote – is the primary qualification for eligibility for candidacy.

We do not forget, however, that the various existing barriers to eligibility all seek to ensure an important outcome – the fidelity to the people of their elected representatives. In our view, this noble goal can now be achieved in a more democratic way, facilitated by technological advances that were not previously available. By introducing a regime of compulsory disclosure of matters relevant to a person's ability to serve faithfully and effectively as an elected representative, we seek to facilitate determination by the voters of questions as to whether a candidate has the competence, freedom from conflicts of interest, and integrity, to serve as their representative. In our view, it is the people who should make these decisions in a representative democracy.