

EXPLANATORY STATEMENT

Electoral and Referendum Amendment (Eligibility) Regulations 2018

Issued by Authority of the Minister for Finance

Commonwealth Electoral Act 1918

Legislative Authority

Section 395 of the *Commonwealth Electoral Act 1918* (the Electoral Act) provides that the Governor-General may make regulations, not inconsistent with the Electoral Act, prescribing all matters which by that Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for giving effect to the Electoral Act.

Section 392 of the Electoral Act provides that the Governor-General may make regulations that alter a form in Schedule 1 of the Electoral Act.

Outline

The purpose of the *Electoral and Referendum Amendment (Eligibility) Regulations 2018* (the Regulation) is to amend the *Electoral and Referendum Regulation 2016* (the Principal Regulation) to alter the candidate nomination forms. The Regulation adds a checklist to the nomination form. Those seeking to nominate as candidates may complete the candidate checklist to demonstrate their eligibility to be elected to Parliament under section 44 of the Constitution.

A person must be qualified under the Constitution and the laws of the Commonwealth to be capable of being chosen or to sit as a senator or a member of the House of Representatives.

The Regulation aims to minimise the risk of a recurrence of the disqualification issues that arose in the 45th Parliament by improving the candidate nomination arrangements for those seeking election. The Regulation gives effect to Recommendations 3 and 4 of the Joint Standing Committee on Electoral Matters (JSCEM) report titled *Excluded: The impact of section 44 on Australian democracy* tabled on 17 May 2018. JSCEM recommended that the Government consider strategies to mitigate the impact of section 44 of the Constitution, including through improvements to the candidate nomination process (Recommendation 3) and to consider implications of the report in the context of up-coming by-elections (Recommendation 4).

Increasing transparency of information relevant to the status of candidates for election under section 44 of the Constitution is important for maintaining public confidence in Commonwealth democratic processes, as well reassuring voters that their elected representatives are qualified to sit in Parliament.

The candidate nomination form is made public under section 176 of the Electoral Act. Subject to the candidate's consent, the checklist provided by the candidate with their nomination will be published on the website of the Australian Electoral Commission (AEC). If the candidate provides any additional material with their nomination to demonstrate their eligibility, that material will be published on the AEC website. The checklist and any additional material will be published as soon as practicable after the declaration time under section 176 of the Electoral Act, and continue to be published until a petition disputing the election can no longer be filed under section 355 of the Electoral Act.

Purpose and operation

The requirements for nomination are set out in Part XIV of the Electoral Act. Section 166 of the Electoral Act provides that a nomination may be made using a form in Schedule 1 of the Electoral Act. Subsection 170(1) of the Electoral Act sets out the declarations and particulars that a candidate is required to give with respect to their eligibility under the Constitution and the laws of the Commonwealth.

The Regulation provides for nomination forms C, CA, D and DA in Schedule 1 of the Electoral Act to be altered by including the checklist text in Part 1 of Schedule 3 to the Regulation, and for nomination form CC in Schedule 1 of the Electoral Act to be altered by including the checklist text in Part 2 of Schedule 3 to the Regulation.

The checklist forms part of the candidate nomination form. A person nominating as a candidate in an election may complete the checklist and may consent to having the checklist published. Any additional material a candidate provides with their nomination form to demonstrate their eligibility under section 44 of the Constitution will be published.

The completion or otherwise of the checklist is not a ground for rejecting a request for nomination under section 172 of the Electoral Act.

Further details of the Regulation are set out in **Attachment A**.

Consultation

Consultation on the Regulation was undertaken with the AEC and other relevant stakeholders.

Regulatory Impact

The Office of Best Practice Regulation (OBPR) has advised that the Regulation has a minor regulatory impact on business, community organisations or individuals and therefore a regulatory impact statement is not required.

OBPR ID Number: 23841

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*
Electoral and Referendum Amendment (Eligibility) Regulations 2018

The *Electoral and Referendum Amendment (Eligibility) Regulations 2018* is compatible with the human rights and freedoms recognised or declared in international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Electoral and Referendum Amendment (Eligibility) Regulations 2018* (the Regulation) amends the *Electoral and Referendum Regulation 2016* to:

- alter candidate nomination forms by including a checklist which candidates may complete to demonstrate their eligibility to be elected to Parliament under section 44 of the Constitution; and
- subject to the candidate's consent, allow the checklist and any additional material provided by the candidate with their nomination to be published.

Human rights implications

The Regulation engages the following human rights:

- Article 17 of the International Covenant on Civil and Political Rights (the ICCPR) provides, that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation. It further sets out that everyone has the right to the protection of the law against such interference or attacks; and
- In relation to taking part in the conduct of public affairs, article 25 of the ICCPR provides that:
Every citizen shall have the right and opportunity, without unreasonable restrictions to:
 - (a) take part in the conduct of public affairs, directly or through freely chosen representatives;
 - (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
 - (c) to have access, on general terms of equality to public service in their country.

In relation to article 25(c) of the ICCPR, the Regulation enhances access to public service on equal terms by seeking to ensure that all candidates who nominate for election to Parliament are in fact eligible and meet the same eligibility requirements under the Constitution and the laws of the Commonwealth.

The Regulation does engage with rights not to be subjected to unlawful interference with privacy, however, a person nominating as a candidate in an election may complete the checklist and may consent to having the information they do provide in the checklist published.

The Regulation increases transparency of information relevant to the status of candidates under section 44 of the Constitution. This is important for maintaining public confidence in Commonwealth democratic processes as well as reassuring voters that their elected representatives are in fact qualified to sit in Parliament.

Conclusion

The Regulation is compatible with human rights as it seeks to enhance the right of citizens to take part in public affairs and elections on equal terms. The Regulation is also compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Details of the *Electoral and Referendum Amendment (Eligibility) Regulations 2018 (the Regulation)*

Section 1 – Name of Regulation

1. This section provides that the title of the Regulation is the *Electoral and Referendum Amendment (Eligibility) Regulations 2018*.

Section 2 – Commencement

2. This section provides that the Regulation commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

3. This section provides that the Regulation is made under the *Commonwealth Electoral Act 1918* (Electoral Act).

4. Section 392 of the Electoral Act provides that the Governor-General may make regulations that alter a form in Schedule 1 of the Electoral Act.

5. Section 395 of the Electoral Act provides that the Governor-General may make regulations, not inconsistent with the Electoral Act, prescribing all matters which by that Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the Electoral Act.

Section 4 – Schedules

6. This section provides that the items specified in a Schedule to the Regulation is amended, repealed or has effect as specified or set out in the items in the relevant Schedule.

Schedule 1 – Amendments

Item 1 – Part 4 Division 1A

7. Item 1 inserts a new Division 1A in Part 4 of the *Electoral and Referendum Regulation 2016* (the Principal Regulation). Item 1 inserts new sections 13A and 13B into the Principal Regulation.

8. New section 13A provides for the nomination forms C, CA, D, DA and CC in Schedule 1 of the Electoral Act to be altered to include a qualification checklist. The checklist forms part of the candidate nomination form.

9. New subsection 13B(1) allows a person nominating for election to provide additional documents together with their nomination to the Australian Electoral Commission (AEC) in accordance with section 167 of the Electoral Act. This provides candidates with an opportunity to demonstrate their eligibility to be elected to Parliament under section 44 of the Constitution. The purpose of any additional documents and information provided in the checklist is to demonstrate that the person nominating is qualified for election under section 44 of the Constitution, and not any other purpose.

10. The completion or otherwise of the checklist is not a ground for rejecting a nomination under section 172 of the Electoral Act.

11. New Subsection 13B(2) provides that, subject to the person's consent, the AEC must publish on its website the checklist provided with the person's nomination. A person nominating as a candidate in an election may complete the checklist. The AEC must publish on its website any additional documents a person may provide with their nomination to demonstrate their eligibility for election under section 44 of the Constitution.

12. New subsection 13B(2) paragraph (b) provides that the AEC must publish any additional document provided by a person nominating for election to demonstrate their eligibility to be elected to Parliament under section 44 of the Constitution, irrespective of whether that person consents to the publishing of the candidate checklist. Where a person's nomination is not declared under section 176 of the Electoral Act, the AEC is not required to publish the checklist or any documents in relation to that nomination.

13. New subsection 13B(3) sets out the timeframe for publication of the checklist and any additional documents. The checklist and any documents must be published on the AEC website as soon as practicable, in the circumstances, after the declaration time under section 176 of the Electoral Act. The checklist and any documents must continue to be published on the AEC website and available to the public until a petition disputing the election can no longer be filed under section 355 of the Electoral Act – that is, within 40 days after the return of the writs for the election.

14. New subsection 13B(4) allows a person to redact, omit or delete information from any documents provided which they do not wish published, for example personal information relating to family members which those family members do not wish published.

Item 2 – Part 5 Division 1A

15. Item 2 inserts a new Part 5 into the Principal Regulation after Part 4.

16. New section 29 is an application provision. New section 29 provides that the amendments in the Regulation apply in relation to any elections the writs for which are issued on or after the Regulation commences.

Item 3 – Schedule 3

17. Item 3 inserts a new Schedule 3 to the Principal Regulation which sets out the checklist to be included in the nomination.

18. Those seeking to nominate as a candidate may complete the checklist to both satisfy themselves that they are eligible and to publicly demonstrate their eligibility to be elected to Parliament under section 44 of the Constitution.

19. The questions in the checklist reflect that there are aspects of section 44 of the Constitution that have not been the subject of conclusive guidance by the High Court of Australia.

20. The AEC do not vet candidates. The onus is on individuals nominating to satisfy themselves that they are in fact eligible to be elected to Parliament under section 44 of the Constitution, including through seeking independent legal advice.

21. It is a matter for the Court of Disputed Returns following a referral by the Parliament, or following a petition under Part XXII of the Electoral Act, to rule on whether or not a person is incapable of being chosen for or sitting as a senator or member of the House of Representatives. The inclusion of the checklist provided for by Item 3 of the Regulation is a means of assisting candidates in an election to satisfy themselves and electors of their likely eligibility, or otherwise, to take a seat in Parliament, without providing definitive advice on such matters.