

## Can a senator be expelled from the federal parliament for offensive statements?

Written by Anne Twomey, Professor of Constitutional Law, University of Sydney

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In the wake of comments about the Christchurch massacre, members of the public have raised the question of whether a senator can be expelled from the Senate for making offensive statements.

It is now well known that members of parliament can have their seat vacated in the parliament due to their disqualification under section 44 of the Constitution for reasons including dual citizenship, bankruptcy, holding certain government offices or being convicted of offences punishable by imprisonment for one year or longer.

But there is no ground of disqualification for behaviour that brings a House of Parliament into disrepute. This was something left to the house to deal with by way of expulsion.

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## What powers do the houses have to expel?

[Section 49](#) of the Commonwealth Constitution provides that until the Commonwealth parliament declares the powers, privileges and immunities of its houses, they shall be those the British House of Commons had at the time of federation (1901).

The House of Commons then had, and continues to have, the power to expel its members. The power was rarely exercised, but was most commonly used when a member was found to have committed a [criminal offence or contempt of parliament](#). Because of the application of section 49 of the Constitution, such a power was also initially conferred upon both houses of the Australian parliament.

The House of Representatives exercised that power in 1920 when it expelled a member of the

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Labor opposition, [Hugh Mahon](#). He had given a speech at a public meeting that criticised the actions of the British in Ireland and expressed support for an Australian republic.

Prime Minister Billy Hughes (whom Mahon had previously voted to expel from the Labor Party over conscription in 1916), moved to expel Mahon from the House of Representatives on November 11 – a dangerous date for dismissals. He accused Mahon of having made “seditious and disloyal utterances” that were “inconsistent with his oath of allegiance”. The opposition objected, arguing that no action should be taken unless Mahon was tried and convicted by the courts. Mahon was expelled by a vote taken on party lines.

In 2016, a private member’s [motion was moved](#) to recognise that his expulsion was unjust and a misuse of the power then invested in the house.

The power of the houses to expel members, as granted by section 49, was subject to the Commonwealth parliament declaring what the powers, privileges and immunities of the houses shall be. This occurred with the enactment of the [Parliamentary Privileges Act 1987](#).

It was enacted as a result of an inquiry by a parliamentary committee, which pointed out the potential for this power to be abused and that as a matter of democratic principle, it was up to voters to decide the composition of the parliament. This is reinforced by sections seven and 24 of the Constitution, which say that the houses of parliament are to be “directly chosen by the people”.

As a consequence, the power to expel was removed from the houses. [Section 8](#) of the Parliamentary Privileges Act 1987 says:

A House does not have power to expel a member from membership of a House.

This means that currently neither house of the Commonwealth parliament has the power to expel one of its members.

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### Could the position be changed?

Just as the parliament had the legislative power to limit the powers and privileges of its houses, it could legislate to amend or repeal section eight so that a house could, in future, expel one of its members, either on any ground or for limited reasons.

Whether or not this is wise remains doubtful. The reasons given by the parliamentary committee for the removal of this power remain strong. The power to expel is vulnerable to misuse when one political party holds a majority in the house. Equally, there is a good democratic argument that such matters should be left to the voters at election time.

However, expulsion is still an option in other Australian parliaments, such as the NSW parliament. It's used in circumstances where the member is judged guilty of conduct unworthy of a member of parliament and where the continuing service of the member is likely to bring the house into disrepute.

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It is commonly the case, though, that a finding of illegality, dishonesty or corruption is first made by a court, a royal commission or the Independent Commission Against Corruption before action to expel is taken. The prospect of expulsion is almost always enough to cause the member to resign without expulsion formally occurring. So, actual cases of expulsion remain extremely rare.

### Are there any other remedies to deal with objectionable behaviour?

The houses retain powers to suspend members for offences against the house, such as disorderly conduct. But it is doubtful that a house retains powers of suspension in relation to conduct that does not amount to a breach of standing orders or an "offence against the house".

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Suspension may therefore not be available in relation to statements made outside the house that do not affect its proceedings.

Instead, the house may choose to censure such comments by way of a formal motion. Such motions are more commonly moved against ministers in relation to government failings. A censure motion is regarded as a serious form of rebuke, but it does not give rise to any further kind of punishment such as a fine or suspension.

The primary remedy for dealing with unacceptable behaviour remains at the ballot box. This is a pertinent reminder to all voters of the importance of being vigilant in the casting of their vote to ensure the people they elect to high office are worthy of fulfilling it.

*Anne Twomey has received funding from the ARC and occasionally does consultancy work for governments and inter-governmental bodies.*

Authors: Anne Twomey, Professor of Constitutional Law, University of Sydney

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