Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
Canberra ACT 2600

Supplementary Submission to the Joint Standing Committee on Electoral Matters - Inquiry into the 2016 election

I am pleased to attach a supplementary submission to this inquiry.

Michael Maley PSM

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS – INQUIRY INTO THE 2016 FEDERAL ELECTION

1. This submission supplements the one I lodged with the Committee on 8 October 2016 (published as no. 5 on the Committee's home page), and responds to a number of points raised by my friend Professor Graeme Orr in his submission no. 86.

2. In my original submission, I addressed the issue of the possible disqualification of candidates under section 44(i) of the Constitution, and recommended that:

> "the Committee consider adopting a scheme along the following lines.
>
> - Candidates would be required to indicate their place of birth on the nomination form, and to confirm whether that place was in Australia.
>
> - Where a candidate indicated a place of birth outside Australia, he or she would be required to lodge with the nomination form a complete statement of the facts on which he or she wished to rely to establish the absence of any relevant disqualification under section 44(i) of the Constitution, along with copies of any supporting documents providing evidence relevant to the issue. These could include documents demonstrating that the candidate had taken "reasonable steps to renounce foreign nationality", but could also be documents establishing that the candidate had not, in fact, acquired foreign nationality by birth (for example, because his or her parents were on a diplomatic posting in the relevant foreign country at the time).
>
> - This statement and associated documents would be deemed part of the nomination form, and would be made public.
>
> - The AEC would **not** be required to consider whether the statement and any document(s) sufficed to establish that the candidate was not subject to a constitutional disqualification, but would simply be required to ensure that where a candidate showed a place of birth outside Australia, a statement of some type had been provided.
>
> - Any person who wished to challenge the right of the candidate to be elected or to sit in Parliament would, in taking the matter to court, be entitled to rely on the statement and document(s) lodged by the candidate as constituting *prima facie* a complete statement of the candidate's case as to why he or she was not disqualified.

3. Professor Orr's submission characterises this as my "suggestion that we need to find new ways to police section 44". With respect, my proposal was nowhere near so broad, but dealt only with one specific aspect of the enforcement of one paragraph of section 44.

4. Professor Orr raises the concern that my proposal would impose "an undue burden on potential candidates", and, noting the difficulty of proving a negative, gives the example of a candidate being called upon to show that he or she was not a citizen of any foreign power.

5. My original submission might have given the impression that I had in mind that a candidate, having indicated a place of birth outside Australia, should have to provide a statement in relation to a multiplicity of countries, but of course that was not my intention: in speaking of any "relevant" disqualification, I rather had in mind that a candidate, having indicated a place of birth in Country A, should only have to provide a statement demonstrating why he or she was not a citizen of, or owing continued allegiance to, Country A. In practice, this would effectively cover the vast majority of cases in which a person might be subject to a disqualification under section 44(i) of the Constitution.

6. A candidate is already required in his or her nomination form to state that "I am not, by virtue of section 44 of the Constitution, incapable of being chosen or of sitting as" a Senator or Member of the House of Representatives".[1] The AEC has also made it clear that:

> "It is a candidate's own responsibility to ensure that his or her qualifications for candidacy meet the requirements set out in the Constitution and the Act. With respect to s. 44(i) of the Constitution, intending candidates holding dual citizenship should take 'all reasonable steps', as per the ruling of the High Court in Sykes v Cleary, to renounce their other citizenship before nomination."[2]

and that:

> "Division 137 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) makes it an offence to provide false or misleading information or documents in purported compliance with a law of the Commonwealth, with a maximum penalty of 12 months imprisonment."[3]

7. In the light of these requirements, it is reasonable to suppose that any duly diligent potential candidate would already have undertaken the investigations which would enable him or her to prepare a statement of the type I have recommended be required. My proposal is therefore not about imposing additional burdens on candidates, but about ensuring that the results of the investigations which ought to have been done will be made transparent to the voting public.

---

[1] *Commonwealth Electoral Act 1918*, Schedule 1.

[2] Australian Electoral Commission, *Electoral Backgrounder: Constitutional disqualifications and intending candidates*, paragraph 42, at http://www.aec.gov.au/About_AEC/Publications/backgrounders/constitutional-disqual-intending-candidates.htm.

[3] ibid, paragraph 11.

8. The complexity of the required statement will of course vary from case to case, and it would be easy enough to imagine situations of some subtlety which could need to be addressed. I would argue, however, that it is precisely in such circumstances that the greatest benefits would flow from my recommendation, since candidates would be forced to focus clearly on issues which up until then may have been of only marginal significance to them.

9. Finally, Professor Orr asserts that "it would be a problem to have electoral authorities more involved in vetting candidates and any proof of non-disqualification". I agree, which is precisely why I recommended that they should not be so involved: see paragraph 2 above.