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Joint Standing Committee on Electoral Matters

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Submission to the Inquiry into matters relating to Section 44 of the Constitution

Hamilton Stone is a Canberra-based consulting firm that provides policy advisory and capacity building services to government and non-government organisations.

We are making a submission to this inquiry for two reasons.

- Founder and co-director of the company, Dr Ian Holland, has experience in researching and commenting on section 44 matters. In a previous role as a principal researcher with the Parliamentary Research Service, he published articles on how the section operates and the issues it raises. He has continued to be involved in public discussion of the issues.
- Our company values engagement with policy processes. We believe all aspects of public life are stronger when the community is more deeply and meaningfully involved. The issues that have emerged with sections 44(i), 44(iv) and 44(v) jeopardise public involvement in parliamentary life, by greatly limiting the number of Australians who are eligible to stand for office or limiting the circumstances under which they can stand for office or limiting the circumstances under which they can stand. We do not think this is consistent with encouraging participation in civil society. Accordingly, the section should be changed.

Legislative reform or constitutional change?

The terms of reference canvas the possibility of either legislative or constitutional change. We believe the committee should recommend constitutional change. The High

Court's reasoning in recent cases has several consequences that cannot be significantly mitigated through legislation. These include:

- Major parties and incumbent members of Parliament are advantaged by the relatively strenuous procedural requirements. This is because they have more resources to support candidates to resolve issues, and less turnover in candidates, meaning there are fewer checks required. Depending on consideration of the Gallagher case (and potentially others that are similar), these procedural requirements may be even more onerous than the court has already established. This systemic bias cannot be removed by legislating to make nomination processes more rigorous. If anything, the contrary is the case. Both the current system, and any proposed legislative reforms, are likely to further disadvantage migrant or lower income individuals from being involved.
- Dual citizenship is commonplace and should not be discouraged. Australians can have important ties to other countries without being compromised in their ability to serve this country (Holland 2017c). This cannot be addressed without constitutional change.
- Some of the suggestions for legislative change, such as "altering procedures for challenging a parliamentarian's qualifications in the Court of Disputed Returns", seem designed to avoid elected members being forced to comply with the meaning of the Constitution, as determined by the High Court. That is bad law-making.
- The 'office of profit' provision is antiquated and its effects on recounts cannot be legislated around.

Why is change required?

The committee will be familiar with most of the arguments in favour of changing section 44. In relation to section 44(i) these arguments include:

- Section 44(i) does nothing to ensure parliamentarians act in Australia's interest. This is the most important argument. Hamilton Stone is not aware that anyone has substantiated the claim that dual citizens are less likely to advocate in support of their country, either here or internationally. Section 44(i) is, to be blunt, an evidence-free zone. We do know, however, of cases where solely-Australian elected representatives appear to have acted contrary to national interest (Holland 2017b). The Constitution should not contain clauses that narrow participation in political life for no national benefit.
- A migrant nation should not have a xenophobic constitution. The pledge required as part of becoming a citizen is enough:

    - I pledge my loyalty to Australia and its people,
      whose democratic beliefs I share,
      whose rights and liberties I respect, and
      whose laws I will uphold and obey.

  Beyond this, it should be up to voters to decide whether a person is fit to represent them.
- The current provisions make it difficult for political parties to recruit talented individuals outside the established pool of party candidates, because they increase the risk that people will be unable to ensure that they comply with the Constitution in time for the close of nominations.

In relation to section 44(iv):

- A significant proportion of the Australian population occupies offices of profit under the crown. Because the place of local government under that part of the Constitution is not clear (Holland 2002), the exact scope of section 44(iv) is not known, but it disqualifies millions of people from running for office without resigning from their jobs. A 'work around' exists in some cases, where public servants can resign and be guaranteed return to their jobs if not elected. However this is simply trying to avoid the effect of the clause and, as the Hollie Hughes case has shown, it comes with its own problems.

What should change?

We see no reason why the bar for entering Parliament should be higher than the bar that is set for voting in an election, or indeed for being a member of Australia's defence forces. This can be addressed by simplifying section 44(i) to simply state that a person must be an Australian citizen in order to be elected or to hold office.

We oppose an option for reform contained in the terms of reference: "to provide that an Australian citizen born in Australia is not disqualified by reason of a foreign citizenship by descent unless they have acknowledged, accepted or acquiesced in it". This risks making the already-opaque provisions of section 44 even more complex. It would, for example, immediately trigger questions about the meaning of "acquiesced". It also avoids the fundamental issue: there is no evidence that foreign citizenship is a problem at all. Furthermore, it would not assist those who, as in several cases in 2017, held foreign citizenship willingly, sought to renounce it, but did not adequately do so. Individuals in such situations would potentially be in the same situation as is currently the case. It is a band-aid solution that should not be supported.

Section 44(iv) could be replaced with a simpler provision that states that a person should not hold another job while they are a member of Parliament; or alternatively

that a member of Parliament shall not also hold an office of profit under the crown. Either way, it should not be relevant at the point of nomination, only at the point of entering Parliament.

Is change too hard?

No. It is a well-rehearsed argument that, because most referendums to amend the Constitution have failed, change is too hard. However, referendums have not failed because it is inherently hard to get the Constitution changed. Referendums have failed because most have been poorly conceived or executed. Too often one of the major parties has not fully supported the reform, while too many cases have involved the Commonwealth seeking a change in the balance of powers with the states. As outlined in Holland (2017d), most referendum questions pass if they meet the following criteria:

- There is bipartisan major-party support for the change
- Most state premiers are either supportive of, or unconcerned by, the proposal (and, by implication, the proposal does not seek greater Commonwealth power at the expense of states)
- There is community understanding of the reason for change
- The referendum question does not combine multiple changes in a single question
- There is not a highly organised, high-profile and credible force opposing the change.

In the case of section 44, bipartisan support for change is the first and most important criterion for securing reform. Other criteria have already been met: the issue does not concern the states, and there is probably now an unprecedented level of community understanding of the need for change.

Constitutional change would be successful if this committee unanimously recommends change, and both parties support the referendum. It will be important that the Committee recommend that each proposed change be the subject of its own question in the referendum. Changes regarding citizenship should be posed separately from changes relating to the 'office of profit' provision.

Conclusion

Hamilton Stone encourages the committee to recommend changes to section 44 that make it easier for Australians to participate in public life through seeking election to Parliament. We discourage legislative reforms that, while seeking to increase confidence in the nomination process, will not address the fundamental issues with section 44 and risk making political participation harder rather than easier.

Dr Holland is happy to appear before the committee to give evidence.

Publications on Section 44

Holland 2002, *Candidacy of Local Councillors for Federal Office*, Research Note No. 21 of 2002-03, Department of the Parliamentary Library, Canberra.

Holland 2003, *Crime and Candidacy*, Current Issues Brief No. 22 of 2002-03, Department of the Parliamentary Library, Canberra.

Holland 2004, *Section 44 of the Constitution*, E-Brief, Department of the Parliamentary Library, Canberra.

Holland 2017a, Wood, William Robert, *The Biographical Dictionary of the Australian Senate*, Vol. 4, 1983-2002, Department of the Senate, Canberra, 2017, pp. 78-81.

Holland 2017b, *Section 44 of Constitution must change after Larissa Waters, Scott Ludlam resign*, Fairfax media, 20 July 2017.

Holland 2017c, *Setting the bar too high?* Machinery of Government blog, Policy Innovation Hub, Griffith University, 27 July 2017.

Holland 2017d, *Let's make it easier to run for parliament*, Machinery of Government blog, Policy Innovation Hub, Griffith University, 2 November 2017.

Holland 2017e, *Citizenship, the crossbench and #qldvotes*, Machinery of Government blog, Policy Innovation Hub, Griffith University, 21 November 2017.