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Commonwealth Electoral Amendment (Members of Local Government Bodies) Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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Commonwealth Electoral Amendment (Members of Local
Government Bodies) Bill 2002

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Politics and Public Administration Group
12 February 2003

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Commonwealth Electoral Amendment (Members of Local Government Bodies) Bill 2002

Date Introduced: 12 December 2002

House: House of Representatives

Portfolio: Special Minister of State

Commencement: On Royal Assent

Purpose

The purpose of this brief Bill is to amend the *Commonwealth Electoral Act 1918* (the Electoral Act) to ensure local councillors are not penalised by State or Territory laws as a result of their decision to stand for federal Parliament. It was argued in the second reading speech that:

This amendment to the *Commonwealth Electoral Act 1918* is necessary to reinforce the Commonwealth's authority to legislate exhaustively—subject to the Constitution—on qualifications for election to the Commonwealth parliament.¹

The Bill is aimed at ensuring local councillors do not have to resign their positions in order to be candidates for federal office.

Background

As outlined in the Information and Research Service's Research Note on [Candidacy of Local Councillors for Federal Office](#), the impetus behind the Commonwealth Electoral Amendment (Members of Local Government Bodies) Bill 2002 (hereafter 'the current Bill' or 'this Bill') was a Queensland law, assented to in May 2001,² that sought to declare vacant the position of any local councillor who was a candidate for State or Federal elections.

The [Queensland Local Government Act 1993](#) was amended to read:

224A Councillor ceases to be councillor on becoming candidate for an Australian Parliament

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A councillor ceases to be a councillor if—

(a) under the *Electoral Act 1992*, section 88(3), the councillor becomes a candidate for an election as a member of the Legislative Assembly; or

(b) under the *Commonwealth Electoral Act 1918* (Cwlth), section 176, the councillor is declared to be a candidate for an election.

The [Local Government Association of Queensland](#) (LGAQ) was unhappy about the new law, believing it unfairly discriminated against local councillors. They successfully challenged the provision relating to federal candidacy (s. 224A(b)) in the Queensland Supreme Court, after succeeding in getting the case remitted down from the High Court.³ The Commonwealth Government intervened in the case, arguing that the Queensland provision was invalid.⁴ The Supreme Court agreed. It unanimously held that this was because it was inconsistent with sections 163, 164 and 327(1) of the Commonwealth Electoral Act. The majority also held that the State Parliament 'did not have the legislative power to enact such a law'.⁵

Despite their success in having the Queensland law struck down, the Commonwealth remains concerned about control over the qualifications and disqualifications for federal office. This concern persists because, first, the Queensland Supreme Court decision does not prevent any other State or Territory from trying to pass a law similar to that which was enacted in Queensland. This would leave the Commonwealth, or another party such as a local government representative body, to have to launch once again a similar court case to that run against the Queensland provision.

A second, related, reason is that the Queensland Supreme Court judgement has been called into question.⁶ Critical to the court's decision was the view that the Queensland law placed a burden on candidates for federal office sufficient to allow section 224A(b) to 'be characterised as a law relating to the conduct of Federal elections'. The response of lawyer and academic Anne Twomey is simple:

It is hard to see how this is so. The Queensland legislation does not in any way prevent or hinder local councillors from nominating for election to the Federal Parliament. There is no additional category of disqualification from the right to nominate. All the legislation does is vacate the office of the councillor. This is completely understandable. It is a general principle, frequently applied, that people who hold high statutory or elective office must resign from that office before running for a different elective office. This prevents people from using the mantle of one office, unfairly, to get elected to another office. It also avoids any conflict of interest, where a person's campaign may conflict with his or her duties of office.⁷

These are the kinds of arguments that led, back in 1902, to the drafting of [section 164](#) of the Commonwealth Electoral Act, which states:

A person who is, at the hour of nomination, a member of:

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- (a) the Parliament of a State;
- (b) the Legislative Assembly of the Northern Territory of Australia; or
- (c) the Legislative Assembly for the Australian Capital Territory;

is not capable of being nominated as a Senator or as a Member of the House of Representatives.

That section thus prevents sitting State or Territory parliamentarians from becoming federal Senators or Members.⁸

If a State Parliament cannot enact such a law as section 224A(b), the question is 'why is it that the State Parliament cannot legislate for the qualification and disqualification of its local councillors?'⁹ One of the three justices of the Supreme Court, Justice Davies criticised the Commonwealth's submission that the Queensland law was invalid because it attempted to deny or alter the Commonwealth's executive capacity. He said:

s. 224A(b) does no such thing. Its direct effect and practical operation is plainly only upon councillors of a State local government. And a legitimate purpose of it may be seen in the need to ensure that local councillors are not distracted from their duties as such or placed in a position of conflict with those duties by standing as a candidate for some other office...

In my opinion [s. 224A(b)] is not invalid as being beyond the legislative competence of the Queensland Parliament.¹⁰

He did however still find the provision invalid for the other reasons outlined above. It can be seen that the Queensland Supreme Court decision was by no means uncontroversial, and followed lines of reasoning that a court in another State (or a higher court) may choose to disregard. This then may be a second reason that the Commonwealth still wishes to legislate, through the Commonwealth Electoral Act, to protect the positions of local councillors. A third reason may be that the issue might arise before the High Court, and the Commonwealth may wish to strengthen its claims, based on the Electoral Act, that a law such as was enacted in Queensland is invalid.

The current Bill is identical in text (differing only in name) to a Bill tabled on the last day of sitting prior to the proroguing of Parliament in 2001. The Bill when it first appeared was called the Commonwealth Electoral Amendment (Prevention of Discrimination Against Members of Local Government Bodies) Bill 2001. Contrary to what was printed on the cover of [some versions of that bill](#), it was in fact not presented and read. Rather, Senator Robert Hill tabled a draft Bill and with it a 'proposed second reading speech' by Senator Ron Boswell.¹¹ This appears to have followed an unsuccessful attempt by the Government to amend another Bill, already before the Parliament at the time,¹² that sought to amend the Electoral Act for purposes unrelated to the present discussion.

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Legislated permission and Constitutional prohibition?

The proposed Bill would create an unusual situation. On the one hand it seeks to prevent discrimination against local councillors standing for Parliament. On the other hand, there has long been uncertainty as to whether section 44(iv) of the Constitution might in fact prevent local councillors from being candidates. This issue is canvassed extensively elsewhere, such as in the House of Representatives Standing Committee on Legal and Constitutional Affairs' Report on [Aspects of Section 44 of the Australian Constitution](#), and the Parliamentary Library's publication, [Candidates, Members and the Constitution](#).¹³ It is outlined here just briefly.

[Section 44](#) of the Constitution addresses grounds under which a person may be disqualified from sitting in the Parliament. It reads in part:

44. Any person who

...

(iv) 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

...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

The untested question of Constitutional law is whether being a local councillor constitutes holding an 'office of profit', and if so, whether that office can be said to be 'under the Crown'.¹⁴ The detailed legal arguments need not be canvassed here. The point is that for some years political parties have tended to consider it advisable for local councillors to resign before contesting a federal election, in case they could be disqualified under 44 (iv). Senator Nick Minchin illustrated this approach in his evidence to the Joint Standing Committee on Electoral Matters in 1997:

At one stage, after all our candidates had bulk nominated, we received some advice that any connection with local government might well constitute an office of profit...

I think eight of our 12 candidates happened to be local councillors and I had to get all of them to withdraw their nominations. Fortunately, we received this advice and acted on it before the closing of nominations. But we had to get them all to withdraw, all to resign from their council positions and then all to renominate. As you can imagine, when you are running an election campaign that is the sort of headache and nightmare you do not need...That was a bruising and memorable experience.¹⁵

Indeed, the Australian Electoral Commission cautions prospective candidates:

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such positions as councillors and employees of local government, and members of the governing bodies and the employees of statutory authorities, could be at risk of disqualification, depending on their particular circumstances.¹⁶

This Bill thus seeks to protect the candidacy of those whom, in other contexts, are being advised that they may be constitutionally unable to take office. This certainly explains paragraph 8 of the Explanatory Memorandum for the Bill, which says in part:

The amendment to the Electoral Act should in no way be considered to remove or alter any existing Constitutional barriers to qualifying for standing for election. The onus is on all intending candidates and specifically, members of a local government body, to ensure that they Constitutionally qualify for election.

This Bill thus attempts to address one aspect of an issue that really awaits a long overdue decision by the Parliament to address problems with section 44 of the Constitution. These issues were identified in 1981 by the Senate Standing Committee on Constitutional Affairs and again by the House of Representatives Standing Committee on Legal and Constitutional Affairs. They were recognised by the Joint Standing Committee on Electoral Matters in 1996. That same year, all parties in the Senate supported a motion by Greens Senator Bob Brown calling for the government to propose a Constitutional amendment that would seek to implement long-needed changes to section 44.¹⁷ Senator Bob Brown also sought to give effect to the House of Representatives Committee's recommendations through a Private Senators' Bill in 1998.¹⁸

As has been written elsewhere,¹⁹ an important question to ask could be not only whether the currently proposed Electoral Amendment Bill should pass, but also when is the Parliament going to initiate a referendum to reform section 44 of the Constitution?

The arguments for and against

There are many arguments for and against the current Bill. They are briefly summarised before being set out in more detail and considered in the context of a very similar debate that took place in 1902.

In summary: the arguments for the Bill

- The Commonwealth should have exclusive control over anything to do with candidacy for federal office, and this Bill may help guarantee this by preventing any doubts emerging regarding States' ability to prevent local councillors from seeking federal office.
- Electoral laws should maximise the pool of talent from which future MPs are drawn and protect that diversity of choice.

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- Local council experience gives prospective candidates a legitimate track record on which to stand for other office. This should not be treated as an unfair advantage, but as a perfectly valid reason to seek election to parliament. Laws that interfere with this should not be tolerated, and the current Bill helps ensure they are not tolerated.
- If there are concerns about abuse of the resources of local government office, regulation should be aimed at protecting against that abuse, not indiscriminately restricting the ability of all councillors to become candidates.
- Voters should be trusted to decide whether it was right for a local councillor to stand for office in another tier of government. If the voters think it is OK, why should the parliament prevent it? The current Bill will help ensure voters have that choice.

In summary: the arguments against the Bill

- The current Bill would not provide local councillors seeking federal office with any legal protection not already afforded by section 327(1) of the Electoral Act.
- The current Bill would explicitly treat local councillors very differently from State MPs. Section 164 of the Electoral Act prevents State MPs from standing for federal office. The Commonwealth could be accused of inconsistency if it retained this ban while simultaneously passing the current Bill, designed to ensure local councillors can be candidates. Why should these two categories of elected politician be treated so differently under federal electoral law?
- Taken in conjunction with section 44 of the Constitution, the Bill will confuse prospective candidates by sending contradictory signals about whether local councillors are eligible to stand for federal office.
- Local councillors should not be encouraged to see their offices as merely stepping-stones to 'higher' ambitions.
- There is potential for conflict of interest to arise between a person's role as a councillor, and their motivations as a candidate for (or holder of) federal office. Particularly in light of the Queensland Supreme Court decision, the Commonwealth needs to take responsibility for preventing conflicts of interest arising for elected officials, and the current Bill is a move in the wrong direction on this point.
- Allowing local councillors to run for federal office encourages them to do so, and in doing so increases the number—and cost to taxpayers—of local government by-elections.
- Both local government and federal government roles require a lot of work. It is simply not practical for anyone to try and do both, so the Commonwealth should not be passing laws that might encourage the perception that such a thing should be attempted. (This might lead to an argument not to oppose the Bill totally, but to amend

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it so that it prevents holding offices at both levels simultaneously, while still seeking to protect local government office-holders during *candidacy*).

The Electoral Amendment Bill: echoes of 1902?

This Bill is poised to celebrate the centenary of debate on a related federal law: the electoral law preventing State MPs from being candidates for federal election. Debate on that issue spanned the period March to September 1902. The restriction that was debated at that time can currently be found in section 164 of the Electoral Act set out above.

This restriction (in a slightly different form) was introduced during debate on the original Commonwealth Electoral Bill in 1902. It had also been a regular topic during the Constitutional Conventions of the 1890s, which had ultimately decided that such a disqualification should not be put in place.²⁰ The debate in 1902 was vigorous, and in fact there was no disqualifying provision in the Bill as it was first read.²¹ It appeared to be introduced by the government some months later as an amendment, largely in retaliation against some States that had introduced provisions preventing federal MPs from being candidates in State elections.²² Many of the points likely to emerge during debate of the current Bill were canvassed in the 1902 debates, and in the Queensland parliamentary debates in 2001, when section 224A(b) of the *Queensland Local Government Act 1993* was originally passed into law.

Encouraging talent?

Many federal MPs have served in local government. In fact, as of January 2003, each side of politics had 20 MPs who had served in local government (amongst coalition MPs, the breakdown was 16 Liberal and 4 National). Only one MP outside the major parties—Lyn Allison of the Australian Democrats—has been a councillor. Thus nearly one in five federal MPs has been an elected councillor at some time. Many current MPs have served in local government immediately prior to their election to federal Parliament; a few have served in the two offices concurrently.²³ Clearly local government experience is an important part of the background of federal politicians.

The need to encourage talented candidates to make themselves available for higher office was a reason why some federal MPs objected to the restrictions on State MPs implemented in 1902, and is likely to be a reason to support the current Bill. There were certainly some heated objections to the restriction proposed in 1902. At that time Senator Higgs (Labor, Queensland) remarked that he had:

never heard a more illiberal proposition made. It is almost dog-in-the-manager [sic] policy for us to debar the members of a State Parliament from contesting a seat in the Senate or the House of Representatives. It is not in keeping with what we understand to be the dignity of the members of this Parliament. Because the members of a State Parliament have seen their way to debar members of the Commonwealth Parliament from contesting a seat in the State Parliament that is no reason why we should

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descend to their level... The appearance of such candidates [State MPs] in the field will give a wider choice to the electors. If we carry this amendment, their area of choice will be restricted, because very many of our best men, after having been to the expense of contesting a State election, will not be prepared to risk losing their seats in the State Parliament, and undertaking the expense of a Federal contest... The State Parliament is a very good school for the Federal Parliament, just as a municipal body is a very good school for the State Parliament...²⁴

These remarks were echoed in debate in the Queensland Parliament in 2001, with Mrs Pratt (Ind.) saying that 'a council is an exceptional training ground for any member of parliament'²⁵ and Mr Bell (Ind.) opposing the restrictions because 'people should be positively encouraged to take their grounding in local government as a legitimate way of receiving appropriate training for higher levels of service in the state and federal parliaments'.²⁶

In the 1902 debate, Senator O'Connor (Protectionist, NSW) argued that, had the founders of the Constitution thought a restriction on candidacy for Federal office desirable, it would have been included in the existing disqualification provisions of the Constitution. Its absence, he reasoned, indicated it was intended that State office holders should be able to be candidates. 'We should be doing a wrong to ourselves, and a wrong to the people of Australia', he concluded, 'if we restricted or interfered in any way with their right of choosing their representatives'.²⁷

There is another side, however, to arguments about encouraging representatives to move between levels of government. It may not be desirable for local councillors to become too focussed on future opportunities. The result could be that councillors 'did not care about representing [voters] at council level if they could go further and viewed their election to council purely as a stepping stone to higher self-promotion'.²⁸ The law would need to strike a balance, encouraging the transfer of skills without encouraging people to fail to take their local government duties seriously.

Finally, it is possible to distinguish between encouraging elected representatives to move between tiers of government and giving that encouragement by actually allowing them to hold one office while seeking another. One of the supporters of the Queensland restrictions insisted 'There is no argument that local government representation has provided useful professional development for many elected representatives at the state and federal levels'.²⁹ Requiring councillors to vacate office if seeking election to another tier of government was not aimed at discouraging them from taking that step, but merely ensuring that they were focussed on one task rather than two, potentially conflicting, tasks. This issue is further addressed later in this Bills Digest.

(Ab)use of resources?

Much of the debate about the 1902 provisions centred on whether holding State office gave candidates an unfair advantage (as Senator Lt-Col Neild (Free Trade, NSW) maintained), or was proof of a candidate's worth (as Senator Playford (Protectionist, South

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Australia) insisted). Senator Styles (Protectionist, Victoria) favoured the restriction. He ruminated:

The Premier of a State and all his colleagues could contest a seat in the Federal Parliament with the advantage of all their prestige and influence. They would almost be certain to secure seats as against abler men who held no public position.³⁰

He thought failure to introduce the restriction would, as a result, actually make the fields of candidates smaller rather than larger: 'I apprehend that outside parliamentary life there are hundreds of able men who would see at once that they would have no show with the State Premier and his colleagues in the field'. Thus they would not stand for office.

There was also concern at that time that State MPs would extract a substantial and unfair advantage from their free rail travel passes. It should be recalled that at that time, all travel was by land, the electorates were physically larger than in the present day, and the railways more extensive. In addition, many candidates were probably poorer than today, and there was no public funding of elections. In this environment, being able to travel at no cost from town to town was a valuable campaign resource. It hardly seemed fair that some candidates would have it while others did not.

During debate in Queensland, it was similarly asked 'why should ratepayers pay the salary of councillors who are not focussed on working for them?'³¹ Supporters of the restriction also were concerned about 'the councillors from the various local authorities who have abused their position and have effectively conducted ratepayer funded campaigns for election to higher office'³² and people campaigning 'in the council car with the council phone'.³³

No one would suggest that abuse of office is something to be endorsed. However supporters of the current Bill will point out, as did Mr Seeney (National) in the Queensland debates, that failure to protect the right of local councillors to stand will:

nobble the field and make it difficult for people who have established a leadership profile in a community and, therefore, would be considered to be frontrunners in the group seen as the best candidates for an election.³⁴

That is, advantages enjoyed by a local councillor in the campaign may not be the product of their abuse of council resources, but because of their profile and achievements while in local office. Supporters of the current Bill will argue that the regulatory focus should be on protecting against abuse of the *resources* of office, rather than implementing a blanket ban against *holders* of office.

Conflict of interest?

One of the main causes of concern about office-bearers in one jurisdiction being candidates for, or office-bearers in, another level of government is the potential for conflict of interest.

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During debate on Senator Brown's Constitutional Alteration (Right to Stand for Parliament – Qualification of Members and Candidates) Bill 1998 (see also discussion below), Senator Ellison (Liberal, Western Australia) asked:

is it important to preserve the basic principle embodied in that provision, that is, that a person should not hold two offices which may give rise to a conflict of duty or the appearance of such a conflict?³⁵

If participants in debate over the current Bill are concerned about this issue, they might oppose the kind of guarantee that this Bill seeks to provide. Supporters of the approach taken in this Bill will need to address the question of why they see no conflict of duty, or appearance of such, between being a local councillor and seeking federal office.

Far from passing the current Bill, its critics might desire to enact a law to *prevent* local government councillor candidacy. Why? In its decision, the Queensland Supreme Court considered that it was beyond the legislative competence of a State to pass legislation that vacated the office of a local councillor who became a candidate for, or was elected to, federal office.³⁶ Let us assume for the moment, despite the concerns of Twomey and others, that the case proves to be sound and enduring law. This means that States now cannot prevent people from holding federal office and local government positions simultaneously. Yet federal parliament makes numerous decisions that affect local councils, and provides 19 per cent of their funding.³⁷ There is, as participants in the 1902 federal and 2001 Queensland debates have outlined, a case to be made for this situation to be remedied, in order to prevent conflicts of interest. The Queensland Supreme Court decision appears to leave responsibility for this in the hands of the Commonwealth, even though local councils are creatures of State law. It may be that, far from supporting the present Bill, there is thus now a case for the Commonwealth to act to prevent conflict of interest situations arising, by at the very least requiring that a person does not simultaneously hold offices in two tiers of government.

Incidentally, the Queensland Supreme Court decision raises some broader issues in this area that the Commonwealth may now need to address. If the principles enunciated in that decision are applied elsewhere, then numerous other state prohibitions on certain officials from standing for parliament may also be invalid. These include positions such as ombudsmen and directors of public prosecutions.³⁸

During the debate in Queensland, Mr Bell (Ind.) made an interesting point about conflict of interest. His point concerned the claim that there would be a conflict of interest during candidacy (not to be confused with conflicts arising from holding two offices simultaneously), as a local councillor's actions could be affected by seeking election elsewhere. He said:

Quite honestly, the conflict of interest, if it were to exist at all, would not be abridged or removed by the fact that someone resigns at the point of nomination. That conflict surely would have existed long before that if it were to occur at all.³⁹

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Bell rightly recognised that people generally do not become candidates for federal office out of the blue. It would be a move planned months, and perhaps years, in advance. Local councillors planning such a move would know their intentions long before the day of nomination, which was the time at which the Queensland law would come into play. Bell's point was that a law that declared the councillor's position vacant when they officially became an election candidate would do little to address potential conflicts of interest arising during the preceding months, as the candidate perhaps looked for opportunities to boost their chances of a future political career elsewhere.

Preventing this kind of conflict of interest situation cannot be considered to be a significant factor behind Queensland's restriction on local councillors. A corollary to this argument could be that supporting the current Bill does not mean one is not concerned about conflict of interest issues. Rather, it recognises that they cannot be eliminated through the kind of law Queensland sought to enforce. Conflict of interest issues, the argument continues, should be confronted, but will not be addressed by stopping a person from being a councillor just during an actual election campaign.

Will it cost money?

It might be argued that the Commonwealth's Bill will ensure that costly council by-elections continue to take place, as local government representatives continue to stand for federal office (triggering by-elections because, if elected, councillors usually resign their local office). Certainly, supporters of the Queensland law claimed it would save ratepayers money because 'it will save by-election money'.⁴⁰ Yet this must mean that those supporters believed there would be fewer by-elections because fewer people would move from the local sphere to another level of government. In other words, supporters of the Queensland law (and thus opponents of the current Bill) believed the attempted Queensland restrictions would have the effect of discouraging local councillors from standing for higher office. Yet this contradicts the claims of their fellow advocates for the new regime, who said the restrictions were not meant as a discouragement, but merely to avoid conflicts of interest etc.

In fact, if the aim was genuinely to save money, then one would adopt the approach advocated by Mr Bell, of requiring a councillor to stand down from their office while a candidate, and surrender office only if elected.⁴¹ This however is not the approach that the Commonwealth's Bill seeks to take.

Too much to do, too little time?

Opponents of the current Bill may put forward the pragmatic argument that people simply cannot do both jobs at once. Both local government work and being a federal MP are demanding roles. Regardless of any in-principle objections, it could be argued that no one *should hold* both offices concurrently because no one *could do* both jobs concurrently. It might be considered that the law should simply reflect this reality. This argument relates more to holding office than to candidacy, but it remains relevant to the current Bill. They

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may also say that protecting and proclaiming the value and professionalism of service in any tier of government would be best achieved by ensuring that it is not possible to hold two positions, at two different levels of government, at once. The current Bill is oriented instead toward ensuring that holding office simultaneously is possible.

Trust the voters

It can be argued that it should be left to the voters to decide whether they want a local councillor in their area to take up federal office. If the electorate thinks a currently serving local councillor would best serve them in another forum, should they not be free to exercise that choice? In 1902, the opponents of section 164 of the Electoral Act repeatedly made this point, saying State MPs should be free to stand. Even earlier, in the Constitutional Conventions, Mr Higgins said 'I am perfectly prepared to leave it to the electors of the State Parliament to say whether they will trust [federal] affairs in the hands of those who occupy seats there'.⁴² Sir Edward Braddon concurred: 'we should leave it to the judgment of the people of the States, who, after all, are the arbiters in this case, to say what should be done'.⁴³ The same may be said for local government: let the voters judge whether a councillor has done the wrong thing in seeking federal office while still holding their municipal office. Thus the current Bill should be supported, ensuring that this judgement is left in the hands of voters, rather than being usurped by State governments.

Contradictory principles

Leaving aside the pros and cons of allowing the candidacy of local councillors, there is a more fundamental question about the consistency of treatment of elected office holders. It could be argued that it makes no sense to create additional protection for local councillors while not at the same time moving to abolish the section 164 prohibition on the candidacy of State MPs. Opponents of the current Bill will be asking why local councillors deserve special treatment not available to State MPs? The Federal Parliament has benefited from the skills of local councillors and State MPs. Yet the latter are banned from being candidates for federal office, while the current Bill proposes to protect the ability of the former to stand. As was outlined earlier, the ban on State MPs very nearly did not become federal law a century ago, precisely because people could see advantages in having State MPs standing for federal office. Many even thought the offices should be able to be held concurrently. The current Bill seems to apply all those arguments to local councillors, while ignoring the implications for State MPs.

Supporters of the Bill may argue that the Constitutional recognition of the States puts their representatives in a different position. This argument may have some weight when dealing with the question of holding both jobs simultaneously. It is less clear, however, how it is relevant to the question of *candidacy*. There is a case to be made for treating State and local representatives in the same way while they are candidates for federal office. In this case, amending section 327 (as proposed by the current Bill) could only be part of the solution; section 164 would have to be modified as well.

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Prevention of candidacy, or prevention of incumbency?

During the 1902 debates, Senator O'Keefe (Labor, Tasmania) sought to distinguish candidacy from incumbency. He suggested:

It is not reasonable that a man should be able to occupy at the same time one seat in the Federal Parliament and another in the State Parliament, but we should stop at that, and not show the selfish spirit which it appears some State Parliaments have shown.⁴⁴

O'Keefe wanted to prevent people simultaneously holding two elected offices. However, his view was that a distinction should be made between candidacy for office and actually taking one's place in Parliament. He did not want to prevent a person being a federal *candidate* while also being a State MP. This distinction exists, ironically enough, in current Queensland law. The [Parliament of Queensland Act 2001](#) section 68 states in part:

(1) Any of the following persons who is elected as a member can not take his or her seat until the person stops holding the membership or appointment mentioned in relation to the person—

(a) member of the Commonwealth Parliament or of a legislature of another State;

In section 72 it also states:

(1) A member's seat in the Assembly becomes vacant if any of the following happens—

...

(e) the member becomes a member of the Commonwealth Parliament or of a legislature of another State;

Queensland has thus implemented the distinction between candidacy and incumbency that Senator O'Keefe unsuccessfully suggested for the federal legislation back in 1902. It might be possible, through amendments, to consider making such a distinction in the current Bill.

Legal Doubts? What can be achieved by amending the 'political liberty' provisions?

Up to this point, this Bills Digest has accepted the legal premise of the Bill and outlined the issues for debate. There are however questions to be considered about the Bill's legal effect, regardless of one's views about the underlying question of policy. It is worth recalling that the current Bill seeks to amend the provisions in the existing Electoral Act concerning political freedoms ([s. 327](#)). The current text of section 327 reads:

Interference with political liberty etc.

(1) A person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act.

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Penalty: \$1,000 or imprisonment for 6 months, or both.

(2) A person must not discriminate against another person on the ground of the making by the other person of a donation to a political party, to a State branch or a division of a State branch of a political party, to a candidate in an election or by-election or to a group:

(a) by denying him or her access to membership of any trade union, club or other body;

(b) by not allowing him or her to work or to continue to work;

(c) by subjecting him or her to any form of intimidation or coercion;

(d) by subjecting him or her to any other detriment.

Penalty: (a) if the offender is a natural person—\$5,000 or imprisonment for 2 years, or both; or (b) if the offender is a body corporate—\$20,000.

If we consider the legal issues that were argued in relation to subsection 327(1) during the Queensland Supreme Court case, the approach of the current Bill may be called into question.

One of the points successfully argued in the Queensland Supreme Court was that the Queensland law was invalid because it was inconsistent with subsection 327(1) of the Commonwealth Electoral Act. On this all the judges agreed.⁴⁵ Let us begin by accepting the opinion of the Supreme Court on this point. In its decision, the court unanimously agreed that section 327(1):

indicates that the field of operation [of the Electoral Act] extends to the prevention of any interference⁴⁶ with a right under the Constitution and the Act to stand for election as such.

The legal question, therefore, was whether the Queensland law interfered with this field of operation. The Court then concluded, contrary to the arguments made by the Queensland Government, that section 224A(b) of the Local Government Act did seek to enter the field of operation of section 327(1) of the Commonwealth Electoral Act, and to detract from its operation.⁴⁷ The Queensland law was therefore invalid. Now, if that is the case, the current Bill may be unnecessary because the law is already adequate to achieve the Commonwealth's goals. The Bill would create no protection not already afforded by the scope of 327(1). The current Bill would seem to be of relevance only if the reasoning of the Queensland Supreme Court were to be in some way overturned in a higher court, or disregarded by another jurisdiction's Supreme Court.

A key question then is to understand the logical consequences of setting aside the reasoning of the Queensland Court.

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If one were to disagree with the argument of the Queensland Supreme Court, it would be for the reasons outlined by the State of Queensland,⁴⁸ which considered that the State law was nothing to do with federal office, but was about qualifications to be in local government. Yet in this case, amending section 327 in the manner proposed by the current Bill may still be no help. This is because rejecting the Queensland Supreme Court's arguments regarding the scope of subsection 327(1) necessarily implies accepting that the Queensland law is *not* concerned with federal electoral matters. That is, the Queensland law should have been considered to be a law regulating qualifications for Queensland local government office. But if it is a law concerning local government, then it becomes unclear on what basis the Commonwealth's legislation would lie. Local government is a creature of State government: it is not a federal matter. If the Queensland law is considered to be about qualifications and disqualifications for holding a Queensland local government position, what grounds has the Commonwealth to interfere in this matter? Thus, *if* one were to reject the Queensland Supreme Court's arguments, then amending section 327 of the Electoral Act in the manner proposed by the current Bill might *still* not fulfil its objective, because the amendment would not be relevant to the qualifications for local government office.

It might be said that the point of the Bill is to give greater clarity, particularly to prospective candidates and State governments, about their legal rights and obligations under the Commonwealth's Electoral Act. That is, the new clause in a sense codifies aspects of the Supreme Court judgement in the key location to which people turn when they are considering electoral matters: the Electoral Act. This however could be seen to be a weak reason to enact legislative change. It also could send a confusing, rather than clarifying, signal, contradicting the current approach of the Electoral Commission, which warns candidates to be careful not to fall foul of section 44(iv) of the Constitution concerning offices of profit under the Crown.

There is a related policy question about why the government has not mentioned the simultaneous *holding* of local and federal office in its proposed new section 327(3). It only mentions nomination and candidature. Is this because the federal government is undecided about whether people should be able to hold such offices in parallel? Is it signalling to the States (and perhaps the courts) that it thinks a State law preventing such dual incumbency would be legally acceptable, even though State laws regulating candidacy are not? Or is it concerned that extending its proposed Bill to incumbency would attract a dispute that might finally lead to the High Court ruling on whether elected local government positions are offices of profit under the Crown? It would be interesting to get some clarification of this issue.

Finally, there is also a question concerning the effect of seeking to nullify a State law to the extent to which 'the law *discriminates* against a member of a local government body' (emphasis added). This is the question of whether declaring a council position to be vacated because a councillor has nominated for federal election could in fact be said to be 'discrimination' against them. It is possible to envisage that a court would consider that causing a councillor's office to be vacated was not discrimination, because it was (again,

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as Queensland argued) a matter of disqualifications for local government office that the State can legitimately control. It might also turn out that any disputes under the clause contained in the current Bill could turn on the question of how the State law was constructed. Take for example a State law containing conflict-of-interest provisions that prevented all sorts of judicial and elected officers (such as judicial positions and ombudsmen as well as local councillors) from simultaneously seeking other elected office. Would this mean that including local councillors in such a list would not violate the proposed new section 327(3), because it was not 'discriminatory' (on the grounds that the restrictive provisions applied to a whole class of persons equally)?

These are just some of the complex legal and policy questions the Bill as currently formulated raises.

ALP/Australian Democrat/Greens policy position/commitments

There was no debate in the Senate on the Bill that was tabled by Senator Hill at the end of the last Parliament in late 2001, so it is not clear what position other parties or independents might take on this proposal. Senator Boswell did however issue a media release in which he stated that:

The Democrats agreed to this amendment [meaning the content of the tabled Bill], however, Federal Labor filibustered in the Senate and did not allow the debate to proceed.⁴⁹

At this stage, therefore, it seems possible that the ALP will oppose the Bill, while the Democrats may support it. The Greens have been advocating reform in this area for some time. Their focus has been on section 44 of the Constitution generally, rather than any particular issue such as the candidacy of local councillors. In 1998, Senator Brown (Greens, Tasmania) introduced the [Constitutional Alteration \(Right to Stand for Parliament – Qualification of members and Candidates\) Bill 1998](#). In his second reading speech, he remarked on the restrictions caused by the 'office of profit' provisions of s. 44 (iv):

This situation is discriminatory, and it deprives the federal parliament of a huge pool of talented potential politicians, including every public servant. At every recent election it has caused trouble and expense as someone unwittingly falls foul of the constitution.⁵⁰

These views would seem to suggest that the Greens might favourably view a Bill that sought to preserve the ability of as wide a range as possible of people to stand for office.⁵¹

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A technical flaw?

The proposed new subsection as it is currently drafted would appear to prevent discrimination against a candidate in a federal election, but not to prevent such discrimination against a person nominated for, or declared to fill a casual Senate vacancy, unless they had been a candidate in a previous election. This is because the current Bill prevents discrimination only against *candidates in an election*, whereas the procedure for filling a casual vacancy is not an electoral procedure.

Main Provisions

Item 1 of Schedule 1 amends section 327 of the Commonwealth Electoral Act, which is concerned with the protection of political liberties. Item 1 prevents a State or Territory law from discriminating against a member of a local government body because they stand, or are declared as a candidate, for federal Parliament.

Concluding Comments

This tiny Bill has opened up some large questions:

- How should State and local politicians be treated as candidates for federal office, and why should they be treated differently?
- Who is going to regulate conflict of interest issues between the federal and local spheres of government, and when and how will they go about it?
- If local councillors are elected to Commonwealth Parliament, are they or are they not at risk of disqualification owing to holding an office of profit under the Crown?

Endnotes

- 1 *House of Representatives Debates*, 12 December 2002, p. 10271.
- 2 [Local Government and Other Legislation Amendment Act 2001](#)
- 3 *LGAQ (Inc) v State of Qld*, [2001] QCA 517; *LGAQ (Inc) v State of Qld*, [2001] HCA 75; Stephen Fynes-Clinton, 'Riding the legal merry-go-round', *Council Leader*, vol. 27, no. 6, 2001-02, pp. 20-3.
- 4 Daryl Williams, [Queensland Local Government Case](#), *Media Release*, 3 October 2001.

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- 5 Anne Twomey, ['The limitation of State legislative power'](#), *Constitutional Law and Policy Review*, vol. 4, no. 1, 2002, p. 18.
- 6 *ibid.*
- 7 Twomey, *op. cit.*, p. 19.
- 8 This ban was to be found in s. 96 of the *Commonwealth Electoral Act 1902*, and was included in s. 70 of the Electoral Act when first consolidated in 1918.
- 9 Twomey, p. 18.
- 10 [2001] QCA 517 at: 14–15.
- 11 Senator Robert Hill, *Senate Debates*, 27 September 2001, p. 28224.
- 12 The Commonwealth Electoral Amendment Bill 2001. A [Supplementary Explanatory Memorandum](#) was released in connection with the proposed additional Schedule for the Commonwealth Electoral Amendment Bill 2001, but the additional schedule never made it into that Bill.
- 13 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution*, July 1997, Canberra.
- 14 The parties to the Queensland Supreme Court case did not seek to argue that local councillors held an 'office of profit under the Crown', so this question remains unaddressed by the courts.
- 15 Cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution*, July 1997, Canberra, p. 67.
- 16 Australian Electoral Commission, 'Constitutional Disqualifications – Section 44 of the Constitution', [Electoral Backgrounder No. 13](#), October 2001.
- 17 *Senate Debates*, 29 October 1996, p. 4659.
- 18 [Constitution Alteration \(Right to Stand for Parliament – Qualification of Members and Candidates\) Bill 1998](#).
- 19 Ian Holland, [Candidacy of Local Councillors for Federal Office](#), *Research Note No. 21*, 2002, Parliamentary Library, Canberra, p. 2.
- 20 See *Convention Debates*, Sydney, 1891, pp. 877–81; Adelaide, 1897, pp. 1181–2; Sydney, 1897, pp. 996–1011. The decision to omit such a disqualification is described in Quick and Garran's *Annotated Constitution of the Australian Commonwealth*, 1901, p. 488, though their account contains an error. They state that Sir Edward Braddon moved the insertion of a disqualification clause at the 1897 Convention in Adelaide. In fact Dr Cockburn moved it, and Braddon spoke against it.
- 21 *Senate Debates*, 24 January 1902. The provision (which became clause 98a of the Bill) was introduced in the House of Representatives after the original version of the Bill passed the Senate, 21 March 1902. The amendment, to which the Senate ultimately acquiesced, had originally failed in the Senate, when debated in committee on 12 March 1902. It also failed, the second time around, by 10 votes to 11. *Senate Debates*, 21 August 1902, p. 15267. When the House of Representatives insisted upon the amendment (*House of Representatives Debates*, 24 September 1902, p. 16045), the Senate only acquiesced by a single vote (*Senate*

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Debates, 25 September 1902, p. 16100). There was thus very nearly no law preventing State MPs from being candidates for federal office.

- 22 The government minister responsible for the Bill, Sir William Lyne, quoted the relevant legislative provisions from NSW, South Australia and Victoria, and indicated that 'The Acts of other States contain similar provisions'. *House of Representatives Debates*, 30 July 1902, pp. 14719–20.
- 23 MPs who have served concurrently are: the Hon. Paul Calvert (Liberal, Tasmania), elected to the Senate for a term deemed to have begun in July 1987 and Councillor in the Municipality of Clarence until 1988; the Hon Roger Price (Labor, Chifley), elected to the House of Representatives in 1984 and Alderman in Blacktown City Council until 1987; and Julian McGauran (National Party, Victoria), elected to the Senate for a term deemed to have begun in July 1987 and Councillor in Melbourne City Council until 1988. These dates are based on the 2002 Parliamentary Handbook entries for the Senators and members. It is possible that a few other MPs, for whom complete data is not available, have served concurrently.
- 24 Senator Higgs (ALP), *Senate Debates*, 12 March 1902, p. 10874.
- 25 Mrs Pratt (Ind.), *Queensland Parliamentary Debates*, 17 May 2001, p. 1045.
- 26 Mr Bell (Ind.), *Queensland Parliamentary Debates*, 17 May 2001, p. 1055.
- 27 Senator O'Connor (Protectionist), *Senate Debates*, 12 March 1902, p. 10875.
- 28 Mrs Pratt (Ind.), *Queensland Parliamentary Debates*, 17 May 2001, p. 1045.
- 29 Mr English (ALP), *Queensland Parliamentary Debates*, 17 May 2001, p. 1045.
- 30 *Senate Debates*, 12 March 1902, p. 10875.
- 31 Mr English (ALP), *Queensland Parliamentary Debates*, 17 May 2001, p. 1045.
- 32 Mr Lawlor (ALP), *Queensland Parliamentary Debates*, 17 May 2001, p. 1050.
- 33 Ms Stone (ALP), *Queensland Parliamentary Debates*, 17 May 2001, p. 1055.
- 34 Mr Seeney (National), *Queensland Parliamentary Debates*, 17 May 2001, p. 1047.
- 35 *Senate Debates*, 3 December 1998, p. 1239.
- 36 The Court in particular cited the *Smith v Oldham* case: (1912) 15 CLR 355. Cited by McMurdo P, [2001] QCA 517 at para. 9.
- 37 Commonwealth Grants Commission, *Review of the Operation of the Local Government (Financial Assistance) Act 1995*, Canberra, June 2001, p. 9.
- 38 Twomey, *op. cit.*, p. 19. Holders of most of these offices would probably nevertheless be unable to hold office because of the 'office of profit' provision of the constitution. Nevertheless, this fact itself merely serves to highlight the apparent contradiction between the way the current Bill seeks to treat councillors, and the way many other public offices are treated when it comes to candidacy for elected positions.
- 39 Mr Bell (Ind.), *Queensland Parliamentary Debates*, 17 May 2001, p. 1054.
- 40 Mrs Carryn Sullivan (ALP), *Queensland Parliamentary Debates*, 17 May 2001, p. 1056.

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- 41 Mr Bell (Ind.), *Queensland Parliamentary Debates*, 17 May 2001, p. 1054.
- 42 *Constitutional Convention Debates*, Adelaide, 22 April 1897, p. 1181.
- 43 *Constitutional Convention Debates*, Adelaide, 22 April 1897, p. 1182.
- 44 *Senate Debates*, 12 March 1902, p. 10876. He reiterated the argument when the Bill was returned from the House of Representatives with a list of amendments: *Senate Debates*, 21 August 1902, p. 15257.
- 45 Justice McMurdo, [2001] QCA 517 at para. 2; Justice Davies at para 63; Justice Williams at para 81.
- 46 This prevention of interference extends to prevention of interference by a body politic: see the *Acts Interpretation Act 1901*, s. 22. This specific point was not however, argued: see Justice Davies, [2001] QCA 517 at para. 31.
- 47 Justice Davies, [2001] QCA 517 at para. 61.
- 48 As well as by Twomey and Justice Davies in his dissenting judgement on this particular point.
- 49 Senator Ron Boswell, [Commonwealth Intervenes in Local Government Court Action](#), Media Release, 3 October 2001.
- 50 *Senate Debates*, 24 June 1998, p. 3986.
- 51 The Greens may have recently developed an added interest in Section 44 issues. There was some debate about whether their House of Representatives member, Mr Michael Organ (elected in the Cunningham by-election), might be ineligible to be an MP under the 'office of profit under the Crown' provision. He was employed by the University of Wollongong as a librarian, and was on leave without pay both when a candidate and once he had taken office. There was a suggestion that this might be an office of profit under the Crown because Universities are established by statute, and because so much of their funding is from the government. See Paul McInerney, 'Organ's eligibility questioned', *Illawarra Mercury*, 20 December 2002.

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