

## Candidacy of Local Councillors for Federal Office

This Research Note discusses issues highlighted by a recent attempt by the Queensland Government to require local councillors to vacate office if seeking election to federal Parliament.

### Who can Seek Election to Federal Parliament?

The qualifications for seeking federal office are embedded in the [Constitution](#), and in sections 163 and 164 of the [Commonwealth Electoral Act 1918](#) (the Act).<sup>1</sup> [Section 44 \(iv\) of the Constitution](#), states that a person who 'holds any office of profit under the Crown ...' cannot be chosen to sit in Parliament.

### Office of Profit

The effect of the 'office of profit' provision remains unclear.<sup>2</sup> While litigation has clarified that some people—such as State and federal public servants—are not eligible to stand for Parliament,<sup>3</sup> no one is sure whether local councillors are affected. First, not all councillors hold an 'office of profit': only those paid for their services do so. Second, it is a matter of debate whether councillors hold office 'under the crown'.<sup>4</sup>

The second question arises because councillors are not appointed by government but elected under a system established by legislation. That is, they hold office not at the discretion of the executive, but as a result of elections held under acts of the State parliaments. This may mean they are not 'under the crown'.

In 1997 the House of Representatives Committee on Legal and Constitutional Affairs completed its report on [Aspects of Section 44 of the Australian Constitution](#). They [addressed the question](#) of 'office of

profit under the crown', agreeing it was a grey area which would benefit from replacing the current disqualification provisions of section 44 with new, less ambiguous arrangements (similar points were made in a 1981 Senate Committee report).<sup>5</sup> The Government endorsed the suggestion 'in principle', but with constitutional change being exceedingly difficult to achieve, nothing further has happened.

The main issue with section 44 is considering what sort of conflicts of interest should prevent a person being a candidate for, or member of, parliament. This issue was highlighted when Queensland decided to try and prevent candidates for State or federal office retaining positions they might hold as local councillors.

### The Queensland Local Government Act Changes

In 2001, the Queensland Parliament amended the [Local Government Act 1993](#), inserting s. 224A(b), to read:

A councillor ceases to be a councillor if—

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

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 in the Supreme Court, after succeeding in getting the case remitted down from the High Court.<sup>6</sup>

The court concluded that the provision regarding federal candidacy was invalid. It unanimously held that this was because it was inconsistent with Commonwealth electoral law. The majority also held that the State Parliament 'did not have the legislative power to enact such a law'.<sup>7</sup>

The outcome relied on the court's opinion that the Queensland law:

should be characterised as a law relating to qualification to stand for election to federal parliament, rather than a law relating to the terms and conditions upon which a person may hold the State office of councillor.<sup>8</sup>

### The Boswell Bill

Prior to the Queensland Court handing down its decision, Queensland National Party Senator Ron Boswell had tabled in federal Parliament the [Commonwealth Electoral Amendment \(Prevention of Discrimination Against Members of Local Government Bodies\) Bill](#). This Bill would have amended [s. 327](#) of the Act, concerning interference with political liberty. A new clause was to be added, stating:

A law of a State or Territory has no effect to the extent to which the law discriminates against a member of a local government body on the ground that:

- (a) the member has been, is, or is to be, nominated; or
- (b) the member has been, is, or is to be, declared;

as a candidate in an election for the House of Representatives or the Senate.

The Bill was tabled on the last sitting day (27 September 2001), lapsed when Parliament was prorogued, and had not been re-introduced at the time of writing.

## Should Local Councillors be Disqualified?

There are arguments both for and against what the Queensland law sought to achieve. Those supporting the new law argued:<sup>9</sup>

- the situation for local councillors should mirror existing federal law, which prevents a sitting State MP from being a candidate for federal Parliament
- local government should not be treated as a 'training ground' for aspiring politicians, but as a tier of government requiring committed representatives. It would therefore be good to discourage people from seeing it as merely a stepping stone to 'higher' ambitions, and
- ratepayers should not have to pay councillors who are not concentrating on their local responsibilities.

Those who opposed it argued:<sup>10</sup>

- the law was being implemented to prevent Labor's political rivals (including independents) from using local government as a platform for seeking State or federal office
- it was inconsistent to require only local councillors to resign their jobs if they were to be candidates, but to leave others—such as union officials—free to continue in their jobs when they stood as candidates, and
- the skills and knowledge of experienced councillors can benefit

## Endnotes

1. For a comprehensive discussion of qualifications and disqualifications, see Gerard Carney, *Members of Parliament: Law and Ethics*, Prospect Media, St Leonards, NSW, 2000.
2. Kathryn Cole, '[Office of profit under the crown' and membership of the Commonwealth Parliament](#)', *Issues Brief* no. 5, 1993, Parliamentary Library.
3. *Sykes v Cleary*, (1992) 176 CLR 77.
4. See, e.g. *Sydney City Council v Reid*, (1994) 34 NSWLR 506.
5. The issues are discussed in more detail in Bob Bennett, '[Candidates, Members and the Constitution](#)', *Research Paper* no. 18, 2001–02, Parliamentary Library.
6. *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.
7. Anne Twomey, '[The limitation of State legislative power](#)', *Constitutional Law and Policy Review*, vol. 4, no. 1, 2002, p. 18.
8. *LGAQ (Inc) v State of Qld*, Williams JA, para. 76.
9. The Act, s. 164; Allon Lee, 'The Right to Stand', *GovernmentNews*, November 2001, p. 20; Mr Mickel, *Queensland Parliamentary Debates* (QPD), 17 May 2001, p. 1066; Mr English, p. 1045.
10. Mr Seeney, QPD, 17 May 2001, p. 1048; Mr Hopper, p. 1049; Mr Wellington, p. 1057.
11. Mr Bell, QPD, 17 May 2001, p. 1054.
12. Anne Twomey, op. cit.

other parliaments. People should not be discouraged from transferring their skills to these arenas.

Some who opposed the law argued that a more appropriate approach would be to require local councillors to stand down from their duties while they were a candidate, only resigning from local government if they were actually successful in the State or federal election.<sup>11</sup>

## Is any Action Needed?

The question is what is the objective of the framework for elections?

The challenge is to have a regime that avoids conflict-of-interest situations or the abuse of ratepayers' funds, while at the same time ensuring no one is unnecessarily impeded from seeking State or federal office. Some would also say the system should not be biased in favour of established political parties over independents.

If the Commonwealth wants to ensure councillors can become MPs, need it act now the Queensland law has been invalidated? Perhaps it does, as the fate of the Queensland law does not prevent other States trying similar strategies. Certainly, legal academic Anne Twomey has called into question the soundness of the Supreme Court's reasoning in the case.<sup>12</sup> The Boswell Bill might be one way to pre-empt such events.

Alternatively, the Commonwealth could seek to legislate to prevent a person from *sitting* in federal Parliament while also being a

councillor, without preventing them being a *candidate*. The distinction between 'being chosen' and 'sitting' already exists in the Constitution and the Act.<sup>13</sup> This approach would nevertheless have its challenges, and could raise questions about whether a similar approach should be taken to candidacy for federal office of State and Territory MPs (currently prohibited by s. 164 of the Act).

The problem with the legislative approach is that it relies on the High Court accepting that local councillors do not hold an 'office of profit'. The only sure way to resolve these (and related) issues is through Constitutional change to restructure section 44. Progress on this front awaits a bipartisan initiative to take forward suggestions made by the parliamentary committees (referred to earlier) in 1981 and 1997.

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13. Examples include the Act, [s. 379](#).

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