

Councillors standing for State or Federal Elections

With upcoming state and federal elections forecast in or before 2022, the MAV recommends councils and councillors familiarise themselves with the relevant laws and review applicable election content in councillor codes of conduct and other related council policies.

Local government experience provides for a recognised track record on which to stand for state or federal elections. As a prospective or nominating candidate, a councillor needs to ensure they continue to act with integrity, avoid potential conflicts of interests and the perception of misuse of their position and council resources.

LOCAL GOVERNMENT ACT 2020

Councillors are elected to perform their duties in a lawful manner and must comply with relevant provisions of the *Local Government Act 2020 (the Act)* including the standards of councillor conduct which are prescribed in regulation 12 of the *Local Government (Governance and Integrity) Regulations 2020*. When considering standing for Federal or State Parliament, it is recommended councillors consider these duties and requirements under the Act, including standards of conduct and potential conflicts of interest.

These standards of conduct require councillors to do everything reasonably necessary to ensure they perform the role effectively and responsibly including by ensuring they are fit to conscientiously perform the role of a councillor when acting in that capacity or purporting to act in that capacity and must not deliberately mislead the Council or the public about any matter related to the performance of their public duties.

Councillors must comply with the conflict of interest provisions outlined in sections 126 to 136 of the Act as well as the *Local Government (Governance and Integrity) Regulations 2020*. Managing conflicts of interest is about ensuring the integrity and transparency of decision making. Councillors nominating for Federal or State Parliament must ensure their private interests as a nominee do not affect their public duties and they do not use their position as councillor for personal benefit. Councillors must disclose any conflicting interests and not participate in decision making processes on matters where they have a conflict of interest.

The Act also provides it is an offence if a councillor intentionally misuses their position to gain or attempt to gain an advantage for themselves or for any other person, including by using public funds or resources in a manner that is improper or unauthorised.

Section 34(2)(a) of the Act specifies a person is not qualified to be councillor and ceases to hold the office, if they are member of either the Victorian Parliament, the Commonwealth Parliament, or of another State or Territory of the Commonwealth Parliament. Therefore, a councillor must resign immediately if they are successful in a State or Federal election.

COMMONWEALTH AND STATE CONSTITUTIONAL LAW

A councillor considering standing for federal or state elections should familiarise themselves with relevant constitutional laws - the *Commonwealth of Australia Constitution Act* (the Australian Constitution), for Federal elections, and the *Constitution Act 1975* (the Victorian Constitution), for Victorian elections.

If a councillor intends to nominate for election to Federal or State Parliament, the MAV recommends they seek independent legal advice in regards to the various issues associated with running as a candidate whilst still a councillor.

Federal Parliament eligibility

Under section 44(iv) of the Australian Constitution, a person who 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 disqualified from nominating as a candidate or sitting in Parliament.

It is not considered that the position of councillor will fall within the category of holding 'any office of profit under the Crown' under s44(iv) of the Constitution. In 2018 the High Court unanimously held that a Tasmanian councillor and mayor was not incapable of being chosen or of sitting as a Senator of Federal Parliament by reason of section 44(iv).

In addition, section 327(3) of *The Commonwealth Electoral Act 1918* provides any State legislation that discriminates against a councillor on the ground that the councillor has been, or is to be, nominated or declared as a candidate for the House of Representatives or the Senate has no effect. This section reflects the intention of the Federal Parliament, as outlined in the Minister's second reading speech for the *Commonwealth Electoral Amendment (Members of Local Government Bodies) Act 2003* as being 'to ensure that eligible members of a local government body do not suffer any penalty arising from their decision to stand as a candidate for election to either the Senate or the House of Representatives'.

State Parliament eligibility

Under section 49 of the Victorian Constitution, a person who holds any office or place of profit under the Crown (whether in right of Victoria or any other capacity), or is in any manner employed in the public service of Victoria or of the Commonwealth for salary wages fees or emolument may stand for election to the Victorian Parliament provided they resign from that position if elected to the Parliament. Otherwise, the person's election may be null and void. Accordingly, once a councillor is elected to Victorian Parliament they must resign from council.

MAV GUIDELINES

The MAV recommends councils, at a minimum, adopt the following Guidelines as part of their Councillor Code of Conduct developed under section 139 of the Act or to supplement that Code.

1. A councillor who becomes an endorsed candidate of a registered political party or publicly expresses an intention to run as an independent candidate for a state or federal election (a Prospective Candidate), should provide written advice to the CEO, as soon as practicable, who should then provide written advice to all councillors.
2. A councillor who is a Prospective Candidate, should declare their intended candidacy at a meeting of the council as soon as practicable after notifying the CEO pursuant to Guideline 1.
3. A councillor who nominates as a candidate for a State or Federal election (a Nominated Candidate), should apply for leave of absence from the council and this leave of absence should commence no later than the date of their nomination as a candidate with the relevant electoral commission for the election (Nomination Date) and conclude no earlier than the close of voting for the election. During this period, a councillor who is on a leave of absence should not attend meetings of the council or otherwise act as a councillor.
4. Any councillor / staff relationship protocol which the council has in place in respect of the election period prior to a council election, should be observed by a Nominated Candidate and this should apply from their Nomination Date until the close of voting for the election.
5. A council, upon receiving an application for a leave of absence from a councillor who is a Nominated Candidate or who intends to become a Nominated Candidate, should consider this as a reasonable request and approve that application.
6. A councillor who is a Prospective Candidate or a Nominated Candidate should take care to declare conflicts of interest that may pertain to their conflicting role as a candidate.
7. A councillor who is a Prospective Candidate or a Nominated Candidate, should take care to differentiate between their role as a state or federal election candidate and role as a councillor when making public comment.
8. A councillor who is a Prospective Candidate or a Nominated Candidate, should not use council resources, including council staff, equipment and facilities in relation to their candidacy.
9. A councillor who is a Prospective Candidate or a Nominated Candidate, should not use council activities, including council meetings, events, network meetings and council-related external activities in relation to their candidacy.
10. A councillor must resign immediately if they are successful in a state or federal election.

Guidelines

The distinction between Prospective Candidate and Nominated Candidate

These Guidelines draw a distinction between Prospective Candidates and Nominated Candidates because, as with council elections, candidates for state and federal elections only become actual nominated candidates a few weeks prior to the relevant election date. Accordingly, these Guidelines recommend different treatment for Prospective Candidates and Nominated Candidates on the basis that some requirements are recommended as appropriate for Nominated Candidates during a formal election period which are not considered to be necessary prior to the formal election period.

Further Information:

For further information see:

- Parliament of Australia website (www.aph.gov.au)
- Australian Electoral Commission website (www.aec.gov.au/)
- Victorian Parliament website (www.parliament.vic.gov.au/)
- Victorian Electoral Commission website (www.vec.vic.gov.au/)

DISCLAIMER: This document was updated on 3 November 2021. The information is guidance only and does not constitute legal advice. The MAV recommends independent legal advice is obtained regarding the various issues associated with running as a candidate whilst still a Councillor.