



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

**Reference: State Elections (One Vote, One Value) Bill 2001 [2002]**

FRIDAY, 13 FEBRUARY 2004

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**SENATE**  
**LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE**

**Friday, 13 February 2004**

**Members:** Senator Bolkus (*Chair*), Senator Payne (*Deputy Chair*), Senators Greig, Kirk, Ludwig and Scullion

**Substitute members:** Senator Murray for Senator Greig

**Participating members:** Senators Abetz, Bishop, Brandis, Brown, Buckland, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Knowles, Lees, Lightfoot, Mackay, Mason, McGauran, Murphy, Nettle, O'Brien, Sherry, Stott Despoja, Tchen, Tierney and Watson

**Senators in attendance:** Senators Bolkus, Kirk, Murray and Payne

**Terms of reference for the inquiry:**

State Elections (One Vote, One Value) Bill 2001 [2002]

**WITNESSES**

<b>BODEL, Mr Kevin Stanley, Assistant Director, Parliamentary and Ministerial, Australian Electoral Commission .....</b>	<b>1</b>
<b>GARDNER, Mr Alexander Walter (Private capacity) .....</b>	<b>39</b>
<b>GREEN, Mr Phillip Charles, Electoral Commissioner, ACT Electoral Commission.....</b>	<b>1</b>
<b>HUGHES, Emeritus Professor Colin Anfield (Private capacity).....</b>	<b>26</b>
<b>MALEY, Mr Michael Charles, Director, International Services, Australian Electoral Commission.....</b>	<b>1</b>
<b>McGINTY, the Hon. James Andrew, MLA, Attorney-General, Western Australian Government.....</b>	<b>32</b>
<b>WHITLAM, The Hon. Gough, AC, QC (Private capacity).....</b>	<b>10</b>
<b>WILLIAMS, Professor George John (Private capacity) .....</b>	<b>18</b>



**Committee met at 9.04 a.m.****BODEL, Mr Kevin Stanley, Assistant Director, Parliamentary and Ministerial, Australian Electoral Commission****MALEY, Mr Michael Charles, Director, International Services, Australian Electoral Commission****GREEN, Mr Phillip Charles, Electoral Commissioner, ACT Electoral Commission**

**CHAIR**—I declare open this public hearing of the Senate Legal and Constitutional References Committee inquiry into the State Elections (One Vote, One Value) Bill 2001 [2002]. The inquiry was referred to the committee by the Senate on 9 September 2003 and is expected to report by 1 March 2004. The bill was introduced by Senator Andrew Murray and proposes that all electorates throughout Australia be comprised, as closely as possible, of equal numbers of electors. The committee received 21 submissions to this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. We prefer that all evidence be given in public but, under the Senate's resolution, witnesses do have the right to request to be heard in private. It is important that we be given notice if that is the case. I now welcome witnesses from the Australian Electoral Commission and the ACT Electoral Commission. You have lodged submissions Nos 19, 15 and 5 with the committee. Is there any need to amend or alter those submissions?

**Mr Maley**—No.

**CHAIR**—Would any of you like to make an opening statement?

**Mr Maley**—At the outset, I would like to thank the committee for giving the Australian Electoral Commission the opportunity to speak to our submission to the inquiry. Our submission has two main elements. Firstly, we have sought to assist the committee by providing a brief overview of a number of attempts that were made in the 1970s and 1980s to pursue some of the policy objectives that underpin the present bill. We have also sought to draw to the committee's attention the specific question of whether the bill, if enacted, would be held by the High Court to be within the legislative power of the parliament. This is not a matter in which the AEC has—or is qualified to have—any strong views, but the fact that it has been raised in many of the other submissions to the inquiry highlights its significance. Secondly, we have however sought to analyse the bill clause by clause. In doing so, we have identified a range of flaws in the drafting of the bill which, in our view, are sufficiently significant to make it desirable that the committee recommend that the bill not be enacted in its current form.

The most important of these flaws are as follows. Firstly, the definition of 'quota of electors for each electorate' in clause 3 is defective in a number of respects. It seeks to base a quota on predicted rather than current enrolments, for reasons which are not clear to the AEC, but leaves unanswered the question of how and by whom such predictions would have to be made. It takes no account of situations such as that which applies in the Australian Capital Territory, which is

discussed in detail in the ACT Electoral Commission's submission to the inquiry, where there are multimember electorates which do not all have the same number of members. The bill's operation in relation to state legislative chambers elected on a rotating basis is unclear. Secondly, clause 4 imposes requirements not on the redistribution processes which take place in the various states and territories but upon elections which follow the redistribution processes. The language of the clause would appear to require that exact numerical equality of 'size' across constituencies at election time be sought. None of the redistribution processes in place in the states and territories would appear to meet such a requirement at present. Thirdly, the bill does not specify what remedies might be open if the court were to hold that the constituencies in the state or territory did not comply with clause 4. The wording of clause 4 suggested such a finding would be able to be made only after the dissolution or expiration of the state or territory legislature. In the absence of a validly elected subsequent state or territory legislature, it is not clear what legislative mechanism would be available to correct the defects identified. Finally, clause 5's attempt to identify those who would be entitled to bring an action under the bill is unclear in that it refers to a registered political party without defining the term and refers also to a 'member of the house of parliament to which the action relates' without taking account of the fact that, if that house had been dissolved it, it would arguably no longer have any members. Having made these points, we would be happy to attempt to answer any questions you may have for us.

**CHAIR**—Would you like make an opening statement, Mr Green?

**Mr Green**—Thank you for giving me the opportunity to address the committee and to expand on the ACT Electoral Commission's submission to this inquiry. It is not normally the ACT Electoral Commission's practice to make submissions to Commonwealth parliamentary inquiries; we tend to stick to our ACT jurisdiction. However, as this bill, if enacted, will have a direct effect on electoral arrangements for the ACT Legislative Assembly, I consider it appropriate for the commission to make a submission to point out that the bill did not appear to take account of the ACT's electoral system. My concerns are entirely related to the workability of the proposed bill. I do not consider it appropriate for the ACT Electoral Commission to take a view on whether it is desirable for the Commonwealth to legislate in this manner, but I would direct your attention to the submission lodged by the ACT Chief Minister, Mr Jon Stanhope, on the ACT government's view on this matter.

My ACT-specific concern with the bill is that the quota formula included in it does not envisage a proportional representation electoral system that elects different numbers of members in different electorates. As you would be aware, in the ACT we have the Hare-Clark single transferable vote system of proportional representation. The ACT has a total of 17 MLAs, a number that is set under Commonwealth legislation in the Australian Capital Territory (Self-Government) Act 1988. It is impossible to divide a parliament of 17 into equal-size electorates without either having 17 single member electorates or one electorate at large. The Hare-Clark system was adopted in the ACT following a referendum of voters in 1992. The option chosen at the referendum specified that the ACT would be divided into three electorates, with two electorates returning five members each and one electorate returning seven members. The system has been in place since the 1995 ACT election.

It is also relevant to note that the Hare-Clark electoral system in the ACT was entrenched under the mechanism spelt out in the ACT (Self-Government) Act following a second referendum so that single member electorates could not be adopted without either approval at a

referendum or by the vote of a two-third majority of Legislative Assembly members. Section 3 of the State Elections (One Vote, One Value) Bill calculates the quota by dividing the number of votes in a state or territory by the number of electorates. Clearly this would not work in the ACT situation, as the number of electorates does not equate to the number of members. However, given the ACT's redistribution criteria, I would argue that the ACT system does deliver one vote, one value and, therefore, if this bill were to proceed, this element of the bill should be changed to allow for electorates returning different numbers of members. In fact, there is a formula set out in the ACT (Self-Government) Act that sets a quota that takes account of different numbers of members in electorates. From a legislative drafting point of view, the bill has many problems with it. The AEC is similarly concerned. I am concerned that these problems make it unclear in purpose and effect such that it would need substantial redrafting if it were to achieve its stated goals. I am happy to take questions.

**CHAIR**—Mr Bodel, do you have an opening statement?

**Mr Bodel**—I am fine, thank you.

**CHAIR**—I will start with one or two questions. I am sure Senator Murray has quite a number, as do other committee members. It seems that what you are suggesting in the submissions is that there are two areas where there are issues. The first is the one vote, one value test, whatever that might be. The second is at what time it is applied. The bill talks about predicted future figures. If you did away with the predicted future figure aspect—for instance, if you looked at the number of voters at the time of redistribution—would that overcome most of the problems in this particular part of your concerns?

**Mr Maley**—I do not believe so. Let me take the two different areas that you have raised. There is a particular difficulty with the definition of a quota of voters for each electorate, because it is unclear where the predictions that are specified will come from. We do not know why there is that suggestion that predicted figures rather than current figures be used—it would seem to add an additional complication without any particularly obvious benefit—but the greater problem is with the drafting of clause 4. It says that people must be 'voting in electorates as nearly equal in size as possible' and there are some further qualifications. The language there is quite imperative. It is not saying that the objective is to have electorates which are all within a 15 per cent tolerance of the average enrolment at election time but that it is an imperative to get to a situation at election time where enrolments are as nearly equal as possible.

With computer processing of enrolment statistics, which are maintained at a very disaggregated level, it is feasible these days to get to levels of equality between enrolments in different electorates which are extraordinarily precise, if that is the way you want to go. In effect, this is what the drafting of that clause would require. I remember that, back in 1988 in a different inquiry, we drew the attention of the Joint Select Committee on Electoral Reforms, as it then was, to a redistricting exercise which had been done in Michigan in the United States. Using computers they got to the point where five out of seven—I am not entirely sure of the proportion—congressional districts had exactly the same population; the populations were identical. The US Supreme Court in looking at the issue of what is meant by equality in the case of *Karcher v. Daggett* in 1983 said that provisions like this requiring equality to be applicable as nearly as possible kick in if someone can come up with a proposal to move voters around which will get the numbers even closer than they are at the moment. The problem with clause 4 is that

it is not adopting the sort of scheme that exists at the Commonwealth level and in most of the state jurisdictions at the moment, where enrolments within a tolerance are acceptable, but it is requiring that you try to seek absolute equality. There are provisions in clause 4 which talk about quotas but they do not sit properly with the fundamental requirement, that absolute imperative, towards equality. That we see as a very big problem.

The second point I wanted to make is that essentially there are two different ways in which you can try to craft provisions that achieve one vote, one value. You can focus on outcomes, as the bill does and as is done in the United States, and say that it does not matter how you get to this point but this is the objective you must meet. The other approach, which is the one that is taken in the Commonwealth Electoral Act in relation to House of Representatives boundaries, is to say that we are more concerned with the process—that is, we will focus on what happens not at election time but at redistribution time and seek to get a process where certain tolerances are complied with. You also have electorates which are going to move together towards closer enrolments as you get further away from the redistribution and then live with the possible consequence, for example, that one or two seats might move the other way and get outside the 10 per cent tolerance at election time. The focus is on what happens at the redistribution process. We think that has been a very effective way to proceed at the Commonwealth level.

**CHAIR**—Could you overcome most of your problems if, for instance, you embraced a model which expressed an objective and then commanded that in each state, for instance, there be a redistribution periodically—say, every three or four years—and in that redistribution the sorts of factors driving the federal redistribution applied to states?

**Mr Maley**—You need to draw a distinction between objectives to be met at redistribution time and objectives to be met at election time. If you were going to focus on the redistribution process, clearly it would be essential to specify objectives to be met as part of the redistribution. But if you then supplemented that with objectives to be met at election time I suggest that would muddy the waters considerably as to whether a particular set of boundaries was or was not valid. From the point of view of an election administration, what you want is certainty. I am sure that is true also for all of the members of parliament. You would want a situation where going into an election you would know that the boundaries that had been determined in some sort of redistribution process were completely legally valid and would not be able to be impugned after the election, which is a very bad time to start challenging electoral boundaries.

**CHAIR**—I think you are saying that what I suggested in terms of the redistribution time being the critical period is something worth exploring.

**Senator MURRAY**—Gentlemen, thank you for your submissions. I do not take a defensive stance on criticisms of the bill, simply because of the way in which private senators' bills are constructed. The brief and limited resources available to us mean that, from the parliamentary drafter's point of view, we do benefit from both criticism and the committee process. So do not feel shy to lash out. That will benefit the bill, not do otherwise.

I want to step back to a fundamental decision at the commencement to the bill which, Mr Maley, you brought out in an answer to a previous question. The first key consideration when you are attempting, as the Commonwealth, to interfere with state law is to have the power to

hang off your approach. We have taken a universal principle to which Australia is a signatory. That can be challenged but there is a sound, firm basis on which the powers of the bill rely.

However, the second decision has to be whether you simply affirm that principle and ask the states and territories to meet it and you give them a time frame in which to do so—some kind of transitional arrangements—which could be lengthy. It might even be a decade if that were necessary. For instance, if you took some place where your upper house had eight years as a term, you can see that you would need a long process.

The third way is to specify the manner in which the principle should be implemented. That is when it gets complex, because the states, except for Western Australia, have all achieved the principle pretty well but with different mechanisms. How would you react, as somebody who is very experienced in this area, to a bill which simply said: this is the principle and this is the tolerance we think is acceptable within the principle; go away and do it in your own fashion in each of your own legislatures?

**Mr Maley**—This is a case where the devil lies in the details, because there are a number of different ways in which one can look at the principles. At the highest level we have a principle that is specified in the International Covenant on Civil and Political Rights, but that is a very generally phrased principle. It is certainly not explicitly talking about numbers of people in electorates—it is not even talking about electorates—yet it is going to be the basis on which a bill of this type relying on the international covenant more generally will have to be drafted. So that is one level of principle.

The next level of principle is the sort of thing that clause 4 of the bill may be trying to encapsulate, which is an expansion of the concept of universal and equal suffrage from article 25 into something that is a little bit more precise. Provided that what is drafted at that second level of principle in Commonwealth legislation is very clear, that may well put the states in a position where they will know what they have to do to comply with what is spelled out. The difficulty we have with what is in clause 4 at the moment is that it is not clear in that way. A state parliament could go into a process with great uncertainty as to whether it was complying with the requirement or not.

**Senator MURRAY**—Without asking you to be a draftsman on the run—although you are probably competent to do it—how would you make it clear?

**Mr Maley**—I will have to step back a stage from that question to make a point: one thing that is not clear to us is to what extent it is necessary to tie the requirements in a bill like this to what is happening at election time in order to ensure that it has the greatest prospect of being held by the High Court to be an exercise of power to implement the International Covenant on Civil and Political Rights. The covenant is not talking about redistribution processes; it is talking about election processes.

In any sort of attempt to draft a bill like this, one angle is simply what will work on the ground, but the other angle is what is going to be legally valid. We are not qualified to have an opinion on what is going to be legally effective. So with anything I say I will put a major caveat on it that we could not warrant that this would be the way to go. Having said that, perhaps I can

then go back and talk about redistribution processes more generally and how they can be made to work.

The Commonwealth redistribution process is one of the most effective ones around. It is attracting attention from people in other countries as well because of the way in which it comes up with an effective, nonpartisan model of redistribution. One of the points that I would make in that context is that if you contrast the last 20 years with the 20 years that preceded them, in the last 20 years redistribution has largely ceased at the Commonwealth level to be a matter of partisan debate at all. It turns up in the middle of the newspaper somewhere that there is a redistribution happening, whereas in the 20 years preceding the 1983 amendments there was massive debate about electoral boundaries, redistributions, malapportionment and so on. So in that sense it is clearly a success.

The elements of the success are five-fold. First, the timing of redistributions has been taken out of any sort of partisan control. We have fixed formulae now in the Commonwealth Electoral Act which specify exactly when a redistribution can and cannot be initiated. That has taken away a lot of the discretion which governments previously possessed to determine the timing of redistributions.

The second critical element is that the actual drawing of the boundaries is being done by bodies that are manifestly nonpartisan, neutral and independent of government. Again, that is specified in the Commonwealth Electoral Act. The third important element is that the criteria for the drawing of boundaries in the act are very clearly and precisely specified and are largely numerical criteria. Redistributions these days are very much driven by the plus or minus 10 per cent requirements for current enrolments and the plus or minus three per cent requirements for projected enrolments. The community of interest criterion is there but it is very much subordinate. So what the committees are doing is not so much exercising massive individual discretions as working through the implications of a formula which has already been endorsed by the parliament.

The fourth critical element is that the process is transparent in that there are extensive opportunities for public input and political party input at a number of different points for suggestions and objections—for example, public hearings into objections. The final critical element is that there is no longer any possibility for disallowance of a proposed redistribution by either house of the parliament, which certainly saw a number of redistributions fall by the wayside in the 20-year period before 1983. So all of those elements are the things that make the Commonwealth scheme work as well as it does. A number of those elements may be the sorts of things that could be thought about when crafting an effective redistribution scheme to be used more generally.

**Mr Bodel**—Just to add to that, one of the things that is very clear from the Commonwealth Electoral Act is that it is a very prescriptive act. It is not what you would call a principles based act. There are very strong bounds under which the five elements that Michael outlined are exercised. In terms of the Commonwealth act, that is one of the reasons why it has been such a success: that it is quite prescriptive rather than principles based.

**Mr Maley**—One point I should add is that the act places limitations on when redistributions can be kicked off. You cannot initiate a redistribution in the final parts of a parliament when an

election is looming. That is really designed to produce certainty of boundaries and electoral arrangements as you are coming into an election, which we think is very important.

**Mr Bodel**—In fact, the test for redistributions takes place 12 months after the first sitting of the House of Representatives in order to try to bed down any redistribution before the next federal election.

**Senator MURRAY**—This is my last question before I cede the floor. I have a radical solution to some of the criticisms. I see great weaknesses in the solution but I will put this to you. There are two things that you want to achieve with this bill. The primary objective is to turn the final state which is malapportioned into a truly democratic state—that is from my perspective. For Victoria, which has reformed its upper house, it is no longer an issue. So that is the primary objective. The secondary objective is to prevent, through force of Commonwealth law, any state reverting to a malapportioned status simply because it suits a party. One of the things that could be done with this bill is very simply to lay down a deal which has a finite life—say, 10 years sunset—to regard as having met the conditions of the international covenant in respect of eight state, federal and Territory governments, excluding WA, and therefore it would be directly targeted at just one state. The bill would assume for the purposes of the principle that that principle be met. That is a fairly radical approach but it would have the benefit of simply laying out a principle and then saying to the Western Australians, ‘Here is the law. You find a way of meeting the 15 per cent,’ and they could do so through a multimember choice, through a single constituency choice or whatever choice they wanted—through a Queensland type solution, for example. They could go any route they like. How would you react to that sort of approach?

**Mr Maley**—My feeling on that is that I would want to see it in drafted form before I offered opinions on it. Not being a constitutional lawyer, I am not sure whether having a bill which was very explicitly targeted at one state gives rise to other issues. I really do not know on that. But, again, it would very much depend on how the principle—and not just the principle in the international covenant but any more explicit in principle support—was expressed. I am not sure that to simply take the wording of the international covenant and embody that in a law and say that all states must comply with it would actually take things terribly much further. It would simply throw into the High Court the question of what is the meaning of the International Covenant on Civil and Political Rights.

**Mr Bodel**—Once again, not being a constitutional lawyer so there are big caveats on it, I think that it might turn out that some state and even the Commonwealth redistribution processes that were intended to comply could be found not to comply if it went into the High Court.

**Mr Green**—I would point out that neither the Commonwealth House of Representatives or the Senate systems would pass the test that is envisaged in this bill because of the fact that you have got state boundaries and you have got the same number of senators in each of the states, guaranteeing Tasmania five seats in the House of Representatives when its population does not entitle it to that number. I think you will have a presentational difficulty in trying to justify a scheme imposed on the states that the Commonwealth itself does not meet.

**Senator PAYNE**—We will have some constitutional lawyers and we can pursue those questions with them later. We are safe to pursue Tasmania because there are no Tasmanian senators on this committee—but I will not do that because they will get me later!

**CHAIR**—Mr Green, you mentioned in your submission that the test ‘as nearly equal in size as possible’ raises problems. Do you have an alternative suggestion to that?

**Mr Green**—I think I was referring then to the concept of what is meant by ‘size’. There are different measures of size. Are you talking about physical size or are you talking about numbers of electors per electorate, which I think is what is meant? I think you need to be very specific about what you actually mean by size.

**CHAIR**—Yes, it is in the definition of ‘quota of voters for each electorate’ so I presume they are talking about numbers of voters.

**Mr Green**—We presume that, but it is just a drafting thing. I think that if you are going to use that expression you should define it clearly. I would also direct your attention to the possibility—and Michael mentioned some of this—of putting in this legislation criteria that are over and above those directed at equal suffrage, such as means of communication and distance, geographical features and area, existing boundaries and so forth. I would suggest to you that those are not actually to do with equal suffrage. They are recognised redistribution criteria, but they are not really to do with the equality of suffrage. So I would be really looking at what power the Commonwealth might have under the international covenant to go far in prescribing just exactly how detailed a redistribution requirement had to be.

**CHAIR**—But you haven’t taken legal advice on this? This is just your concern?

**Mr Green**—This is just my opinion. I am certainly not a lawyer.

**CHAIR**—There are some South Australians on this committee and, as a consequence, your paragraph 3.29, where you talk about the impact this legislation may have on the South Australian redistribution process, is of interest. Would you like to have a look at that and explain what the concern is?

**Mr Maley**—It is a concern that arises in a number of circumstances. As of this moment there has never been any dispute up till now that the prescription of redistribution processes is a matter for the state parliaments and state constitutions. A number of state parliaments have, in fact, moved to try to set up schemes for redistribution and then entrench them to protect them from subsequent amendment. South Australia was one of the first jurisdictions to go down this route, which, in effect, provides in the constitution that you cannot get away from having what they see as a one vote, one value scheme unless you have a statewide referendum to change the Constitution. There are some similar but not identical entrenchment provisions in relation to the Hare-Clark system as used in ACT legislation, which I think Commissioner Green could expand on if he wanted to. It is simply not clear to us what would happen if, on the one hand, you had Commonwealth legislation which might be seen as striking down a particular set of constitutional arrangements in South Australia but then a provision in the Constitution which says that you cannot change those provisions without a referendum. If it were open to the state parliament to simply respond to a court ruling that their provisions were inconsistent with the Commonwealth act, then presumably one would look to the state parliament to do that. But if, on the other hand, it requires a referendum, what would one do, for example, if one put forward a referendum and it failed? To us it is a point of legal uncertainty. Constitutional lawyers may be able to answer this question.

**CHAIR**—I presume you would read the state law in the context of the Commonwealth legislation.

**Mr Maley**—Possibly, but you still might want to get to the point of having a different process for the states so that the future redistribution processes would be compliant with Commonwealth law. But what if, on the other hand, you had a provision in a state constitution saying ‘you cannot change these processes except by referendum’? It is not clear to us where you would go from there.

**Senator MURRAY**—I doubt you are competent to answer this and I do not mean that in terms of your competence but in terms of your legal background. The Commonwealth could, of course, require that states, where there was doubt that one vote, one value applied within a certain tolerance laid down by the legislation, be obliged to call a referendum to deal with the issue. In my view, that would only really end up affecting Western Australia—but I am not a lawyer either so I have got to be careful. That is reversing the concern you have. It is forcing states to take back to the people the principle which the Commonwealth would say needed to be applied.

**Mr Maley**—Which still does not resolve the question of what would happen if the people, as they seem to do in referendums from time to time, vote no.

**Senator MURRAY**—That is right.

**ACTING CHAIR (Senator Payne)**—From time to time, Mr Maley! If there are no further questions, Mr Bodel, Mr Maley and Mr Green, I thank you on behalf of the committee for your submissions and for assisting us this morning with our deliberations.

[9.41 a.m.]

**WHITLAM, The Hon. Gough, AC, QC (Private capacity)**

**CHAIR**—I now welcome the Hon. E. G. Whitlam, AC, QC. You have lodged submission No. 14 with the committee. We thank you for that. If there is no need for amendments or alterations to that submission, would you like to start off with an opening statement.

**Mr Whitlam**—Kalimera sas, Mr Chairman.

**CHAIR**—For the sake of *Hansard*, would you like to translate that?

**Mr Whitlam**—Good morning, everyone. I am very happy to take part in the Senate's admirable committee system again. The most recent occasion was also in this building.

There were three matters which I thought I might raise today. You will notice that in the second last paragraph of my submission I stated:

Nobody can justify the delay of more than four decades in applying one vote, one value in one of the six States in Australia. It took no more than four years to apply one vote, one value in the hundreds and hundreds of electorates in all 50 States in the United States.

I then referred to the two attachments to my submission: the first is 'USA—Members of State Houses of Representatives', and I particularly direct your attention to Georgia, which has 180 members in its general assembly; and the second on the last page is 'USA—Members of State Senates', and again I direct your attention to Georgia, which has 56 state senators. On Tuesday this week in Georgia three federal judges threw out a distribution of that state which had been challenged by 29 Republican voters against redistricting plans authored by Democrats in 2001.

Republican voters had been packed into some districts while Democrats were spread out. Some districts were drawn with five per cent more constituents than the average district while others were drawn with five per cent fewer constituents. The governor, a Republican, stated that about half the states had deviations in state plans that were greater than nine per cent. Redistricting experts around the country were operating under the assumption that a 10 per cent deviation was more or less a safe harbour. That 10 per cent deviation resulted from the fact that some were five per cent more than the average and others were five per cent smaller than that average. They referred to it as a 10 per cent deviation. The deviation in the United States up till now had been often thought to permit five more per cent or five fewer per cent.

But the primaries, which were to take place in July this year for the elections—which of course have to take place on the Tuesday after the first Monday in November—were ruled out and the elections were ruled out on those borders. The court ordered that a distribution had to take place immediately. If not, the relevant federal body would introduce a new redistricting. That redistricting would apply for the primaries for the senate and the assembly in July and for the election on 2 November.

I draw the contrast. Senator Murray's bill was introduced 2½ years ago. In America when it comes to redistricting, they do not beat about the bush. They say, 'It is to be done immediately—no primaries, no elections, unless the borders are as nearly as possible the same number of electors as laid down by the Supreme Court of the United States of America under Chief Justice Earl Warren 40 years ago.' We are taking much longer in Australia to do the right thing. Even in applying it, we have so far taken 2½ years. The Republican governor, the successful applicant, in the United States last Tuesday said:

This is a good day for democracy and a good day for Georgia ... The people of Georgia should be able to choose their politicians rather than have the politicians choose their people.

The next submission I make relates to the elections for the unicameral parliament of Queensland last Saturday. Those elections showed how necessary it is for the Australian parliament to enact a [State Elections \(One Vote, One Value\) Bill 2001 \[2002\]](#) to implement article 25 of the International Covenant on Civil and Political rights. Of the 89 Queensland seats, nine had an enrolment of more than 30,000 and three an enrolment of fewer than 20,000. The most numerous was Kurwongbah, which had an enrolment of 32,214. The others above 30,000 were Noosa, Burleigh, Kawana, Murrumba, Beaudesert, Brisbane Central, Robina and Ferny Grove. Ferny Grove had an enrolment of 30,046. I have given the enrolment in all the others in this paper, which I will give to you. The three districts in Queensland which had an enrolment of fewer than 20,000 were Mount Isa, with 16,946; Charters Towers, with 18,559; and Gregory, with 19,068. In America that would not be tolerated, and it would be promptly overthrown and a replacement installed. This bill relates obviously to the unacceptable situation in Queensland as well as to the still less acceptable situation in both houses in Western Australia. Queensland, of course, like the two territories, is unicameral.

The third submission I would make at this stage goes to the last page of my submission of 13 October last year, where I quoted the report of the Western Australian Electoral Commissioner on the enrolment figures as at 30 June 2003. They ranged in the metropolitan area between Wanneroo, with 44,725, and Perth, with 22,942, and in the country area between Dawesville, with 19,225, and Eyre, with 9,110. The commissioner's figures as at 31 December show that the range in the metropolitan area is now between Wanneroo, with 45,731, and Girrawheen, with 22,866, and in the country area between Dawesville, with 19,612, and Eyre, with 8,964. On 4 August last year the electoral distribution commissioners published their determination pursuant to the Electoral Distribution Act 1947 of the electoral boundaries which will apply under that legislation to the next state general election, which is due in late 2004 or early 2005.

Under the determination, the range of enrolments as at 31 January this year in the metropolitan area was between Darling Range, 28,176, and Mindarie, 23,322, and in the country area, between Warren-Blackwood, 14,994, and Leschenault—another one of those French explorers—12,505. These statistics were obtained by matching current enrolment data at census collector district—CCD—level to data from the division of the state that was published on 4 August 2003. The Electoral Commissioner will not publish the new figures until after 31 June this year when the electoral master file will have been converted to the new boundaries.

One can notice that, if this committee's report is accepted and Senator Murray's bill passed by the Senate and then by the House of Representatives before 30 June this year, there will be new boundaries in Western Australia in both houses before the end of this year and, therefore, in time

for the next election in Western Australia. If our Senate committee system and our parliament work as promptly as the United States does, the next Western Australian election for both houses will be, for the first time in their history, on the basis of one vote, one value, which was adopted and applied by the US Supreme Court and the federal courts in the United States over 40 years ago, and adopted almost immediately by the United Nations in its covenant on civil and political rights.

May I conclude with two observations. First, I wish my old Senate colleagues had shown the initiative that Senator Murray has shown in introducing this relevant bill and in delivering his relevant speech 2½ years ago. Secondly, in this week when the federal parliament has taken an initiative which has been immediately adopted in every state and both territories, I hope that every parliament in Australia will soon adopt two other practices from the oldest and greatest federation in the world, the United States of America: fixed terms for all executive and legislative positions and the same date for all elections for those positions. I thank honourable senators.

**CHAIR**—Thank you, Mr Whitlam. Can your assistant please introduce himself for the *Hansard* record?

**Mr Chaytor**—I am Mr Steven Chaytor.

**Mr Whitlam**—Mr Chairman, I must plead that I was unable to hear the previous evidence that was given this morning and I am finding it difficult to hear even you, whom, of course, I have never had any difficulty in hearing in our decades of association.

**Senator PAYNE**—I have a similar situation.

**CHAIR**—You may not have had difficulty in hearing me, Mr Whitlam, but you may have had difficulty in accepting what I was saying from time to time.

**Mr Whitlam**—Usually I agreed, as I am sure I will on this occasion.

**CHAIR**—Hopefully. Let me say at the outset that I am not so sure that former Vice-President Gore shares your faith in the US electoral system; but that is another argument for another time. There is the objective of one vote, one value. As you said, you did not quite hear the previous evidence, but there are concerns about how this particular proposal implements the principle. That has been very much the focus of the deliberations of the committee. It seems from what you are saying that one way of overcoming some of the implementation problems is to give what we could call a reserve power to the Commonwealth AEC to step in and redistribute when the states are being somewhat recalcitrant. Is that the case?

**Mr Whitlam**—I would not think that is necessary. All one has to go back to is the Toonen case, where of course former Attorney-General Lavarch introduced a bill that was not challenged by the errant Tasmanian parliament and government at that time. You will remember that former foreign minister Gareth Evans, on the advice of a better Attorney-General—

**CHAIR**—Than what?

**Mr Whitlam**—He was a lawyer from Melbourne, Michael Duffy. He recommended to Senator Evans, who accepted the advice, that Australia should become a party to the first optional protocol to the International Covenant on Civil and Political Rights—the one that gave a right to persons aggrieved by the failure to implement the covenant to apply to the UN Human Rights Committee. Toonen and his partner were homosexuals. They appealed to the Human Rights Committee on the basis that they were not getting the benefits of the privacy provisions of the ICCPR. The Tasmanian legislation made it a crime for two people—male or female, male and female—to engage in unorthodox sexual practices or in any practices that would not result in conception. This applied not merely to homosexual men or women; it applied, for instance, to married couples who were engaging in fellatio. If people were engaging in these practices in the open—say, in a park—or in their own bedrooms with the blinds up, and if they could be shown to be indulging in those practices, homosexual or heterosexual, they were committing a crime in Tasmania.

**CHAIR**—In a public park that is fair enough though, isn't it?

**Mr Whitlam**—But in Tasmania it would apply if you were indulging in those practices at night time with the blinds up. Somebody could flash a torch and observe what you were doing. It was not just a question of frightening the horses in the parks, the streets or on the beaches; it also applied if you were indulging in such practices in your own residence, in your own bedroom, and could be detected. Moreover, Toonen and his partner had provided evidence to the crown law authorities in Tasmania that they were engaged in illegal practices, but they were never prosecuted—that is, what they were doing in private was illegal but they were not being prosecuted. So they thought they would test the laws.

The Human Rights Committee of the UN said that Tasmania was breaching the ICCPR. They made that finding after having submissions from the Australian government, the Tasmanian government and other interested parties. Attorney-General Lavarch introduced—and both houses adopted—the sexual privacy act, and it was not challenged by Tasmania. It complied, and the Tasmanian laws were changed. Senator Murray's bill gives the right to people to go to courts to ensure their rights under the ICCPR. With all respect to the previous witnesses, as you have related their evidence to me, there is no difficulty if this committee promptly reports, if the Senate promptly passes the bill and if the House of Representatives promptly passes the bill. If all this happens before the end of June—and there is plenty of time to do it—then the bill itself provides the machinery. The whole of this process, which the parliament has been considering for 2½ years, will apply at the next state elections in Western Australia.

**Senator MURRAY**—Sir, it is my opinion that universal equal suffrage is the most important political right of all.

**Mr Whitlam**—Unquestionably.

**Senator MURRAY**—And in my early years, at some considerable danger to myself, I fought for that principle in what was known then as Rhodesia and in South Africa. I have been greatly influenced by your own work in this area, and I thank you for it. But the most pertinent influence on this particular bill was the Commission on Government appointed by Premier Richard Court.

**Mr Whitlam**—Yes.

**Senator MURRAY**—It came to a very balanced and independent view that the principle of one vote, one value was entirely in the interests of the voting electorate of Western Australia. What they recommended, however, was that, given all the circumstances of Western Australia, a 15 per cent variation was appropriate. You and a number of other witnesses have said that if there is to be a variation it should be far smaller, and in your evidence today you have indicated approval for an American approach which is much smaller than that. So I would ask your advice to the committee. If the committee were to stay with the Commission on Government's view that 15 per cent was the maximum tolerance, would that be an abrogation of the principle we are trying to implement?

**Mr Whitlam**—I believe it would be. The American courts have now said that it is impermissible to have even a legislature in which there is a five per cent variation from the average, above or below. They referred to it, as I say, as a nine per cent variation; that was five. The federal parliament time and time again has adopted the 10 per cent variation—that is, allowing 10 per cent below or 10 per cent above—but even that can bring about, I think, a 30 per cent variation between the largest and the smallest. There had been applying to federal elections whenever a distribution took place—in my time, I remember, there was no distribution between 1955, I think, and 1969—a permitted variation of 20 per cent.

The Constitution review committee of which I was a member—now the only surviving member—and which met between 1956—my 40th birthday—and 1959, said that the 20 per cent variation, which had been permitted by federal laws up until that stage, could result in differences of enrolment of 50 per cent between the largest enrolment and the smallest. That was on a 20 per cent permissible variation. That Constitution review committee said that 10 per cent should be the largest permitted, and that was adopted at the only joint sitting of the parliament, in 1974. After my government was succeeded by the Fraser government, the National Party, as I think it was then called, pressed for the restoration of the 20 per cent variation which had always applied under federal laws in Australia from the beginning until 1974. Every state branch of the Liberal Party rejected that suggestion.

The 10 per cent variation was adopted in the Commonwealth Electoral Act (No. 2) 1973, which after the joint sitting became act No. 38 of 1974. It was passed again in the Representation Act 1977, No. 16 of that year. It was passed again in the Commonwealth Electoral Legislation Amendment Act 1983, No. 144 of that year. In each case the words set out the considerations that the redistribution committee for each state should take into account and then said:

... and subject thereto the quota of electors for the State or Territory shall be the basis for the proposed redistribution, and the Redistribution Committee may adopt a margin of allowance, to be used whenever necessary, but in no case shall the quota be departed from to a greater extent than one-tenth more or one-tenth less.

The only respect in which I differed from Senator Murray's bill—and I did so with respect—was on that issue. My submission would be, my strong belief would be—and it is a belief strongly held over half a century—that 10 per cent variation is the most that should be permitted. It has been accepted in every subsequent federal election, including in Western Australia.

I differed from the 15 per cent permitted by Richard Court, the better Court—by his committee—and in Senator Murray's bill because, for instance, one of the criteria set by the better Court committee and Senator Murray's bill is distance from the capital city. In fact there

are many country electorates in Western Australia from which it is possible to get a flight to Perth which takes less time than driving from a metropolitan electorate to Parliament House in Perth. It is not distance. Accessibility is the point. I do not believe for one minute that we should say that federal members from Western Australia or any other state can adequately represent an electorate distant from the state capital and state members cannot. I do not believe that Western Australian MLAs or MLCs are under greater handicaps than Western Australian senators or MHRs.

**Senator MURRAY**—They are better paid, for a start.

**Mr Whitlam**—Even that may change. It is amazing what can change in a week. As you will understand, I certainly believe that able members of parliament could make more money in other occupations, but I do believe that most members of parliament have the best jobs they could get.

**Senator KIRK**—Thank you, Mr Whitlam, for your submission this morning. My question goes to some of the other submissions that have been made to us, and these are along the lines of the unintended consequences that this bill may have in states and territories where those states and territories claim that their existing legislation already enshrines the one vote, one value principle that we are seeking to adopt. My question goes to your opinion as to the appropriateness of the Commonwealth interfering, if that is the correct word, in what is going on at the state and territory level. Should it not be left for the states and territories to do something about inequalities where they do exist? The underlying issue there for me is that I am concerned as to whether the Constitution may even prohibit the Commonwealth interfering in this way. I think we are going to hear some evidence along these lines following you. I am interested in your views about those matters.

**Mr Whitlam**—I understand that that view is widely held. I believe it is not a correct view. The federal parliament, and the federal parliament alone, has the responsibility of implementing international obligations. From the very outset the federal parliament has had responsibility for external affairs. Ever since the Koowarta case the High Court has upheld that view, that is, that the federal parliament and the federal government have not only the right and the jurisdiction but also, in my view, the duty to apply best international standards. The states and territories have no international standing.

There is only one international body, the International Labour Organisation, which mentions the rights of states, territories, cantons or provinces. The constitution of the ILO is the only document where you will find that states, cantons, provinces and territories have to be considered in the application of ILO conventions and the administration of ILO committees. And the constitution of the ILO says that that restriction in favour of states, provinces and cantons applies where industrial laws are not an exclusive federal responsibility. Accordingly, there are only three countries in the world which are affected by that provision in the International Labour Organisation's constitution: the United States of America, Canada and Australia. In all other federal systems—including India, Germany, Mexico, Brazil and ever so many other federal countries—industrial relations are the responsibility of the federal government, as they would have been if South Australia had supported the industrial referendum in 1946.

That is, there could be no question—and I speak maybe a bit dogmatically on this, because no act or action of my government has ever been thrown out by the High Court. I am the only Prime

Minister of Australia whose government's acts and actions have never been invalidated by the High Court of Australia. Even Menzies, who was another good lawyer, went astray on the Communist Party Dissolution Bill: all the judges, with one exception, the Chief Justice, said that that was unconstitutional. I am quite dogmatic on this, but I believe I am correct: it is a federal responsibility. The federal parliament has had jurisdiction since 1901 in external relations, and the High Court ever since *Koowarta's* case again and again has applied that.

**Senator PAYNE**—Mr Whitlam, if the Senate were not of a mind to support Senator Murray's bill and it failed in the Senate, what do you imagine the prospects might be of an amendment to the Constitution by referendum to give the specific power to the Commonwealth under which they could legislate more directly in this area? How realistic do you think that would be as a proposition, given Australia's record in passing constitutional amendments?

**Mr Whitlam**—I certainly am aware of Australia's record in not passing referendums. But I would point out that in New South Wales, in the case of the Legislative Council, where a referendum has to be passed to make a difference in the system of electing the Legislative Council of New South Wales, there have been four referendums—all carried. Two were introduced by Premier Wran, the next by Premier Greiner, the third by Premier Fahey, who was later a member of this parliament. Every referendum has been carried in New South Wales, and for the very good reason that they were all held on election days. That is, there is a much better record of carrying referendums if they are put on election days. My successor, but my good friend, Malcolm Fraser put four referendum proposals and I, once again as Leader of the Opposition, with the assistance of one of the best Australian Attorneys-General, as he turned out, Lionel Bowen, supported those referendums in every state. One of them, to have election days for the federal and state parliaments on the same day, was defeated because it was opposed by Premier Bjelke-Petersen, who is still with us, and Premier Court of Western Australia, who is still with us.

If referendums are held on election days, then they are likely to carry. That simultaneous elections proposal would have been carried in every state if Malcolm Fraser's state colleagues Bjelke-Petersen and Court Senior had not felt free to oppose it. If it had been held on an election day, they would not have opposed it and it would have been carried as the other three were—the Barwick one about retiring ages for federal judges and all that. They were all carried very strongly. I am not advocating that this proposal should wait until the next election day, although that will take place towards the end of this year. I think it ought to be done, as the federal parliament can do it, before the end of June so that the Western Australian distribution could take place.

The sad thing is in Western Australia that there is no way of the people resolving disputes between the two houses. For instance, the Legislative Council there does not give its president the right that the President of our Senate has under the Constitution—that is, the Senate president can vote—and of course in the case of an even vote the proposition is lost. But in Western Australia, if the president of the council had been able to vote and he had had the same rights as the President of the Senate has had—and there have been women there as well as men in our case—then this bill would not have been necessary. In New South Wales if there are disputes between the assembly and the council, there can be a referendum on the disputes, but there is no way of resolving disputes in Western Australia. The houses cannot sit together, however long the process takes.

In Western Australia this situation has lasted ever since Earl Warren's Supreme Court in the US and the ICCPR found 40 years ago, and every state now has—albeit, in American eyes, a faulty—one vote, one value system. But I at least believe that the federal parliament in dealing with an act should adopt its own repeated preference for no more than a 10 per cent variation. Both sides have adopted this, and nobody queries it in the House of Representatives. Why should we assume that Western Australian state members are less competent than Western Australian federal members or federal members right round Australia?

**CHAIR**—Thank for your evidence and your submission in particular—it has been great. I am told you may be the first former Prime Minister to appear before a Senate committee. That may not be the case but the check this morning indicates that no other has appeared before a Senate committee—definitely not former Prime Minister Keating.

I am going to indulge myself with one question which is totally outside the standing orders and probably one that very few in this place will understand the context of. You pronounced 'privacy' in two ways. Do you have any contemporary thoughts on the pronunciation of 'kilometre'?

**Mr Whitlam**—There used to be a Senate committee which was responsible for English. It was an excellent committee. Privacy is like 'prracy' or 'piracy'.

**CHAIR**—That was chaired by Mal Colston, wasn't it?

**Mr Whitlam**—I am not prepared to be dogmatic in that respect. I refer to 'privates', so I suppose one ought to say 'privacy' with a long 'i'. I say 'pirates', so I suppose I would prefer 'piracy' also with a long 'i'. But I would not venture to disagree with any of the distinguished senators if they said 'privacy' or 'prracy' instead of what I think would be better.

**CHAIR**—How about 'kilo-metre' and 'kil-ometre'?

**Mr Whitlam**—It is, unquestionably, 'kil-ometre'.

**CHAIR**—Still?

**Mr Whitlam**—Ever since Elizabeth I the accent has been on the antepenultimate syllable. Under Elizabeth I, English adopted the words 'barometer' and 'thermometer'.

**CHAIR**—I think that is a good note on which to finish. Thank you very much.

**Mr Whitlam**—Thank you.

**Proceedings suspended from 10.36 a.m. to 10.44 a.m.**

**WILLIAMS, Professor George John (Private capacity)**

**CHAIR**—Welcome. You have lodged submission No. 6 with the committee. Would you like to make any amendments or alterations to that, or would you like to start with an opening statement?

**Prof. Williams**—I would like to start with an opening statement. I am appearing in a private capacity. I would like to thank the committee for the opportunity of appearing today. In my opening statement I would like to talk about three things: a little bit about policy, a little bit about the bill and also the constitutional issues that go with the bill.

Firstly, on policy: I strongly support the thrust of the bill. For me this is an issue not of states rights but of citizen's rights, dealing in particular with the essential entitlement to universal and equal suffrage in Australia. This is a right that is appropriately implemented by laws of general application at the federal level, and indeed that applies to a range of other areas as well. I think also there are special considerations that apply when we are dealing with legislation that goes to the electoral franchise in a state, because it is arguable that in some cases federal intervention may be necessary—indeed to overcome a structural flaw within a state electoral system, as we have here.

The other thing about policy that I want to say is that sometimes people contrast equality of voting power with equality of representation. But if you look at the movement around the world, the days of suggesting that special interests should be accommodated through different levels of voting power are largely gone in other comparable nations. The reasons for that are many. One of them simply is that, if you do make special interests and build them into such a system, it is almost impossible to determine fairly what those special interests should be. If you are dealing with the notion of the difficulty of representing people, geography is obviously relevant to that. But equally, given today's multicultural Australian society, you might say someone with an inner city electorate, with great difficulties of language with a largely migrant community, might have even greater problems in representing and understanding the wishes of their voters.

The final thing I want to say about policy is that Australia has voluntarily accepted the obligations under the ICCPR and, clearly under international law, that places a duty upon Australia to implement article 25 of that instrument. If you look at the 1996 general comment that goes with that instrument, you see that it establishes that the instrument goes to the idea of one vote, one value. That is particularly important for the constitutional issues that arise for this as well. I will read out the relevant section. Paragraph 21 of that general comment says:

... Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another.

I think that clearly establishes that the duty imposed upon Australia by that instrument goes directly to the question of one vote, one value as expressed in this bill.

I will turn to the bill itself. I do not want to spend much time on the technical aspects of the bill, because I agree wholeheartedly with the submissions of the Australian Electoral Commission and of, in particular, the ACT Electoral Commission in dealing with some of the problematic aspects of how the bill would actually operate in practice. They are certainly far more expert than I am on that question. For me, as a matter of the legislative design of this bill, there are two alternatives of how you would draft a bill like this. One is that you would draft a bill that operates at a high level of generality, in fact a bill that does almost nothing more than contain a simple statement that the federal legislation implements the principle of equal suffrage. It may set out a 10 per cent margin, or something like that, but actually does not contain any greater detail. The benefit of a law of general application like that would be that it simply sets down the general principle that overrides state legislation by virtue of section 109 of the Constitution and leaves all of the implementation aspects to the states. That is the sort of legislation, for example, that was found in the human rights sexual privacy act of the Keating government.

The difficulty with that approach is that, of course, you do leave the implementation to the states, but the states must implement it in a form that is consistent with that general obligation. The other alternative is to be very specific in a bill like this and to actually have it contain what you see in many of the sections of the Commonwealth Electoral Act, setting out in great detail how redistributions are to occur, the bodies responsible for doing those and imposing very definite obligations upon electoral authorities to carry those out. I think that is a very problematic and difficult way of implementing a scheme like this. I think the preferable way is to go for a law of general application at a higher level of generality even than is found in this legislation. Indeed, I think that the most preferable course will be that this ought to be included in something like a human rights act implementing the ICCPR generally, and indeed it is only when you look at something like this in isolation apart from a more general regime that you would find in any human rights act that some of these issues tend to arise. It is best seen as a human rights act like principle that for some reason here is being implemented in a piecemeal way. That does not undermine its importance. That just emphasises the need and the appropriateness of implementing those other obligations.

The final issues are the constitutional issues. There are two key constitutional issues that arise in this context. The first constitutional issue is: is there a head of power that is relevant and will enable the legislation to be passed? Obviously there is—that is, the external affairs power. The High Court's dicta on the external affairs power identify that, firstly, there must be a treaty obligation, which clearly there is in this case and, secondly, that treaty obligation must be implemented in a way that is reasonably and appropriately adapted to that obligation. The bill may have some difficulties there for a couple of reasons.

The first difficulty is that the wording of the legislation itself does not expressly and precisely encapsulate the treaty obligation. It implements it in the form of setting up a 15 per cent margin and then sets out other criteria relating, for example, to geography and other matters. Those matters are not found in the ICCPR. That is a potential danger in the High Court—that this parliament would have gone beyond the ICCPR and implemented it in a way that the court might see as unreasonable. Indeed, if you go back to the Industrial Relations Act case in the High Court in the late nineties, the court found that an unfair dismissal law that went beyond implementing a general principle to actually add extra standards or criteria to that principle was invalid to the extent that it added extra criteria or principles into that.

To avoid constitutional problems, my advice, therefore, on that point is that the appropriate standard would be to implement the precise nature of the obligation—that is, to state directly and clearly that the legislation mandates a standard of equal suffrage to make specific reference to the general comment made by the UN High Commissioner in 1996 and, if necessary, to use the language used in that general comment. If you do that it removes any doubt about reasonableness in implementation. It is also a good reason that, as a matter of constitutional policy, it would be wise to go for legislation that operates at roughly the same level of generality as the ICCPR itself. Once you get more specific that is when you get questions of degree.

The other constitutional issue that arises is with regard to the implied limitation from the Constitution, where the question is raised: does this in some way affect the capacity of the states to function or threaten their continued existence? That is an implication on which the High Court has handed down many cases—most recently last year in the Austin case. I think the outcome on this particular issue is very unclear. The key question is: does this in some way go to the states' constitutional and political functions in a way that undermines their capacity to exist as an independent and effective state entity?

That was the same sort of issue that was looked at in the electoral context in the Australian Capital Television case in 1992 when three of the judges in that case asked: is it unconstitutional for the federal parliament to ban certain types of political communication during state elections? That is largely the same question we have here, again going to the heart of the electoral process during an election period. In that case, only three of the seven judges addressed the issue. Two of those judges said that they felt that the implication would not have been infringed because a law like that may well regulate the state electoral process but it does not in any way threaten the existence of the state and does not in any way burden the capacity of the state to fulfil its proper electoral processes. On the other hand, one of the judges took a different view by saying that there is something very special about state electoral processes and almost any federal law that alters the way a state wishes to conduct its electoral affairs will be unconstitutional. They are the two views and we simply do not have any more guidance than that from the High Court.

My own view on that question of the implied freedom is that if this was a law that was of more direct and general application, rather than one that implemented much of this in specific language and therefore actually took over much of the state apparatus in doing so, it is more likely to be constitutionally valid. For the same reason, if a law like this was within a general human rights act, again it would be more likely to be valid because it would be seen as a general standard at the federal level rather than as a targeted interference with the state electoral system. However, in its current form I would have to say that, more likely than not, it would be invalid on that implied limitation.

It is hard to give any more guidance than that. It is more likely than not to be invalid because of the way it sets down more specific standards and because there is a strong likelihood that the current High Court will see something special and untouchable about state electoral processes. But, to my mind, particularly given the strong policy behind this bill, that does not indicate that the bill ought not to be passed. To me it suggests that the bill should be redrafted with a view to insulating it from constitutional attack as much as possible, establishing it as a general principle at the federal level that applies generally to all the states and, in doing so, putting forward the best possible case to the High Court to hopefully protect it from being struck down.

**CHAIR**—I will start off with a question, and I am sure my colleagues have many others. You raised two potential constitutional problems: one, implementing the international convention; two, the implied protection of the state. However, you seem to be saying that, to the extent that the legislation does fall within the parameters of applying an international convention, it may be safe from the other potential problem of limitations against the state.

**Prof. Williams**—There is simply a coincidence of factors. In order to gain validity on the first ground, implementing the convention generally and directly is more likely to lead to validity. On the second ground, I think a general law at a higher level of abstraction is less likely to be seen as an interference with state functions than a larger law that directs state electoral authorities as to how to carry out their functions or that seeks to interfere perhaps in a more specific way.

**CHAIR**—What concerns me there is that if you accept that argument then you virtually reach a situation where you could say that, constitutionally, the states can be protected from the implementation of international agreements entered into by the Commonwealth.

**Prof. Williams**—That is certainly true in some areas where the implication exists to protect the states from having their capacity to function undermined. I think it is correct that certain conventions could exist that could simply never be implemented at the federal level. Even though the external affairs power exists for the parliament to use, that power is subject to this other implication. It overrides the external affairs power. That is why getting the balance right between those two things is crucial. A good example of that is the industrial relations legislation, which also ran into difficulties. It was found that, to the extent it implemented a convention but affected the salaries of high-level state public servants, it was invalid, even though clearly there was an underlying treaty obligation to do that.

**Senator MURRAY**—Professor Williams, you have recently edited a book on electoral law and I compliment you on it. It is a considerable contribution to our understanding. The first question I have is a mixed political and constitutional one. This bill will certainly be redrafted as a result of this committee process and its report. That is why it is here. If it were redrafted and passed by the Senate and then laid aside by the House, is there a provision in constitutional law whereby the Senate itself could put a referendum question to the people of Australia?

**Prof. Williams**—Section 128 of the Constitution states that you can put a referendum where both houses agree to a proposal or where either house passes the proposal twice. So obviously that would suggest that the Senate can pass a proposal twice in the absence of a lower house motion. The problem lies in the fact that the decision to then put the referendum is for the Governor-General to make and only the Prime Minister is able to advise the Governor-General to put that proposal to the people. You can pass it twice, but you simply run into a deadlock. Ultimately, only the executive is able to bring about a referendum, even given the sort of support you are talking about.

**Senator MURRAY**—So short of a full passage through the parliament of Australia, you think that the bill will be stymied?

**Prof. Williams**—That is correct, or if it gets through the lower house twice. That is the only other option where of course the lower house, being controlled by the executive itself, could decide to put the bill. That is the gridlock you find within our system.

**Senator MURRAY**—I accept that the constitutional dangers are apparent. Does it assist the constitutional argument that, with some warts and wens, the other states and territories and the federal jurisdiction come pretty close to the principle of the bill? The Hon. E.G. Whitlam said that Queensland, in a number of its electorates, does not. But overall you could generalise and say that every state and territory and the federal jurisdiction—in all states and territories, except for WA state jurisdiction—complies pretty well with the universal suffrage principle. Would that assist the argument in front of the High Court?

**Prof. Williams**—In fact, it would be used to the opposite effect. Counsel would argue that this legislation only impacts upon Western Australia; therefore, in effect, it singles out Western Australia for special and discriminatory treatment. The High Court has said on past occasions—though this is a principle that is in some doubt now, as a result of a case last year—that if legislation singles out a state in any way then it has the potential to be unconstitutional. Indeed, in 1987 federal legislation that targeted an electricity dispute in Queensland was held invalid by the High Court on the basis that it only applied to Queensland. That is why this legislation, for its own constitutional validity, must be a law of general application and must be seen to operate at a level such that it confers rights upon all Australian citizens irrespective of their state residency. It simply happens that it has a particular operation in Western Australia, but you do not want to identify in the legislation that, in effect, it is secretly aiming to affect only them. I think you can defend the legislation because in fact it will operate for any state that in the future decided to depart from those boundaries.

**Senator MURRAY**—Without doubt.

**Prof. Williams**—That is exactly why I think that argument would not get anywhere in the High Court.

**Senator MURRAY**—Although it should be quite apparent to the High Court that both my motive and the motives of many who support the bill—

**Prof. Williams**—That would be the argument. Again, there are other examples involving industrial legislation. One particular act only applied to Victoria because of the Kennett reforms brought about in that state. The High Court said that it may well be that at the present time it only applied in Victoria but that it was valid because it was necessarily a law of general application. The High Court would not look to the motives that may have driven this particular general law at this time.

**Senator MURRAY**—Can you elucidate the issue of how far the bill's intention would clash with the multimember, multiconstituency model where, as in Western Australia, you have six electoral divisions with between five and seven members, and the division between those five and seven members meets the principle but the constituencies themselves clash with it? How does that interact with what we are trying to do?

**Prof. Williams**—I think it interacts with great difficulty at the moment. I do not think that the wording in section 4, in referring to electorates of nearly equal size, really contemplates the ACT electoral system in any effective way at the moment. Again, you have choices here. Are you going to be far more specific? Are you perhaps going to have legislation that builds in the different regimes or possibilities in the states? Do you go for an even higher level of generality

and simply set down a principle of equal suffrage which the courts then have the job of implementing according to the relevant state schemes?

**Senator MURRAY**—If you went for the high level of generality, would that put the ACT or Tasmania or some of the upper houses in the states in a situation of some doubt as to whether their circumstances conformed?

**Prof. Williams**—I do not believe so, because I think those systems are an effective embodiment of the principle of ‘one vote, one value’. They may do it differently, but there is nothing in the international convention that says that you must implement it according to single-member electorates. It may be that we look through that lens—particularly looking at the lower house of this parliament—but it would be an incredibly narrow definition for a High Court to say, ‘“One vote, one value” means you must have single-member electorates.’ I do not think the two are necessarily connected at all. I think they would ask: in substance, what is the voting power of people according to this different system? In substance, I think that a very reasonable effort is being made to implement that principle in those jurisdictions.

**Senator PAYNE**—Professor Williams, I want to ask you a question I asked Mr Whitlam—and you were sitting just behind him then. Bearing in mind the difficulties with this bill as drafted, which you and other submitters have raised, and bearing in mind the vagaries of the place we all call home, the Senate, what do you think about the proposition of implementing this via a constitutional amendment and referendum? I do not need to canvass with you the difficulties of having referenda passed in this country, but I raise it as a concept.

**Prof. Williams**—As a concept—and I think the submissions of Colin Hughes are particularly useful here; I was very attracted to some of his arguments—I think the best option is, as a matter of policy, to have a constitutional change that would not say, ‘The federal parliament can legislate for state electoral processes’ but would simply say, ‘Every Australian citizen has the right to equal and universal suffrage in federal and state elections.’ You would just go direct and put the principle there. That is a completely unobjectionable principle. It ought to be in our Constitution. In fact I cannot think of any other Western constitution that does not have an express right to vote, whether it be through a human rights act or a constitutional change. It is a very serious omission from our system. It is something that ought to be remedied, and that would be the best policy outcome.

As to the politics of achieving it, at the moment it is incredibly difficult. On the other hand, if anything was likely to get up it might be something speaking of people’s own entitlements to vote. It is such a basic proposition. Then again, the hard work would have to be done—you would need bipartisan support and you would need a number of things to go with it—but it is one of those things that ought to capture the public imagination with effective leadership saying, ‘There’s a gaping hole here in our system.’ I think that is the best option in a long-term sense. But if you look to other countries you will see that this piece of legislation, in the sort of form it is in, would be better in something like a human rights act. That is how other countries like the UK respond to this. It is a quasi-constitutional piece of legislation that has a particularly high level of standing, is very effectively used in educational and other settings and can be used to override state and federal legislation unless it is enacted in the appropriate form. That is a more easily achievable outcome and, frankly, is also a much cheaper way to achieve most of what the constitutional change would achieve.

**Senator KIRK**—Professor Williams, thank you again for your submission, which is helpful to the committee as always. I had a number of questions in relation to the implied immunity point but I think you have covered them quite well, so there is probably no cause to go over that again. But I do want to ask you about the final paragraph of your submission, where you say:

Judicial proceedings to determine matters, such as whether the geographical features of an area can justify a variation, would be problematic ...

Could you elaborate on that? You also mention that unenforceable guidelines may be more appropriate than court enforced criteria. Could you elaborate for us on the kinds of guidelines you have in mind in relation to that and how they might operate in practice?

**Prof. Williams**—As I have said, my first preference for this legislation would be to simply embody the international obligation and leave it at that, and implement it in a way that does not operate through federal judicial bodies but simply operates by virtue of section 109 of the Constitution, which overrides inconsistent state legislation, and leaves it to the state parliament to come up with an appropriate electoral model—and it would need to do so because of its own constitutional system requiring that there be elections and other matters. If you did that, you would not need many of the other things at all. That would put the onus on the states, where it should properly lie, to devise a system.

If you were going to have a system that went a bit further than that, again I would resist having any significant level of judicial review of these types of criteria. With something like the geographical features of the states it is almost impossible to envision the correct judicial criteria. If you were arguing this before the High Court, what could you put forward to say, ‘This is problematic geographically and that is not.’ It is something the courts are not well equipped to do, and if it is put in their hands the danger is that you will end up with a system that lacks a lot of certainty. You might have a lot of legal challenges because of that. The system itself would become problematic.

That is why I suggested that if there was a desire to put anything in that said what the other features were you could put things there. I note, though, that ‘community of interests—economic, social and regional’ is missing, and that is in the Commonwealth Electoral Act. I am not sure why it is not there but I would add it. I would probably simply have something there—perhaps even as a note to the legislation or something in that form—that might say, ‘In this 10 per cent margin these are the sorts of things that electoral commissions might take into account in developing that.’ But as to how they actually do it, leave it to them. Do not let the courts get involved. As long as it is within that 10 per cent it satisfies the test; otherwise there is no room for judicial proceedings in doing it.

As I have also indicated through my answer, I personally would go for 10 per cent despite the Western Australian report, simply because 10 per cent has been accepted in Australia as the uniform minimum standard for one vote, one value. If you are going to impose a national standard of general application, I think it ought to be imposed at the level that is generally accepted. Indeed, if there is any movement over time, I think it ought to be to reduce that 10 per cent. We should be asking the question through this and other committees: ought we to be moving to five per cent at the federal level depending on the technologies and other things available? Clearly, in the US and other countries they do it. Ten per cent is there; we ought to be

narrowing it as much as possible over time. It would be unfortunate if we broadened it out; it would set a national standard at the wrong level.

**CHAIR**—Thank you very much, Professor Williams, for your submission and for your evidence this morning.

[11.12 a.m.]

**HUGHES, Emeritus Professor Colin Anfield (Private capacity)**

**CHAIR**—I gather that at the other end of the telephone line we have Emeritus Professor Colin Hughes—is that right?

**Prof. Hughes**—That is correct.

**CHAIR**—Professor Hughes, you have lodged your submission, which we have labelled No. 3, with the committee. Do you wish to make any amendments or alterations to it?

**Prof. Hughes**—‘Supplement’ is perhaps a better word. I referred to the possibility of the High Court intervening in Western Australia, and of course it has chosen not to do so, so that point, which was not made very much of, no longer applies. I would like to say something more about the Queensland and Tasmanian points that are made in the paper, because of developments since then or my rethinking of some of the points that could be made on it. Would that be convenient for the committee?

**CHAIR**—Sure. I was going to ask if you would like to make an opening statement so, if you would like to, let us begin with that.

**Prof. Hughes**—I will include those two points in it and that is really the only opening statement that I would want to make. As regards Tasmania, certainly the present position for the upper house, the Legislative Council, is now completely satisfactory. The numbers are very good indeed. The David-Isenberg index is well down to barely over one and the Dauer-Kelsay is, as it should be, over 50 per cent to produce a majority of members. The only problem with the Tasmanian Legislative Council would be drafting a provision, if it were to go in the Constitution or in a federal statute with backing of the covenant, to enable the Tasmanian upper house to elect a small proportion of its members at successive elections. How the requirement of equality could be fitted over an annual election system could be rather tricky.

It could go in the Constitution, but I think it would be an undesirable precedent to litter up the federal Constitution with one-off small cases; so many of the American state constitutions have ended up with hundreds and hundreds of pages. Even in a federal statute, it is probably undesirable to have a provision that applies to only one case, although that would certainly be preferable to putting it into the Constitution.

As regards Queensland, I said in the submission that I had seen only a bit of grumbling at the time of the last redistribution about the zonal or area weightage system that now applies in Queensland. To supplement that with what has happened at the recent state election, there was one letter in the *Courier-Mail* calling an unfavourable contrast between those five seats and the seats in what is basically the Brisbane to Sunshine Coast corridor, all of which had the highest enrolments in the state. That reminded me that one of the peculiarities of Queensland—and it applies to Western Australia to a certain extent on the edges of Perth as well—is that there is a very rapid growth belt where it is very difficult to contain the largest enrolments within any

constraints of a three-election cycle. Queensland, of course, has a three-year maximum term; for Western Australia, with four years, it is a bit easier. But, if the Commonwealth were choosing to act, it would need to watch that it did not set off a trigger so that the small number of very rapidly growing electorates—perhaps half a dozen north of Brisbane and slightly fewer south of Brisbane—would not require redistribution in practically every interelection period.

While it is true that South Australia now does live with every election having its own distribution arrangement, I am not at all sure that other states would be happy with it. I would not presume to say whether South Australia is, but overall the reason why the three-election cycle was devised in the first place was that electors and members and political parties alike found it desirable to have a certain stability in boundaries for the cultivation of mutual relationships between the three parties. If you keep upsetting those relationships prior to every election, politics loses a certain equality in its representation. Thank you. Those are the only additional remarks that I care to make.

**CHAIR**—Thank you, Professor. I want to pick up on your last point. As a South Australian I can understand that there is a degree of inconvenience to the parties and to their members, but I am not so sure that the electorate is all that concerned about that and the outcome does keep parties on their toes. I do not really understand why there should be such a strong argument.

**Prof. Hughes**—I suppose the answer is that, having lived through it for a couple of elections, the South Australian electors have got accustomed to it. Basically, there is evidence given by people to those redistribution bodies that take evidence and to public hearings of, ‘We don’t like having our boundaries interfered with; we’re happy with things the way they are.’

**CHAIR**—I think it is fair to say that in South Australia most people probably have not noticed it.

**Prof. Hughes**—That may well be—it is only a relatively small minority who take a sufficient interest to come to the attention of the redistribution authorities, either in writing or in writing and subsequently in oral evidence. But that perhaps overly sensitive minority do seem to prefer stability to frequent change. But I agree with you that overall, if there is something wrong, it ought to be fixed as quickly as possible. It is desirable perhaps to get it as right as you can once and then hope that that will last for a couple of elections.

**CHAIR**—You encourage us to leave it up to Western Australia to find an appropriate solution. They have been trying, but the reality is that there is an impasse. Why should we leave it up to WA in these circumstances? And what confidence could we have that there would be an outcome?

**Prof. Hughes**—I agree with you that the Western Australians have overstayed their welcome on this particular matter. They have been told to get on with it by successive bodies and inquiries over quite a period of time. The undesirable aspect of a federal intervention is the constitutional theory one: there ought to be within a federal system a core of matters in which each jurisdiction has protection and there has to be a very good reason indeed for intervening in those. Something as central as the electoral system, going to its representative theories, the composition of its parliament and so forth ought to be invaded only as a last resort.

Finding a mechanism that builds a bit more fire under Western Australia is rather tricky. If one starts thinking about any constitutional document—there is, for example, the provision of the Australia Act 1986, which has really come in late in the tale, that suggests that there are matters where the imperial parliament could have once intervened which are now vested in the state parliament—the composition of the state parliament might well be the sort of thing that you would think of. Whether the High Court would go along with such a reading of the Australia Act I would not presume to guess. If the committee are thinking of pursuing an action and are at a loose end, they might follow up with legal advice as to whether that provision of the Australia Act is any impediment or risk to the solution being thrown out by the court.

Beyond that, it is just the general proposition that the states ought to be left alone unless they are doing something quite bad that has to be stopped immediately or unless there is a very good theoretical reason that what they are doing cannot be remedied by themselves. One might have said that of Queensland in the past, but Queensland managed to find salvation with a remedy which I would suggest is very attractive to Western Australia. We might be seeing the last fitful stand before Western Australia falls over.

Because the present Commonwealth parliament is approaching the end of its life, it would be difficult, for example, to legislate and say, ‘It won’t be proclaimed unless Western Australia doesn’t come to the party.’ It might be possible for the committee to recommend very strongly that the next parliament legislate and, to that extent, have a sword of Damocles hanging over Western Australia’s head for a reasonable period of time. But these are quite novel constitutional questions about which I would only presume to say, ‘I think there’s a problem.’ It might well be that the committee would want to take more expert advice than I could presume to offer on the point.

**Senator MURRAY**—We have had three learned and experienced witnesses one after the other, of which you are the third. The first two, the Hon. Gough Whitlam and Professor Williams, both inclined to the view that the international convention is best expressed in its principal form and that the Australian addition to that would be the acceptance of a tolerance regime of 10 per cent to the equal suffrage principle. Having expressed the generality of that, it should be up to the states, territories and federal jurisdiction to find their own way through that.

The attraction of that from a practical point of view is that the Commonwealth does not have to get involved with trying to work out what the states should do, but more importantly it reduces the likelihood of High Court disagreement with that process. What do you think of the application of general principles of this sort to electoral law? Do you think it has a proper place, or is your inclination a more practical and pragmatic one than just simply to let the various jurisdictions in Australia work it out for themselves?

**Prof. Hughes**—I think general principles have a vital part to play. My only point is that there are exceptional circumstances which need to be taken out of general principles as they apply to the bulk of the instances and may require some special treatment of their own. I do not know what Professor Williams’s position would have been. I have good reason to believe that Mr Whitlam regards the Queensland solution as backsliding from good principles and would therefore not be averse to seeing that scrapped by the application of federal law by some means or other.

I would argue that the problems of the real outback areas are such that they cannot be accommodated satisfactorily within the 10 per cent variation. They would require the possibility of removing a very small number of seats and treating them specially. One could insert a rider—and I hasten to add that this is what the Canadian Supreme Court have done in looking at not the covenant but their own human rights provision. They have said that there are very few seats up in the north end of the belt of provinces that run across the country that do need to be treated separately and they have interpreted the requirements of suffrage by the covenant as meaning effective representation.

Effective representation unfortunately has a bad name in Australia because of the misuse to which it was put by the Country Party over many decades, which was really an acute form of malapportionment in favour of one sector of the population. We believe that the Queensland solution has produced public acceptance. Of course—taking the chairman's point—we really do not know very much about what the public accepts, but at least almost everyone has gone quiet on the subject compared to the bitter debates that prevailed for 40 years or more from the Hanlon introduction.

I would be sceptical as to whether, for example, a variation larger than 10 per cent would be accepted. That leaves both the problem of outback Queensland and outback Western Australia and a point that I made in the submission about the very small electoral districts of the Northern Territory. Ten per cent of 3,000 is 300. That is a very different situation from 10 per cent of 30,000 in Queensland or 80,000 at the Commonwealth level, where you have a margin that you can play around with. At a variation of 300 you are looking at splitting little hamlets up the main street and doing all sorts of things that are bad for all the qualitative criteria which have served Australia so well for the past century in its electoral legislation and produced real community of interest.

You have had a revival of community of interest in the Queensland state election and it is now foreshadowed for the federal election—the concept of the sugar seat, where there is a local industry that is very much identified with the character and the interests of the constituency and all the people in the constituency. I think that aspect of representation needs to be protected and perhaps on occasion cultivated more than an absolute numerical requirement produces. I would also say that getting into absolute numerical criteria, as the US Supreme Court has over a period of some decades now, shows just how nonsensical the operation can become. The American example warns us off that and the Canadian example encourages us to say, 'Wait a minute; shouldn't there be exceptions?'

**Senator MURRAY**—Nevertheless, the 10 per cent tolerance avoids the worst excesses of the American system; wouldn't you agree?

**Prof. Hughes**—It certainly would do. All I am saying is that it produces a couple of small problems. If the answer were to go back to where Australia was, say, 30 years ago in the various states then I would agree with you and say to take the butcher's axe to it, and 10 per cent would be a great improvement. What I am saying is that voluntary, so to speak, action on the part of most states since then has produced solutions. Western Australia is the only conspicuous case and Queensland is a minor deviation from general principles, which I believe is justified, and I believe Western Australia could find that same solution suitable to its problems, in which case I could live with the two of those.

**Senator MURRAY**—The difficulty with the proposition you put of a special dispensation for large rural electorates is that, if you take Western Australia, in my experience both as a resident and citizen and as a senator for Western Australia, I have never heard any commentary that having 15 lower house federal seats in Western Australia puts anyone at a disadvantage—apart from the member for Kalgoorlie, who has to travel extensively. I have never heard strong commentary from the community that that is unfair. It seems to me an odd proposition that, if equal suffrage can apply on the 10 per cent principle federally in a state, it cannot apply for the state members.

Allied to that observation, on which I would like your response, is a second view I have and it was really elicited by the interchange between you and Senator Bolkus—that is, once people adjust to a new system they accept it as the way it should be. It seems to me that one thing we might consider is transition provisions so that you could have no more than 20 per cent, which would take into account the Northern Territory, but that within a space of say three electoral cycles or 10 years they must reduce it to 10 per cent. That would allow time for adjusting and working out the best way to do things. How do you react to those two observations?

**Prof. Hughes**—To deal with the Northern Territory one first: it really is not a transitional matter; it is an enduring one because of the small scale of the Northern Territory. To that extent it is not really a matter of learning how to redistribute. It is the hard geographical facts against which the redistribution runs that make it a special case. I think it is the only one like that of the eight jurisdictions—or nine, if you count the Commonwealth—that exist, so it is special to that extent, but with great respect I do not think that giving it training wheels would be the answer there. I think it is the scale of the Northern Territory and the number of electors that are involved that make me say that. It might be that 15 per cent would be better than 20 per cent, and I would not argue about it. But having looked at the problem in respect of not parliamentary government but local government, when we were looking at the franchise and representation arrangements for Queensland local government, it was quite quickly apparent that the smaller local authorities really did have a problem if they were confined within the 10 per cent parameter for their seats.

Coming back to the federal point: you use the word ‘rural’ and I use the word ‘outback’, and I think there is an important distinction between them. Many of the zonal systems—and, indeed, the Commonwealth 5,000-square-kilometre formula—in the past caused the rain to fall in relatively small rural seats quite close to the state capitals. In Queensland it was paradoxical that Warwick, which was 100 miles from Brisbane, benefited as a rural seat and Cairns, 1,000 miles away, did not and was put in an urban category. There were anomalies of that sort.

If you think ‘outback’ rather than ‘rural’ then in Western Australia—as I think I say in the submission—you are really talking about Kalgoorlie and a couple of contiguous shires. The problem is that the wheat belt and the south-west corner have to come up not quite to the universal but to the general standard of the rest of the state, including Perth.

The second thing wrong with the Western Australian solution as it presently stands is that the parliament, with all its interests, has drawn boundaries that the redistribution commissioners have to subdivide into individual electoral districts. It is the way that those zonal boundaries have been drawn that rigs the system—as, indeed, was always the case in Queensland, without passing judgment on what successive redistribution commissioners did within the zones. The devil was not in the detail; it was in the grand plan of the zones. If you were to have the

Queensland formula in Western Australia then it would only be that Kalgoorlie area—Kalgoorlie plus a couple of bits—that would benefit from it. As I suggest in the submission, the number of seats involved would not be all that large. In Queensland, by contrast, if you were to look at federal seats and see what would happen within 100,000 square kilometres, four seats would be affected now: Leichhardt, Kennedy, Capricornia and Maranoa. But in Western Australia it would only be the one. The bottom line is that I appreciate what Senator Murray is saying, but I do not resile from what I say in the submission or from what I have been adding to it this morning.

**Senator PAYNE**—In your submission you refer to three possible ways of trying to achieve the object of the legislation. The second of those is amendment of the Constitution. In your text you refer to the ‘quite specific language that this problem area needs’. Have you turned your mind to the language of such an amendment?

**Prof. Hughes**—No. I think it is extremely difficult to be certain you are going to get it right. The prize example that I always use to illustrate the difficulties of getting it right is the 1977 amendment to ensure that representation in the Senate was not tampered with by the state parliament in filling a casual vacancy. The first case that arose did not fit within the provisions of the constitutional amendment, because the party had really ceased to exist and parts of it had ridden off in different directions. All I am saying is that a provision that would be appropriate for the federal Constitution would be extremely difficult to devise. If you were to accommodate the sorts of exceptional cases that I have been advocating then it would be cluttered by the generally wise standard of the Commonwealth Constitution. Otherwise, it would probably override those. Furthermore, you would be putting yourselves in the hands of the judiciary more than I would regard as desirable. There are certainly places where the court has said, ‘This is a political matter and we do not wish to intervene.’ My impression is that, from the Barwick court onwards, as the American cases have been raised in an Australian context, by and large successive compositions of the High Court have not liked the prospect of getting into that sort of work. Therefore, quite possibly, if they had a choice they would find an interpretation that kept them out of it.

**Senator PAYNE**—Indeed. Thank you.

**CHAIR**—Professor Hughes, thank you very much for your submission and the time you have taken with us this morning.

**Prof. Hughes**—Thank you.

**Proceedings suspended from 11.40 a.m. to 11.58 a.m.**

**McGINTY, the Hon. James Andrew, MLA, Attorney-General, Western Australian Government**

**CHAIR**—I welcome the Attorney-General of Western Australia, who is also the Minister for Electoral Affairs and who is appearing by videolink. Minister, you have lodged a submission, No. 8, with the committee. Do you wish to make any amendments or alterations or just proceed with an opening statement?

**Mr McGinty**—I will proceed with an opening statement. I would like to make five points by way of opening. The first is the question of principle that is involved here. I strongly support the view that it is an essential part of a modern democracy that every citizen should be given an equal say in electing their government and that the strength of that vote should not be dependent on irrelevant circumstances, such as where you happen to live, anymore than it should depend upon your economic status or any other question of that nature. It should be a fundamental element of a modern democracy that everybody has an equal say in electing their government.

Over the last 100 years all of the blights on our democratic system of government have been progressively removed. Women have been given the vote and allowed to run for parliament, Aborigines are treated on an equal basis with other Australian citizens, we have removed the property franchise, which was part of the state electoral system as recently as the 1960s, and we have also done away with plural voting, whereby people were entitled to more than one vote. All of those elements have been removed. To my way of thinking, there is now only one major blight on our democracy, particularly in Western Australia but it has national ramifications because we are part of a national system of government. It is that the fact that we do not have every citizen having an equal say in electing their government. Some people's votes are worth, currently in Western Australia, up to five times another citizen's vote. That is the say that they have in electing their government and I think that in principle that is wrong.

Secondly, I want to give a brief historical perspective. The argument is often put that this is about protecting people in rural and remote parts of Australia. It has not historically been that. It has been more about protecting vested and established political power interests. I went back to the referendum to establish the federation of Australia over 100 years ago and, interestingly, the Western Australian population at that time, based on the figures that are provided by the Electoral Commission, was distributed in almost exactly the opposite way to that which it is today. Today 74 per cent of the voting public in Western Australia live in the Perth metropolitan area and 26 per cent live in the country. At the time of the federation referendum in July 1900, 31 per cent of the population lived in the city and the remaining 69 per cent lived in the rural parts of the state, particularly in the Goldfields. At that stage 43 per cent of those people lived in the Goldfields, particularly the areas around Kalgoorlie. That was the time at which the Labor Party adopted, 100 years ago, the principle of one vote, one value. In fact, its precise expression in the policy at that time was the principle of 'one person, one vote'. That was substantially driven out of the Goldfields because the people in the remote parts of the state—the Goldfields are roughly 600 kilometres from Perth—felt that they were not being fairly treated compared with the people in the metropolitan area. Today that situation is almost exactly reversed, but it is the same power elites that determine whether the electoral system will be changed. So it is not a situation where there has been a historical argument in favour of country areas, because the

population shift has occurred independently of the electoral system. It is simply a system that has not reflected or protected the interests of country people.

The third point that I want to make is that the Western Australian state parliament is incapable of reforming itself, and that is why I strongly support this legislation. We had a majority of members of both houses of parliament—that is, the Legislative Assembly and the Legislative Council—voting to support the introduction of a very close approximation of one vote, one value. That was done in 2001, and that is what was recently overturned by the High Court because they determined that not a simple majority of members but an absolute majority—which is one more member—was required to vote for this particular reform. Those people who stand to lose power and influence are those people who opposed the change. They will not change and therefore the parliament itself is incapable of adopting a position of principle because it affects existing power arrangements.

As you are aware, we have been to the High Court on two occasions. The first was in 1996, to base an argument on an extension of the implied freedom of political communication. In my view, the ultimate political communication is when a voter goes into a voting cubicle and casts their ballot. That is the ultimate form of political communication, to say to an elected representative that you do or do not want them. We argued that any fetter on that communication directly through the ballot box should be something which was protected by the Constitution. It is history that we lost 4-2. We then sought a political remedy. We put the bills through the state parliament and failed by one vote. I might add that the President of the Legislative Council is not given a vote. He was a Labor member. So there were sufficient elected representatives to give an absolute majority, but one of our members was not allowed to vote under the Western Australian constitution, or so it is argued. That has been the historical position and accordingly we were defeated again in the High Court on that matter.

The fourth point that I would like to make relates to the peculiarities of the Western Australian system. We have inequities and a high degree of artificiality required in the drawing of electoral boundaries by the current legislation. At the moment the geographically homogeneous region—and I mean that from a population make-up point of view as well as a geographic point of view—of the Kimberley is required to be divided into two seats. This would not be required if we had the principle of one vote, one value. Under the recently announced redistribution in Western Australia, the West Kimberley is part of one seat and the East Kimberley is then linked in with the Pilbara region, with which it has no community of interest whatsoever, purely because the numbers require that that be the case.

If you look at the way in which the current Western Australian electoral law operates the state is divided into two regions—the city and the country. The city limits obviously over time have expanded and, for those of you that are familiar with Western Australian geography, you now have a situation where immediately to the south of Perth you have two cities, Rockingham and Mandurah. They are less than a hundred kilometres from the centre of the Perth area. Rockingham is in the city, Mandurah is in the country. That is why today you have these two adjoining seats in the state parliament: Peel, which is based around the city of Rockingham, in the city with 34,508 voters and Mandurah, because it is in the country, 20 minutes down the road and a fairly compact city, with 14,247 electors. So you have a discrepancy greater than two to one there between two adjoining seats both of which, in reality, are part of the metropolitan area although technically one falls outside of it.

You also have the anomalous position of the country cities. Western Australia only has one population centre of 50,000—that is the greater Bunbury area—so in that sense we are the least decentralised of all the states. But you have the cities of Kalgoorlie, Geraldton, Bunbury and Albany, which each constitute a seat that is very small in size. Each of them is totally urban and yet each of them has roughly half the enrolment of the average city seat. That is a complete anomaly. If there were to be any argument—and I do not concede that there is—for departure from the principle of one vote, one value, then you might be able to make that argument out in respect of the Aboriginal people who live in the western desert area who are truly remote, truly isolated and truly lack a lot of facilities, but you cannot make that argument out in respect of the country cities.

The fifth point that I would like to make is that a lot of this debate is focused on the Legislative Assembly, which is of course where the government is formed. We have run into significant problems in Western Australia due to the power of the Legislative Council. The same reform needs to be made to both houses of the Western Australian parliament because it is the case that, regardless of the popular vote, the conservative political parties because of the malapportionment will always win a majority of seats in the Legislative Council.

The reason that we were able, during the life of this parliament, to put up and have passed by a simple majority the electoral reform legislation bringing in one vote, one value in the Legislative Assembly is because of a quirk of history. The One Nation party in its naivety decided to give their preferences to the other minor parties and that resulted in two additional Green members being elected at the last state election, where everyone concedes that the vote was really a conservative vote and should have gone to the conservative parties. That is not an accident which will repeat itself in 12 months time. So, regardless of the popular vote in 12 months time, the conservatives will again get a majority of seats in the Legislative Council and they will no doubt then return it to the position it has been in for the last 140 years, namely, one of conservative dominance regardless of the popular vote. They are my introductory comments. Thank you very much.

**CHAIR**—Thank you. I will start by going back to your support for the legislation. We have heard some evidence this morning that gives us cause to be concerned about some of the detail of it and some of the broader constitutional questions. Firstly, have you or your department had a chance to look at some of the submissions before this committee and address those issues? Secondly, if not, do you have specific concerns about the drafting of the legislation?

**Mr McGinty**—To answer the second question first, my support is in principle and is not directed at the detailed components of the legislation. My support and the support of the Western Australian government is to the effect that the state parliament is incapable of doing the principal thing and therefore we would support federal legislation which is designed to require electoral equality as an essential element of a modern democratic system, so we pitch it at the in principle level rather than necessarily going through a detailed legal analysis.

As to your first question, it has always been my belief—and I have not had any advice from the state legal apparatus to suggest the contrary—that article 25 of the International Covenant on Civil and Political Rights was sufficient to found legislation of this nature and the requirement of equality as a part of the democratic process. Even though we were unsuccessful in the High Court, we also gained some support for the legitimacy of that approach from the broad thrust of

the implied democratic rights view that was taken by the High Court in the 1990s. Notwithstanding our lack of success on that occasion, we believe that the interaction between state and federal governments, political processes, the nature of a modern democracy and the efficacy of our democratic representative structures require equality. Without that equality you cannot say that you have a system of representative government which the Constitution mandates or describes.

**CHAIR**—For the record, what is the stated position of the WA government in respect of the legislation that was before your parliament? Have you announced what you are doing with that next?

**Mr McGinty**—We indicated when we lost in the High Court that we had committed so much time, energy and passion to the issue of electoral reform in Western Australia that it was time, for the life of this government, to move on and focus on other matters. It is not our intention during the life of this government—and that is for another 12 months; the next state election is due in February 2005—to have more parliamentary time spent on this matter. We also believe that to do that would be a futile exercise, given that the parliament has dealt with it and we have other priorities that we now need to proceed with. Having said that, ‘one man, one vote’—I think that was the original phrase; ‘one vote, one value’ is the contemporary phrase—has been part of our philosophical and political commitment for over 100 years and we do not intend to walk away from it. That will remain so until such time as we achieve that principle.

**Senator MURRAY**—Nice to see you, Minister. Whilst I have the opportunity, my compliments to you for the very good work you have been doing in your various portfolios. You have done a lot on the social justice side which I think Western Australia will long thank you for.

**Mr McGinty**—Thank you.

**Senator MURRAY**—What is the process for a referendum in Western Australia? Can the government do it of its own volition, or does it need parliamentary approval to run a referendum?

**Mr McGinty**—There is a Referendums Act in Western Australia. That requires that the parliament pass a law to submit a question to the people. Interestingly the results of that referendum, unlike a referendum to change the Commonwealth Constitution, are not binding. If a referendum were conducted on this question, for instance, that would not change the law. The parliament would in the light of that referendum need to pass a law to give effect to this issue, and it would need to be passed in accordance with the Constitution. So I think the answer to your question is that there is a provision for a referendum to be conducted but that does not of itself change the law.

**Senator MURRAY**—I think that actually gives greater credibility to the need for federal law in those circumstances because even if the people unanimously—and that would be extraordinary, but let us just use it for argument—agreed with what you were trying to do, those in parliament could resist that view.

**Mr McGinty**—Exactly. We went to the last election with a clear platform of support for the principle of one vote, one value. We maintained that we had a mandate to do that. We were

heavily campaigned against, as you will no doubt remember, during the course of the state election campaign on the basis that we proposed to do exactly what we then did when parliament came back—that is, introduce legislation giving everyone an equal say in electing their government. The conservative members—and I include One Nation, the National Party and the Liberal Party—voted against the legislation in the Legislative Council and in the Legislative Assembly, and that is what denied us the absolute majority that the High Court said was necessary. So, in a sense, we had the approval of the people, because it was part of our platform to do this. The conservative parties in the Legislative Council nonetheless voted against it and ran a major campaign against the legislation, as is their right. But it would potentially be the same if we had a referendum and there was no guarantee that the legislation would then pass the parliament.

**Senator MURRAY**—If I have interpreted the evidence of the Hon. Gough Whitlam and Professor George Williams accurately, their view is that the constitutional strength of such legislation as I propose would be best served by expressing the principle in generality with a tolerance level added rather than trying to get down to the specific mechanics and processes by which you could introduce it in each state and territory. Have you have considered whether you should put article 25 to the parliament as a general principle for its affirmation as a first step and attach to that a device that is used, as you know, often in legislation that any law that is contradictory to that would need to be amended. It would seem to me that it would be a major step for some of those in your parliament to oppose the principle expressed just on its own.

**Mr McGinty**—I would have no doubt, having witnessed the debate on this and other issues that have gone to the fundamental issue of equality of all citizens in recent times, that a significant number of members of the Western Australian parliament in both houses would have no difficulty whatsoever in denying the principle of equality—no difficulty whatsoever.

**Senator MURRAY**—I hesitate to ask you this, given both the cost and the angst you have already been through, but were you to put such a proposition to the parliament and were the Legislative Council to resist a proposition to which Australia is a signatory and to which the whole democratic world accords respect and you then went to the High Court and said, ‘Look, these people are defying the principle of universal equal suffrage as expressed in article 25,’ would you have a better chance than the route you have chosen so far?

**Mr McGinty**—Having been to the High Court and lost on two occasions I do feel a bit jaded about the prospects of going back and being third time lucky. The nature of the political debate that has occurred around this question in Western Australia leads me to believe that you would not get those people whose vested interest it is to oppose a change to the electoral system to bring in the notion of equality—they would find an argument to oppose the adoption of the UN principle in its broadest form.

I go back to the first proposition that you were putting. I think that as a result of that, and if I can see this as a way of support for the thrust of the legislation that you have introduced, what I think is necessary—appreciating that the Western Australia parliament, or a significant proportion of it, will be recalcitrant—is to provide a default system in the event that the Western Australian parliament did not pass legislation in conformity with the principle that is involved here. There would be a requirement that the state be divided into approximately numerically equal divisions—we currently have 57 seats in the lower house—and there should be the

tolerance. I think there is now a clear enough model around Australia which could be applied here because it is so common in each of the jurisdictions. The Commonwealth's electoral system for the House of Representatives is arguably the purest and the closest to the notion of pure equality. The other states, by and large, provide a tolerance of 10 per cent. I think you do need to have a default position should the Western Australian parliament not respond or want to have arguments about what article 25 of the International Covenant on Civil and Political Rights means, because that is where I am certain this debate would go.

**Senator MURRAY**—Minister, the reason I have questioned you in this way is because I have believed in putting forward this legislation—as you know, a previous attempt has been made in the federal parliament—that there is no other way but Commonwealth intervention to restore to the citizenry of Western Australia a franchise entitlement which is denied to them by the system. I think the grotesque malapportionment is a disenfranchisement and a denial of political rights. Your evidence indicates to me that there is almost no other remedy than federal law hinged on the external power and Australia's strong support for the International Covenant on Civil and Political Rights.

**Mr McGinty**—I think it is a corollary of the third point I made in opening that the Western Australian parliament was incapable of reforming itself. We have tried every other avenue open to us to achieve this. We have been to the High Court to argue as a matter of legal principle and we have put it through the parliament and have achieved majority—albeit not absolute majority—approval of the parliament. There is a window of opportunity during the life of this parliament that I do not believe will be there in 12 months time after the next election when we revert to the normal constitution of the Legislative Council, and that is with a majority of conservative members regardless of the popular vote. In my view, there is no other way to now proceed to achieve this very important principle.

No doubt you have got these figures available to you—you did refer to the gross malapportionment. At 31 December last year, the most recent figures that are available to us through the Electoral Commission, the outer urban seat of Wanneroo—and this is just referring now to the Legislative Assembly—had 45,731 electors, the largest numerical seat. The smallest was the seat of Eyre, which is based in the goldfields with the city of Boulder and surrounding mining areas, which had 8,964 electors, a discrepancy of approximately 500 per cent. I think it is important to know that the people in Eyre have five times the voting power of the people in Wanneroo and yet they are all Australian citizens. So I agree that that is a measure of malapportionment that should be seen as a scandal denying a very large number of citizens full participation in our democracy and our system of government. Steps need to be taken. We believe, first of all, that it should be in the Western Australian parliament; failing that, reference to the courts and, failing that, the only other avenue by which we can achieve this matter is by the intervention of the federal parliament. It is the last option; it is not the favoured option; but the others have proven to no avail. We did go to the courts in the hope of achieving justice and it did not work.

**Senator MURRAY**—I will conclude by saying that you left out in your little list then the people. I think that the most extraordinary evidence you have given to the committee today—and I might add in parenthesis that I am one of billions, and I use the word 'billions' deliberately, who believe and hold to the view that sovereignty rests with the people—is that even if you went to the people of Western Australia and they unanimously agreed with the proposition that you

have been put to the parliament, the parliament can still ignore it. Therefore, there is no option but for the federal parliament to act on your behalf.

**Mr McGinty**—If it would be of assistance to the committee I am happy to provide legal advice to that effect—that is, of the interaction between this legislation and the referendums legislation. I could do that if it would be of assistance to the chair.

**Senator MURRAY**—Through the chair, I would appreciate it, yes.

**CHAIR**—So would the rest of the committee, I am sure.

**Mr McGinty**—I am happy to undertake to do that.

**CHAIR**—Thanks very much for your evidence this morning. It is an issue which I am sure will not go away here. I think our major task is to find legislation which is constitutionally and otherwise sustainable. I am sure there is a cooperative spirit on the committee which may lead to that outcome. Thank you.

**Mr McGinty**—I wish you well in that endeavour, and I thank you very much.

[12.28 p.m.]

**GARDNER, Mr Alexander Walter (Private capacity)**

**CHAIR**—Welcome. We have a quorum here, so we can proceed with your evidence. Thanks very much for taking the time this morning in Perth to talk to us. You have lodged submission No. 13 with the committee. Do you wish to make any alterations or amendments or would you like to just start with an opening statement?

**Mr Gardner**—I would like to make a brief opening statement. Do senators have the email I sent? On the web site there is a Word document which is the text of an article I wrote and the email is absent from the web site, but I am assured that the senators have the text of my one-page email.

**CHAIR**—Yes, we have that.

**Mr Gardner**—I would like to address briefly the three points that are in the email and then supplement those three points. Then I am happy to elaborate as senators like.

**CHAIR**—Sure. Please go ahead.

**Mr Gardner**—The first point is that it seems to me that the scope of the bill should only apply to lower houses and not to upper houses. From a Western Australian perspective there are two reasons for this. One is that the state Labor government's recent electoral reform proposals proposed the application of the one vote, one value principle to the Legislative Assembly, the house in which government is formed, but not to the Legislative Council. Indeed, the model that was described for the Legislative Council was something akin to the Senate—that is, it is a house in which the various regions of the state are equally represented. It was proposed that there would be six regions each with six members of the council. It seems to me as though Senator Murray's bill overlooks the natural comparison with the Senate.

The second point is that this Commonwealth bill may not really be necessary in any case. It is my argument, and this is the argument in the article that is attached to the email, that the government could have achieved passage of its electoral reform legislation with an absolute majority in the Legislative Council. I can elaborate on that argument if senators like. In essence it was believed that the President could not vote but, in my view, on an absolute majority vote requirement the President could have voted and, if the President had voted, the absolute majority would have been achieved on the passage of the bills. It seems as though Commonwealth parliament's intervention would not be necessary anyway. Of course, there is a separate question about what political will there would be today to support the bills.

The third point relates to whether the Senate bill would in any event be unconstitutional. I see that Professor George Williams has made a similar submission on this point. I suggested that, yes, one might see the bill as exercising the external affairs power to implement the terms of an international treaty but it is probably susceptible to challenge on the basis of prohibitions implied by the High Court on the basis of the federal nature of our Constitution that the Commonwealth

parliament cannot make laws that discriminate against the states or interfere with the essential functioning of the core constitutional organs of the states. In my email, I suggested that I had not really researched the point at the time. I have given it further thought and I think that this is a fairly strong argument. There is nothing really more central to the constitution of a state than the constitution of its parliament and it seems to me as though the bill would amount to the Commonwealth parliament endeavouring to determine how the state should constitute its parliament. I think that is likely to be invalid.

Those are the three points I had in my email. I will briefly add a couple more. It seems to me as though section 51(xxix) would also come up against the basic proposition in section 106 of the Constitution. Section 51(xxix) is the external affairs power and section 106 is the provision of the Constitution that preserves the state constitutions until altered in accordance with the state constitutions. Even though section 106 is subject to the Constitution, the intention is pretty clear that basically the core elements of the state constitutions were to be changed by the states themselves, not by the federal parliament. A second supplementary point is that, if you look at our constitutional history and indeed the text of the Commonwealth Constitution, the foundation provisions readily acknowledge that the state constitutions were different, that there were different electoral qualifications and different compositions of state parliaments. I think that lends some support to the fact that the Commonwealth parliament should not be legislating in this degree for state constitutions.

Thirdly, as a supplementary point, it seems to me as though the bill lacks a remedy. I am not quite sure what the benefit of a challenge would be. I think this is borne out by the High Court decision in the McGinty case. In that case it was argued that there was an implied requirement of representative government to have one vote, one value. But, reading between the lines, I think the judges were worried on two counts. There is no common-law foundation for the right to vote and there is no common-law foundation for the distribution of electoral districts. So, if someone were successfully to challenge under this type of legislation the state electoral distribution law, then one would be left with what is there. There is no common law to fall back on as to what should be the case. The existing legislation would be invalidated and there would be nothing left. The question arises: does that leave it to the Commonwealth parliament to legislate to fill that gap? That would seem to take it further into the implied prohibition.

I have two more very brief points. First of all, it seems to me as though this sort of change could be affected by amendment to the Commonwealth Constitution. That was tried in 1988, and of course it failed. It really all leads back to my concluding comment, which is that I think this is best resolved politically in Western Australia. The circumstances of the state, I think, are such that Western Australians can design their own best electoral distribution law. It was very nearly achieved, it should have been achieved and it seems to me as though Commonwealth legislation is unnecessary.

**CHAIR**—It was not achieved, so we have a problem, Mr Gardner.

**Senator MURRAY**—Thank you very much for taking the trouble to make your submission and to be available at this hearing. Professor Williams's evidence had two features to it which were relevant to some of your remarks. Firstly, he said that he felt that the proposed bill should be redrafted and would be better able to face any constitutional challenge if it attended to the higher order of law that it attempted to introduce by referring to article 25 and the generality of

that provision within the 10 per cent tolerance and if it left the implementation of meeting that principle to the states and territories. Secondly, whilst he recognised that there were potentially still constitutional difficulties, that was no reason for the Commonwealth parliament not to pass the law.

I have a question which really asks whether there are further protections one could put into a bill, if you follow Professor Williams's approach, which would protect the intention from successful High Court challenge. I have wondered whether the bill should—and I have only wondered it today, so it is just a question to you—say that the principle will apply unless overturned by a referendum of the people of the state or territory affected. Let us assume a scenario where the bill passed, a referendum was held in Western Australia and they approved of the bill. Would you think that would have any influence on the High Court?

**Mr Gardner**—Can I first ask: were the points that you have attributed to Professor Williams submitted in evidence this morning?

**Senator MURRAY**—Yes. Let me stress that it is my rephrasing of his views. You should obviously have regard to the *Hansard* record.

**Mr Gardner**—I think you have conveyed his views well. It seems to me as though there is a certain generality about how the other constitutional problems—that is, the implied prohibitions—might be solved. If there were a referendum within the states to approve or disapprove of the Commonwealth's bill, I do not think it could determine the validity of Commonwealth parliamentary legislation. It seems to me as though the Commonwealth parliament's powers are determined under the Constitution, not by the popular will expressed at a referendum in the states. It may be a very significant political indicator for politicians, but I do not think the judges would use it as a constitutional argument for the validity of legislation.

**Senator MURRAY**—I asked the question because my assumption is that there is popular support for this legislation in Western Australia, just based on my own experience, but we have had evidence from the minister, Mr McGinty, that the Referendum Act of WA does not override the will of parliament. He said that, if he put his proposition to the people of Western Australia, the parliament of Western Australia could still ignore that view. The parliament of Western Australia cannot ignore a Commonwealth law. If that law were reinforced or subject to an exclusion through the state referendum—and I am not proposing this; I am just testing some propositions with you—it would seem to me to give a stronger case politically. I want to know whether it would give a stronger case legally.

**Mr Gardner**—I think again my answer would be no. I would agree with Mr McGinty's comment that, even if he were to put this matter to a referendum of the people of Western Australia, that would not change the law. The Marquet case has shown, I think conclusively, that the absolute majority consent of the two houses of the state parliament would be required. It seems to me as though it would put the politicians on very strong notice.

**Senator MURRAY**—As a matter of principle, as a lawyer who has an interest in these areas, if—and there are lots of ifs—the Commonwealth parliament were to agree on a redrafted bill and if that bill were to be tested in the High Court and found to be acceptable, would you regard that in principle as an unwarranted and unfortunate intrusion in state affairs or would you say

that, given the fact that there is no other route to achieve one vote, one value in WA, it was acceptable?

**Mr Gardner**—I might regard it as unfortunate that Commonwealth legislation were necessary to achieve the objective, but it seems to me that if the High Court were to hold the legislation as valid that would be the end of the matter, wouldn't it? I am not sure that I follow the full ramification of your question. I am sorry.

**Senator MURRAY**—The ramification of my question is simply this: apart from people who have doubts about whether the law would uphold such an approach and call it valid, there are a number of people with legal training—as well as other people in the community—who simply think that the principle of Commonwealth intrusion in state affairs is wrong, even if it might be lawful. That is what I was asking you about.

**Mr Gardner**—If I might intervene: that would still be a political judgment.

**Senator MURRAY**—I am asking your opinion, though.

**Mr Gardner**—Do you mean: what is my political judgment?

**Senator MURRAY**—Here you are as a person in Western Australia intimately interested in these matters. I want to know what your opinion is, yes.

**Mr Gardner**—Again my political opinion is that it would be most unfortunate, because I think these matters can be solved in Western Australia. They would have been solved in Western Australia had the correct legal view been taken of the President's vote in 2001. The other point about this is that, as a matter of the expenditure of time and energy, I suspect that the course proposed with this bill, even if it were redrafted to address some of the technical objections I have seen in some of the other submissions and even if it were to then go before the High Court and be tested constitutionally, will take more political effort and more time and energy on the part of a number of individuals than would resubmitting the matter within Western Australia to the vote of the parliament.

My understanding at the moment is that—and I cannot profess to speak for the Green members of parliament—one particular Green member of the state parliament in the council now takes a different view of the electoral reform legislation from the one that she took in 2001. I can see that there is a political difficulty there, but it seems to me as though you can address those sorts of political concerns. The Green party generally supports this legislation, and the Green party would make a political judgment. If we were to refuse to support this legislation in the council now, it might have an adverse political repercussion for us in the next election and, therefore, we would support it. It seems to me as though you can find a political deal that will get the legislation through.

**Senator PAYNE**—Thank you very much, Mr Gardner, and thank you for your submission. I have asked the same question of most witnesses this morning: perhaps the solution to this, to ensure consistency across Australia and reduce questions of unconstitutionality, is to in fact amend the Constitution by referendum to enshrine the principles we are discussing.

**Mr Gardner**—I personally think that is the better route. I think that is the route that can legally be successful. It was tried in 1988 and it failed. I personally voted yes in 1988. It seems to me as though it is the politically legitimate and the constitutionally valid route to go.

**CHAIR**—Thank you very much for your evidence and cooperation.

**Mr Gardner**—It was my pleasure.

**Committee adjourned at 12.47 p.m.**