HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Section 44(i) and (iv) of the Australian Constitution

CANBERRA

Thursday, 15 May 1997

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WITNESSES

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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Present

Mr Andrews (Chair)

Mr Barresi	Mr Mutch
Mrs Grace	Mr Randall
Mr Melham	Mr Kelvin Thomson

The committee met at 10.17 a.m.

Mr Andrews took the chair.

BLACKSHIELD, Professor Anthony Roland, Visiting Fellow, Centre for International and Public Law, Faculty of Law, Australian National University, Canberra, Australian Capital Territory

CHAIR—This is the seventh hearing of the public inquiry into aspects of section 44 of the constitution. I welcome witnesses and other members of the public who may be in attendance today. This is likely to be the last public hearing of this inquiry. We are delighted that Professor Tony Blackshield, who is an expert in constitutional law, can be with us today. Professor Blackshield is a Professor of Law at Macquarie University and this year is a Visiting Fellow at the Centre for International and Public Law at the Australian National University. We will also be taking evidence from Miss Jackie Kelly who is known to have had an interest in section 44 of the constitution, having been caught by its provisions. We heard, of course, at a previous public hearing, from Mr Phil Cleary who also had an interest in section 44. Professor Blackshield, would you like to make an opening statement?

Prof. Blackshield—I am very grateful to the committee for the opportunity to speak to it. I might say at the outset that I think it is a pity that the committee's terms of reference are limited to paragraphs (i) and (iv) of section 44 because it always seemed to me that the entire batch of disqualification provisions should be considered as a batch. Many of the problems are common to all the provisions. Indeed, I would go further and say that the Senate committee that looked at these provisions in 1981 was on the right track in not only looking at the whole of section 44 as a package, but also in looking at it in conjunction with the relevant provisions in the Electoral Act. Nevertheless, I accept that the discussion here is primarily limited to paragraphs (i) and (iv).

In looking at the overall package, it does seem to me that there are some fundamental considerations that apply right across the board. In the first place, it seems to me that in a democracy there ought to be a presumption against any limitations on eligibility. One should start with the assumption that in a democracy any person, at least any citizen, should be entitled to stand for election and that while there may be reasons for disqualification, the reason should be very carefully considered and on principle should be kept to a minimum.

I say that in terms of the democratic right of every candidate to stand for office, but there is also a democratic issue about the judgment of the voters. There may, indeed, be circumstances in the history of particular candidates that are thought to render them unfit for membership of the parliament. But the question in an individual case of whether the circumstances are such as to render the person unfit is precisely the sort of question that normally one would expect to be judged by the electors, in the particular context, who are able to discriminate and make judgments of how far the individual person really is tainted, corrupted or unfit for office in a way that no broad-brush constitutional provision can do. Both on the grounds of the right of every individual to stand for parliament and on the grounds of leaving that sort of issue to the electorate, I would start out with a very

strong presumption against any disqualifications.

The second point is that to the extent we think there are legitimate reasons for disqualification, there is another general strategic point: should the disqualification provisions be included in the constitution or should they only be included in the Electoral Act? Again, I think I would probably have a bit of a leaning to say that, by and large, when we do think that there is a reason for a disqualification provision, it should be in the Electoral Act rather than in the constitution.

I have a basic sympathy with what Professor Geoffrey Sawer said many years ago, I think, in his evidence to the Senate committee. He said:

> The subject of qualifications and disqualifications of senators and members is in general not suited for inclusion in the rigid parts of the Constitution. It is necessarily intricate and technical, and has to operate in relation to a body of public and private law (for example, statutory governmental corporations and commercial private corporations) and to social conditions which are in constant flux. If general in form, such provisions give rise to numerous problems of interpretation, and if precise they rapidly become out of date and irrelevant.

Generally speaking, it seems to me that part of the problem with our section 44 is that a lot of the language in it has its origin in 18th century British statutes directed to the particular phase of British parliamentary history that was unfolding in the 18th century in relation to the relationship between the parliament and the Crown. Both the language and the political issues to which it was addressed made sense in that 18th century British context but do not make much sense today.

I think that is enough by way of generality, except that I suppose I would classify the five paragraphs of section 44 basically in three groups. There is one group containing paragraphs (ii) and (iii) which deal specifically with the question of whether a candidate has been rendered unfit for election in some way, either by reason of a criminal record or by reason of having been bankrupt and insolvent. Without going into the details of those, because they are not before the committee, I would simply say that neither of those seems currently to me to be justified, and the circumstances in which a record of that kind might render a person unfit for office are very much in that category of the circumstances that ought to be for the electorate to judge in the individual case. Certainly there are forms of criminal record which clearly would taint a candidate in the electorate's eyes, but it should be up to the electorate to say so, and in any clear case I have no doubt the electorate would say so.

The second group contains paragraphs (iv) and (v). Both of these essentially have to do with different kinds of circumstances in which a person who is or seeks to be a member of parliament might be obtaining some kind of financial advantage from the Crown. There are two rationales that get thrashed around in relation to both these provisions. One is the concern to avoid conflict of interest for the individual member of parliament of the kind that might lead to personal corruption, personal gain from the

position of being a member. The other is what I have referred to as the 18th century rationale: the importance that was seen of keeping the parliament completely independent of the Crown, and members of parliament free from influence of the Crown, so there was a concern to ensure that members of parliament were not beholden to the Crown in a way that might enable the executive government improperly to influence the voting of members in their parliamentary capacity.

It seems to me that the first of those rationales, the desire to avoid both the reality and the appearance of corruption by individual members, is clearly very much on the public agenda these days, but is precisely the sort of thing that needs to be handled by acts of parliament, parliamentary rules and orders, codes of conduct both of the parliament and of the political parties, and not by the constitution. While that rationale is important, I do not think it is a matter for the constitution. It is the older rationale, the one directed to the relationship between the parliament and the Crown, that does potentially have constitutional implications.

Oddly enough, the first private member's bill that was introduced to attempt to deal with section 44(iv), Senator Colston's bill in 1978, was very much directed to the corruption possibility. The mechanism that was sought was to enable the person with a potential conflict to become a member of parliament, but to ensure that any financial benefits derived from the other position got chopped off the moment the person was elected to parliament so that there would be no question of double-dipping. To an extent I think the Senate committee in 1981 that looked at this matter was still primarily concerned with that financial aspect—that is, with the possibility of an individual member of parliament being improperly influenced, rather than with the possibility of the executive government being able to exert an improper influence.

Particularly in relation to section 44(iv), but perhaps more generally, one mechanism is to vary the point of time at which whatever disqualification provisions we have should operate. In the High Court case of Sykes and Cleary, which has focused our minds very heavily on this issue in recent years, the main holding was that Mr Cleary had been not eligible to be chosen or to sit because at the relevant time he had been holding an office of the Crown in the Victorian teachers service.

Justice Deane in that case accepted an argument which would have solved the problem. The argument was that the crucial disqualification provision operates to say that the member is not capable of being chosen, that the point of time when the member is chosen is the declaration of the poll. Therefore, on that rationale, what Mr Cleary could have done was to stand for parliament, go through the election, and once the voting had progressed sufficiently far to make clear that he had been elected then he could resign his Victorian position before the declaration of the poll. I would have thought that that was a convenient and sensible solution to that particular problem, and I think it is unfortunate that a majority of the court rejected it. However, they did reject it very firmly. Not only did they hold that 'chosen' does not mean at the declaration of the poll, but also that it

does not mean chosen on election day. Rather, the word 'chosen' covers the entire electoral process beginning from the opening of nominations. So right from the nomination process, a potential candidate has to clear up any problems that they might have under section 44.

Mechanisms that have been considered in the Colston bill, in the Senate committee in 1981 and in the report of the Constitutional Commission in 1988 have all tried to play with the date that we might be able to fix by which the matter might be resolved. One solution is that the competing position—the disqualifying category—should automatically be terminated at the moment at which the elected member becomes entitled to draw a parliamentary allowance under section 48 of the constitution. That has some advantages, particularly in relation to the difficult position of newly elected senators, who are really in a category all of their own here because the lapse of time between the time they are elected and the July date when they take their seats can sometimes be quite considerable. Nevertheless, that fixing of the allowance as the criterion seems to me to be unfortunate because it focuses on the potential of double dipping in terms of money drawn from the Commonwealth exchequer rather than on the more serious constitutional problem.

Another date is the date at which the member takes their seat or the day before taking the seat. Another date is the declaration of the polls. There are difficulties with all of these dates. The main point I would make is that if the disqualification provision were removed or softened, that whole problem of handling its consequences disappears. The mechanism that was recommended by the Constitutional Commission is probably worth considering because it combines that question of date with what I think is the main task under section 44(iv)—that is, that we should think very carefully about what alternative officers or positions really are incompatible with being a member of the federal parliament. We should make a precise list of those provisions. We should have none of this vague language about officers of the Crown, but a specific list of those things where we really think there is a good reason.

The list given by the Constitutional Commission in 1988 was: first, a judge or the holder of any other judicial office; second, a member or employee of the federal, a state or territorial public service; third, a member of the defence force; fourth, a member of another Australian parliament or legislature; and, fifth, a member, officer or employee of certain public authorities. It seems to me that one could question some of the items in that list, but it is certainly a much more specific and much more limited list than what we currently have.

Whatever the list is, the Constitutional Commission proposed that a person in any of those positions who subsequently becomes a member of the parliament would be deemed to have ceased to be so employed or to hold that office on the day immediately before becoming a member of parliament and so would be qualified to be a member. In other words, no disqualification, but once the person holding any of these positions is elected, then on the day immediately before becoming a member of the parliament, the

competing position is automatically cut off by operation of the provision.

Again, there would be a question whether the provision should be in the constitution or in the Electoral Act. It may be that some provision of this kind should be in the constitution but that the list of positions on which it should be operating should be left for the parliament to prescribe. Generally speaking, I think it is important that these things be kept more flexible and more open to change than we know that constitutional provisions provide.

On paragraph (iv), there are two other things that I have to refer to. First of all, the proviso to paragraph (iv) has been a large part of the problem because in some ways it is even more obscurely worded than the main paragraph (iv) itself. One problem that has vexed this parliament virtually since 1901 is that while the proviso about ministers of state does seem to make it clear that ministers in charge of departments can also be members of parliament—our whole system assumes that is the case—nevertheless the wording of the proviso does not seem to make any provision for ministers assisting, for parliamentary secretaries, or for ministers without portfolio. There have been various attempts over the years to get around that difficulty. Clearly it would be better if the difficulty were simply not there.

The other thing is the two categories of exemption that are given in relation to the defence forces. I have always found both of them to be extremely obscure. The general assumption is that both of them, despite the obscurity of their wording, apply to persons who are members of the defence forces other than in a full-time capacity. That seems to be the general consensus. The wording is so obscure that I am not sure that it needs to be read that way.

Whatever the effect of the two categories of exemptions, there is a particular difficulty in that one of them is expressed to refer to the naval and military forces of the Commonwealth. In other parts of the constitution, there is a general assumption these days that the word ‘military’ in the expression ‘naval and military’ includes the air force as well as the army and, in that way, we have been able to adapt to the fact that the constitution was written before there was an air force.

But the other category in that proviso talks specifically about the navy and army. While you can read the word ‘military’ to include the air force, it is very hard to extend ‘army’ to include the air force, especially when navy and army and naval and military forces are contrasted with each other within the same paragraph. That may have been one of the reasons for the concessions that were made in Miss Kelly’s case, although again I have to say that all of the important issues in that case were resolved by concession, and I am not entirely sure that there was not a greater concession than was necessary. But again, whatever the right or wrong answer to the particular legal problems that arose in the Kelly case, what it illustrates is that there are problems, and that it is an embarrassment to our electoral system to have this sort of ambiguity and legal uncertainty hanging around at all.

I should perhaps wind up this statement by referring particularly to one example of that kind. I was involved in some controversy over 10 years ago at the time when Mr John Stone, later Senator Stone, was first seeking his election to the Senate. He was, of course, a retired public servant and was in receipt of a pension in that capacity, an ordinary Public Service pension. The question arose as to whether his receipt of that pension rendered him incapable of standing or being chosen, because the question was whether that ordinary Public Service pension was a pension payable at the Queen's pleasure within the meaning of section 44.

The Senate committee in 1981 was very firm in arguing that the reference to pensions payable at the Queen's pleasure did not refer to that sort of case and, indeed, did not refer to anything that would be meaningful in modern conditions. If it is true that the words do not refer to any current real case at all then, clearly, they should simply be omitted. But, as long as the words are there, it seems to me that they do raise a question. Essentially, the question is that, going back to the 18th century context in which these words were first used, it was then the case that virtually all pensions came into being as an exercise of the royal prerogative. They were payable at the Queen's pleasure, not only in the juristic sense in that their source lay in the royal prerogative rather than in any statutory basis but also quite literally in the sense that the giving or withholding or cancelling of the pension was a matter for the discretion of the sovereign.

Clearly, since the 18th century, all forms of pension have come more under statutory regulation, to the extent that it is nowadays possible in virtually every pension scheme to talk about a right to a pension. The entitlement to the pension and the criteria on which it is awarded are so clearly regulated by acts of parliament that we can know by looking to the statute whether a particular person is entitled to receive a pension. Where there has been that sort of development, one theoretical analysis is that what was originally a matter of royal prerogative has now been displaced by statute, so that whatever prerogative character the entitlement had has now completely disappeared and the whole scheme is entirely dependent on its statutory base. But another analysis that is sometimes used is that the prerogative has been regulated by statute so that, although the criteria that regulated the entitlement are now determined by the statute, the juristic character of the entitlement still depends on prerogative and, in that sense, it still is a pension payable at the Queen's pleasure.

I think what particularly frightened the Senate committee in 1981 was the prospect that if the words 'payable at the Queen's pleasure' were taken to have any continuing meaning, then ordinary invalid and old age pensions might render a person ineligible. That would clearly be unacceptable in a modern democracy. I think that there is an answer to that. Under the Australian constitution, the granting of invalid and old age pensions under section 51(xxiii)—and, nowadays, of course, a wide range of other social security benefits under section 51(xxiiiA)—is all clearly made a matter for the parliament. That is to say, the pensions are clearly allocated in this Commonwealth to the legislative power rather than to the executive power.

As to all the pensions for which this parliament provides under its constitutional powers within section 51, it is clear that they do now have a legislative base, not a prerogative base, and that they cannot be said to be payable at the Queen's pleasure. But the pensions given to retired public servants are in a different category. They are not the result of any specific grant of legislative power in section 51. The power to grant them must somehow arise from the incidental legislative power operating upon the executive power. In the case of those pensions, it still seems to me arguable that the juristic nature of those pensions is in the prerogative—in other words, that they are still payable at the Queen's pleasure. If that is wrong, one has to be able to point to some development since the 18th century in which those pensions have lost their prerogative character.

The more I looked at this matter 10 years ago, the harder I found it to say that that had happened. What really troubled me was a High Court decision in 1924—Laffer against the Minister for Justice, Western Australia, 1924, 35 Commonwealth Law Reports, page 325. That case makes it clear that, as at 1924, the juristic character of Public Service pensions still depended on the royal prerogative. So although by that time there were obviously very elaborate statutory schemes in force regulating the right to a pension, as at 1924 the statutory schemes still had not displaced the prerogative character. So the question would be: what has happened since 1924 to change that situation? I find it hard to give any clear answer.

Again, the point of all of this is that, clearly, a retired public servant should be able to stand for parliament. Clearly, if it were the case that these obscure words in section 44(iv) disqualify retired public servants, that would be a blot on our democracy and something that we should get rid of. The point I am making is that it is not clear and that that unclarity—the possibility of such an argument being put—is itself an impairment of our electoral processes.

I have talked mostly about paragraph (iv). As to paragraph (i), I do not know that I would add anything to what other submissions have said about what is spelled out in the case of Sykes and Cleary, except for this comment: one solution obviously is to insist that a person finding themselves in often an unwanted position of double nationality should do everything possible to divest themselves of the other nationality. But even if we adopt that sort of test, the actual result of the High Court judgments in Sykes and Cleary in relation to both Mr Kardamitsis and Mr Delacretaz shows that in practice, as long as we have any test of that kind at all, there are going to be very real problems of whether an individual has adequately complied with it. So once again I think it is a real problem that we should be trying simply to eliminate as much as we possibly can. Thank you.

CHAIR—We will take up some of the matters that you raised. One of the proposals that has been put to us in relation to the difficulties, particularly with section 44(iv), is that we could overcome many of the difficulties if the words 'chosen' or 'of' were removed from the provision so that it would simply read a 'person who . . . shall be incapable of sitting as a senator or a member of the House of Representatives'. That

seemed to me to be similar to one of the possible solutions you mentioned about, in a sense, the day before you take your seat, but in a simpler way. I was wondering if you had any comments about whether you think that would be workable or are there other difficulties that might arise from such an amendment?

Prof. Blackshield—I think it is workable and I think it is a simpler way of achieving the sort of mechanism that I was talking about. But it does not solve the problem of the ambiguity as to whether the particular disqualification provision applies or not. As long as the words 'office of profit under the Crown' are there, they are going to continue to cause doubts and uncertainties. When you look at all the circumstances of the Cleary case, the fact that he was held to have an office of profit under the Crown suggests that the extent of those words is likely to be very wide, much wider than I think any serious consideration of legitimate disqualifications would go. So there is also a need to do what I suggested, and that is to try to identify which offices really are incompatible with membership of parliament and to limit the disqualification to those.

The mechanism which simply eliminates the word 'chosen', so that the person who is under the disqualification becomes incapable of sitting, does achieve what Justice Deane's solution in Cleary would have achieved. That is, it gives the elected person an opportunity to clear up the problem before taking their seat. In that way, it enables the competition of offices to be resolved by getting rid of the non-parliamentary one and taking the parliamentary one. However, if for any reason an elected person did not avail themselves of that opportunity, this provision would operate so that the non-parliamentary office would prevail and the election would be aborted. Some of the mechanisms that I have seen resolve it the other way so that, if we have to fall back on an automatic solution, it is the non-parliamentary office that gets wiped out and the person does become a member. That seems preferable to me.

CHAIR—On the other part—the actual wording of section 44(iv) for an office of profit under the Crown, et cetera—you refer to the Constitutional Commission list, which included members of the Australian Public Service, for example. In some of the evidence we have had, public servants in this city in particular, for example, have put to us that that list is much too wide. That is, why should not an ordinary officer of the Public Service be entitled to stand for parliament? Others have said that there may be some particular offices that obviously involve the potential for conflict of interest—for example, the secretary to a department—but why should a middle-level public servant be treated in the same way? Do you have any comments about that?

Prof. Blackshield—I very strongly agree with that. That is why, as I read out the 1988 list, I tried to add a caveat that I would not necessarily accept that list. Again, it is a matter of trying to do some serious practical thinking about where there really is a problem. There may be some Public Service positions which really are incompatible with simultaneously being a member of parliament. There must be some, but it cannot be every Public Service position. And there would be a narrower list where the Public Service

position is so politically sensitive that it would be improper for a person to be holding that position while standing for election. So I suspect we need two lists—one where the Public Service position disqualifies you from actually sitting and a separate, narrower list where the Public Service position disqualifies you even from being a candidate. But I suspect that the second list in particular would really be quite narrow indeed.

Mr SINCLAIR—I must admit I would love to take up some of your arguments. Without going into it, in regard to 44(iv), for example, I find problems in the precision of that list of the Constitutional Commission. For example, one of the purposes, without doubt, was the desire to avoid any suggestion of corruption or undue influence. The notable omission to me are people who are involved in some type of contractual relationship with the Crown. Whatever that contractual relationship might be—whether it be providing a service or goods—certainly needs to be included. They might well benefit far more than any public servant.

I am also worried about the imprecision of 'on election to parliament'. I accept that if you could pick up with precision the Justice Deane interpretation, you would be right in the Laffer case; but the problem is that when you take the time of election it too would be as vague as the present form of words. That concerns me, and therefore I think that is a problem. I would like to have the time to discuss it, but I do not have it.

Similarly with the pension instance and John Stone: my worry has always been that, under chapter 2 of the constitution, the executive authority is in fact exercised by the Queen's representative. While it might be a legislative interpretation, as the Queen's deputy, it is the Governor-General who signs that legislation authority. While it might not be the Queen's pleasure, you have got to define just what the Queen's pleasure is, although they are required to act in accordance with the advice of the Executive Council. But there has always been some flexibility. I think there are worries; I am really just identifying at least two of the areas where I have concerns.

What I wanted to do though was to specifically ask two questions. The first is that it does seem to me that your fundamental contention, echoing Professor Sawer, is that we should delete 'all qualifications'. Frankly, it is not practical. I do not think that anybody in the electorate at large is going to accept that you delete the criteria of section 44. Therefore it is your subjective judgment, but I think that—given the Colston case, Rex Jackson, the problems with Western Australia Inc. and all these other things—you are not going to see the electorate at large accepting what in their eyes would be some lessening of constraints. That being so, I think you have got to look at ways by which you might reasonably make this section a little more relevant, particularly with respect to 44(i).

Without a constitutional change, I wonder—because of the problems with dual citizenship—if you have a view on the following. If the electoral law were to be changed so that a person on nomination is required to identify a little more background than they are now required to provide—in particular, where they were born and any other citizenship

of which they are aware—and to give specifically—by some form, perhaps, of attested statement—an authority to the electoral officer to take what steps they could to ensure there was no citizenship other Australian, would that remove the personal obligation that the courts have said now exists?

Part of the problem is that so many people do not even know they have some forms of citizenship. In the case of Kalapakov, I think it was a Swiss citizenship and there were problems because the person had not taken any steps. But, if you were to delegate that authority before you had put your nomination in, and the Commonwealth Electoral Act required that to be done so as to give to the electoral office the responsibility to take whatever steps were necessary—in other words, you could virtually have power of attorney to process their withdrawal of citizenship—would that in your mind constitute sufficient steps to ensure there was no conflict with 44(i)?

Prof. Blackshield—I do not know whether the Electoral Commission would like that proposal, but I would like it very much indeed. There are proposals that suggest that the candidate, at the time of nomination, should make a declaration disclosing any alternative nationality and declaring that they have taken all possible steps to divest themselves of it. Shifting it into an authoritative or an official bureaucratic way of solving the process would seem to me both to be more reliable—a better assurance that all reasonable steps really had been taken—and a way of alleviating the burden on the individual candidates. So I would be very attracted by that. You are right. There has to be some recognition of the problem of double nationality, while also recognising that it is a problem that some candidates cannot get out of no matter how hard they try.

Mr MELHAM—But it will not disqualify them from running, if it is a difficult problem for them to get out.

Mr SINCLAIR—I was just putting a solution forward which the witness answered.

Prof. Blackfield—I like this solution very much indeed. There are a couple of other points. With the words ‘the Queen’, one of the ambiguities about the proviso to 44(iv) is that the exceptions it creates for the defence forces refer to the Queen’s army and navy, the Queen’s naval and military forces, and one suggestion which has always seemed a bit odd to me is that what that means is the British or Imperial forces as distinct from the Australian forces.

Mr SINCLAIR—But she is the commander-in-chief under the constitution.

Prof. Blackfield—Right: commander-in-chief of the Australian forces—although that, like all of her powers, is exercised by the Governor-General as the Queen’s representative. But there is this suggestion that crops up from time to time that those exceptions do not relate to any Australian members of the Australian forces at all but only

to members of the British armed forces; and that, as I say, seems very odd to me. But it is another illustration of how very ambiguous all of these provisions are.

Finally, when I go to that list from the Constitutional Commission, the first position that they will disqualify is that of judge and, in particular, I suppose, of High Court judge. I would take that as a very clear example of an office that is incompatible with being a member of parliament, yet it is not at all clear that that is excluded by our current provisions. Yet, we have had numerous cases of members of parliament subsequently becoming High Court judges. We have had at least one case of a High Court judge subsequently becoming a member of parliament, so we are accustomed to the idea of movement back and forth. There has never been any suggestion that a person could hold both offices at the same time, and it would clearly be unacceptable. But if we are in the business of identifying things that should be spelled out as unacceptable, that is surely one of them.

A division having been called in the House of representatives—

Short adjournment

CHAIR—We will resume the hearing. One of the other things in the proviso which struck me as being somewhat antiquated was the reference to state ministers. I cannot see why we would want that provision there today. I can understand that when the constitution was framed that there was contemplation, I suppose, that the federal parliament may have been seen in those days as having almost a subsidiary role to that of the state parliaments and there was the possibility that state ministers could have some dual role. But the reality these days is that that simply would not be practical, let alone as a—

Prof. Blackshield—I would agree with that. Apparently they did envisage, back in the 1890s—and several of them probably thought of themselves as being in this capacity—that they could be members of both parliaments. It would clearly be impracticable today and it would also be constitutionally inappropriate.

Mr BARRESI—In the list you went through before, you mentioned public authorities. The whole nature of public authorities is changing rapidly these days. Do you have a suggestion for how we would define a public authority?

Prof. Blackshield—No, and I take the point about constant change. For me, this is very much the sort of reason why any provision of that kind ought to be in the Commonwealth Electoral Act and not in the constitution, so that it can be adjusted from time to time. We have had many variations in the past 20 years on corporatisation and privatisation, and the nature of public authorities and their relationship to the Crown is something that has been constantly changing. Whatever provision you make of this kind has to be capable of being adapted to such changes. It should be under the parliament's

control, not stuck in the constitution where it can only be changed by referendum. But again, the more one ventures into that wider area of public authorities, the more I am inclined to say that there is no good reason why those employees should not be able to stand for parliament.

Mr RANDALL—It is a rather simple sort of understanding of this but, as a candidate myself, I know the sacrifices you have to go through. The minor parties have put up the proposition in particular that, because they have got to stand candidates in so many seats, people should not have to stand aside from their jobs, et cetera. As a result, this provision softened up, for want of a better word.

I am of the other opinion. I think that if you want to look for high office, maybe there is some reason why you should be willing to give some sort of sacrifice. As to the idea of the minor parties just putting up a candidate to fill a position, knowing that they cannot win, they should not jeopardise their livelihood. So there are those two arguments.

I am trying to say that it tends to trivialise standing for parliament, if you know that you are only doing it for those reasons: you cannot win but you do not want to take the other step of some sort of self-sacrifice. Do you have any comment on that? I think I know where you are coming from, but do you understand my position?

Prof. Blackshield—Yes, and I think I would probably tend to sympathise with the minor party position. Looking at candidates for any party—major, minor, older or newer—a person who gets elected obviously has to make very considerable sacrifices in all sorts of personal ways. But I would not say that the right to stand as a candidate for parliament should necessarily have sacrifices attached to it.

To come back to the case of the public servants, for example, the kind of mechanism that operates in some states where the public servant who wishes to stand for parliament automatically goes on leave for the period of the candidature but is automatically guaranteed reinstatement without loss of benefits once the election is over, if not elected, has always seemed entirely appropriate to me. If every jurisdiction had that sort of mechanism, some of the problems of 44(iv) would be eased. I would say that it is quite right. Looking at the people in that sort of case, they should be able to stand for parliament without the risk of losing their jobs if they are not elected.

Mr RANDALL—Or losing status. That happens in many state governments: they allow members of the state Public Service, for example, to take leave.

Mr MELHAM—Professor Blackshield, you are not going to be able to do that in the Commonwealth arena. What you really need from a policy aspect is legislation that allows them to resign and then be reinstated.

Prof. Blackshield—But be guaranteed reinstatement.

Mr MELHAM—Yes.

Prof. Blackshield—It is that guarantee that is the essential part of any mechanism like that.

Mr MELHAM—That is right. That is what we cannot overcome at a federal level, because leave will not overcome the constitutional problem.

Prof. Blackshield—That is right.

Mr MELHAM—But that really is a policy consideration more than anything else. So what we are looking at is the essential element of being guaranteed reinstatement at the same level without loss of seniority or status.

Prof. Blackshield—Yes. Again, a lot of these mechanisms have the point of trying to mitigate the consequences of a disqualification provision which we really think is too wide. While some of those mechanisms genuinely help, I think it is also important that we look at the disqualification provisions and make sure that they are not too wide.

On the minor parties, I answered that in terms of the degree of sacrifice that should be required of the individual candidate. I think any minor party is going to have some aspiration to becoming a major party. I do not know how they are going to do that except by fielding candidates. I would have a good deal of sympathy with some of the minor parties, and with some I would not, but I think all of them are entitled to that aspiration.

Mr RANDALL—I have one very brief point which goes to the same sort of question, but with 44(i). I have met a number of people, for example, who are very reluctant to give up their dual citizenship. On the same point, I would say that if you are going to make the sacrifice of standing for high office in Australia, you should be willing to make that sort of sacrifice and decide which particular allegiance you hold most dear. We have had a number of cases, and I know there are cases, where dual citizenship can continue without any hindrance in a number of countries. Do you agree with my premise about self-sacrifice?

Prof. Blackshield—Let me answer that in two parts. First, under the existing constitutional provisions, while I can understand that a person holding dual citizenship might sometimes have personal reluctance to give up the other citizenship, it would be absolutely clear to me under the present constitutional provisions that if they want to be candidates for electoral office, they ought to do so. For somebody who would cling to the other citizenship and, in effect, defy the present constitutional position, I would have no sympathy at all. Once we start talking about changing the constitutional provisions, we need to ask: is it always the case that the holding of some other nationality really is a disqualification from office?

Mr MELHAM—Is that the problem then? You then go into this subjective test rather than an objective test.

Prof. Blackshield—There has to be an objective test, but we need to think about why we are imposing that test. We need to devise a test that satisfies the policy objective we have, not various other policy objectives that we do not have.

Mr MELHAM—Why isn't it the policy objective that if you want to sit in the national parliament, let there be no doubt that you only have allegiance to Australia?

Prof. Blackshield—I talked about paragraphs (iv) and (v) as really having the constitutional purpose of ensuring that the national parliament is not unduly influenced by the Crown. I suppose subsection 44(i) has a parallel purpose of ensuring that members voting in the national parliament are not unduly influenced by allegiance to any other crown or government, which I suppose is even more important than preventing the distorting influence of our own Crown. So, yes, there is a real objective to be pursued there.

But whatever else happens in relation to the allegiance question, it seems to me that there is a particular problem in the present wording about the words 'entitled to the rights or privileges'. Again, I suppose the reason behind that might be that if you are entitled to the rights and privileges of a citizen of Ruritania, you might conceivably be influenced to vote in the interests of Ruritania to ensure that the Ruritanian government does not take your rights and privileges away. It seems to me that this is getting pretty far-fetched.

One of the problems relating to 44(i)—I have not heard of it recently—is that over a number of elections during the 1980s there was a Sydney barrister, George Turner, who at every election would crop up with a list of, on one occasion, 35 members of parliament and on another occasion 57 members of parliament who he thought were disqualified. One on his list in the 1980s was the then Prime Minister, Bob Hawke, on the grounds that Hawke had been made an honorary citizen of the state of Israel. There is, in fact, an argument that that little honorary ceremony had entitled Hawke to the rights and privileges of a citizen of the state of Israel and, therefore, that he was, indeed, disqualified. Again, I would say we simply ought to get rid of language that gives rise to that sort of possibility.

Mr MELHAM—Isn't it the problem that, whilst the constitution was framed in the 1890s, there has been an evolution in terms of what is an office of profit? That is what worries me with this debate. I might be in a minority here—I know I am in my own party—because I actually support what the High Court did in Sykes and Cleary. I think they got it right, both on the nationality aspect and also at the time of nomination. People are having a bit of sympathy for the Jackie Kellys of this world and the Phil Clearys, when I have no sympathy for them. The fact is that if you exempt an office of profit, you might then have judges, senior public servants, or whatever, running.

People are walking away from what the original intent of the constitution was—that is, if these people want to involve themselves in the political process, they should sever their office of profit and engage in the political process. If we change the constitution, be it by referendum or whatever, to relax the office of profit provisions, then it becomes a political judgment about whether senators should run for lower house seats or whether the Democrats can attract a high profile.

If you change the office of profit provision, why should the Director of Public Prosecutions, for instance, be allowed to run and still hold the office of Director of Public Prosecutions and not have to give it up until he knows whether he has been elected to the parliament, before he takes his seat? I think that creates more of a problem than it solves because it then opens up a Pandora's box. Everyone is sympathetic to Cleary because he thought he was on leave without pay. Everyone is sympathetic to Kelly, but the thing is Kelly did not expect to win. She thought she would get about five per cent and she would resign next time. I think it is opening up a Pandora's box.

Prof. Blackshield—The reason one might not be sympathetic to Phil Cleary or Jackie Kelly would be Mr Randall's reason, that if they wanted to stand for parliament at all they should have been prepared—and this is not even to make a sacrifice—to do whatever was necessary beforehand to clear up any possible difficulty about their eligibility.

I would say, looking at the substance of the disqualifying element in both cases, that there was no real reason why each of those people should not have been eligible to stand for parliament and that the difficulty is in the over-broad disqualification provisions which created a problem for them. Again, maybe under the existing constitution each of those people should have taken scrupulous attempts to tidy up the position beforehand. The real point is that they should not have to.

Mr MUTCH—With respect to that, some people have suggested that we might be able to tidy that up, provided we believe in that principle which I tend to be favourable towards. Changing the constitution would obviously be very difficult. They have suggested that we have an antidote—that is, that we amend the Electoral Act for people elected in these circumstances, for instance, the ones who wanted to renounce their citizenship and had a lot of personal onus to do so, who took steps to do so, signed an exclusive oath of citizenship in Australia and then, because they had not taken further steps in the other country, were deemed to be ineligible.

If the Commonwealth, for instance, undertook to take all appropriate steps on behalf of a successful candidate, if we amended the Electoral Act to state that, would be something that would overcome this section? Would the High Court say, 'The parliament has introduced a mechanism and we would look favourably upon that as saying that that person has taken all reasonable steps,' or is that going to be legally difficult to achieve?

Prof. Blackshield—This is essentially Mr Sinclair's suggestion—

Mr MUTCH—I am sorry, I was probably out of the room when he asked that question.

Prof. Blackshield—Your suggestion might be a bit broader. His specific suggestion was that the Commonwealth Electoral Commission should do it; that the candidate should give a power of attorney to the commission and the commission would then be responsible for making sure that all reasonable steps were taken, et cetera. What I said was that I thought it was a lovely idea but I was not sure that the Electoral Commission would agree. The more I think about it the more I suspect they would not agree.

Mr MUTCH—They have got no choice.

Mr MELHAM—But then it creates other problems, doesn't it?

Prof. Blackshield—I am attracted by it because I agree with you that the present situation is an unreasonable burden on the individual candidate. I am not sure that your suggestion even legally would solve the problem.

Mr MUTCH—That is the question. Would the High Court—

Prof. Blackshield—We are talking about a constitutional provision and, generally speaking, one needs to be wary of the extent to which a statutory solution can be expected to overcome a constitutional problem. The High Court's job would still be to determine whether the constitutional test of eligibility had been satisfied. One certainly could not guarantee that they would accept that mechanism. While I am worried about the burden on the individual candidate, each candidate carries that burden only in one case. To imagine the Electoral Commission or any other government agency carrying that burden in what might be a very large number of cases within the fairly short time span of a nomination period—

Mr MELHAM—And if they nominated five minutes to midday.

Mr MUTCH—It would certainly apply to the winners.

Mr MELHAM—Professor, isn't it really the situation that instead of people trying to subvert the constitution we should just accept it? The High Court actually was a bit adventurous in giving us an advisory opinion in relation to citizenship because it was determined on the office of profit. Isn't the best solution to this, if we want to make this policy decision, to pass uniform legislation in all state and territory parliaments and in the national parliament that guarantees people the right to reinstatement without penalty at the same level, so there is no loss, there is no conflict, but there is an onus on them to comply? That overcomes the problem.

It does not overcome the problem that they can be subsequently disqualified if they are too lazy to resign or if they do not take adequate steps. What I am saying to you is that there is a problem there because society has evolved so that what constitutes an office of profit is now different because there are more categories of that. Some of those offices of profit are seen to be innocent offices of profit—like a teacher on unpaid leave.

But if you legislate the other way, doesn't it then create other problems and open a Pandora's box because you can have a judicial officer running, still holding judicial office but not having to resign it until elected? What if he wants to make a point, so he deliberately runs for an unwinnable seat because he does not want to be elected? I would have thought that that was an interesting exercise. I use again as an example a DPP who might not be happy with the hangers and floggers, and thinks that they have gone too far, so wants to run for a seat and not resign.

Mr MUTCH—What is wrong with that, if they suspend office holding?

Mr MELHAM—My view is that they should resign their position. I think they should be entitled to reinstatement.

Mr MUTCH—Yes.

CHAIR—Before you answer that, I would like to add a further aspect about reinstatement. It has been put to us by one or more of the witnesses that what Daryl is proposing does not actually overcome the problem and that it would still be open to the High Court to say that because you are guaranteed reinstatement you still fall foul of the constitution. Whilst technically you could say that you have resigned from your position—and the argument would be that you, therefore, no longer hold an office of profit under the Crown—the fact that you are guaranteed by legislation to be reinstated to that position, particularly if it is the same position, level, pay, et cetera, is a device which does not overcome the object of section 44(iv).

Mr MELHAM—I know what you are saying, but isn't that argument flawed because it would be up to the individual themselves to elect to be reinstated because they are not holding the position? The onus is on them. They might not seek to be reinstated. So it is not automatic that they are going to be reinstated should they not take the offer up. That is where I disagree with that earlier evidence.

CHAIR—I would like to hear a response to that proposal.

Prof. Blackshield—I would hope that a mechanism of guaranteed reinstatement would work and I would hope that the argument you have just outlined would fail. I would not feel able to guarantee that it would fail. After all, Phil Cleary was on leave without pay and one of the very significant reasons why he was nevertheless held to be holding an office of profit under the Crown was simply the fact that the Victorian statute—the teachers act—did refer to teachers as 'officers'. It used the word 'officers'. If

that statutory categorisation was a relevant factor, then a statutory guarantee of reinstatement might be relevant. So, I would hope that the argument would fail, but we come back to the basic point that, under this language, there are no guarantees.

In any event, the guaranteed reinstatement mechanism does very substantially alleviate the particular problem of public servants wishing to stand for parliament. But that is only one problem in the nest of problems here. I go back to saying that the whole of section 44 does need revamping; it can only be done by constitutional amendment; and the High Court did, in effect, give an advisory opinion on section 44(i) while they were in the business of section 44(iv).

The whole history of this has been one where it is a pity that constitutional amendment had not proceeded ere this. I do not think anybody had seriously thought about section 44 until the Webster case in 1975, and that immediately produced the common informer mechanism that alleviates the consequences of disqualification. My understanding is that it did produce some bipartisan agreement on the need to deal with the more substantial issues, but that that bipartisan agreement got overtaken by other events in 1975. The Colston bill in 1978—which I do not think was very satisfactory—was, nevertheless, a serious attempt to get it back on the agenda. The 1981 Senate committee, I thought, was a very serious and sustained attempt to look at all those issues and get them on the agenda, but nothing happened.

In the Wood case in 1988, the High Court held that Wood was disqualified under the Commonwealth Electoral Act provisions and it therefore did not deal with the constitutional provisions. But what it said in effect was, 'The constitutional situation is a huge can of worms, and thank goodness we do not have to get into it today!' I thought that there the High Court was not giving a full advisory opinion but sounding a clear warning—a shot across the bows—alerting the parliament to the fact that there was a huge problem and it was high time something was done about it. Nothing happened then; it is high time something happened now.

I know that, since 1988, people have been very depressed about the possibility of constitutional amendment, but I am not necessarily so depressed. I would have thought that this particular matter—which, after all, primarily affects existing and aspiring members of parliament—would be something on which amendment as a bipartisan issue would be possible and, given that bipartisan agreement, I would expect that a constitutional referendum would succeed.

Mr MELHAM—A referendum, in effect, allowing changes in what constitutes an office of profit and then giving the parliament the power to basically legislate as to what areas are disqualified?

Prof. Blackshield—Not focused on the office of profit thing, and not focused on double dipping or on corruption of members of parliament, but focused on the democratic issue that, firstly, by and large, people should be free to stand for parliament; and,

secondly, when there are doubts about their fitness, by and large those doubts should be determined by the electorate. Put it as the present obsolete, obscure, disqualification provisions being a blot on the democratic status of our constitution. We would all want to remove such a blot—and I think it is a blot.

Mr BARRESI—If we did that, it would remove a lot of the problems we have.

Mr MELHAM—It would not get us into government.

Mr BARRESI—I would like to go back to the High Court decision and taking reasonable steps. Daryl was talking about the office of profit and guaranteed reinstatement if one chooses. That decision on taking reasonable steps, to some extent, provides an opportunity for a failed candidate who has taken reasonable steps to then take steps, after he has failed, to have his allegiance reinstated with a foreign country. I know one specific candidate at the moment who took reasonable steps to renounce his Irish citizenship and who is now making application to have it reinstated. I say that simply because—

Mr MELHAM—Did he lose his Australian citizenship?

Mr BARRESI—No. I say that because 'reasonable steps' is so loose at the moment. I had to go through it. There was no feedback from the country to which one was applying indicating that they actually accepted it. If there was, I certainly have not seen it. If you take reasonable steps to do so and there has been no response, what is there to prevent a candidate then saying, 'I have lost the election. I might as well have that reinstated because there are some pretty good entitlements down the track, such as a passport into the European Community'? That could very well be a big benefit to someone of European origin.

Mr MELHAM—That is something we can overcome with dual citizenship.

Mr BARRESI—While Daryl says that they got it right in that decision, I think that there is a loophole in that case.

Prof. Blackshield—The whole scenario is one that had not occurred to me. If we assume that a person has reluctantly renounced their other citizenship, made the sacrifice in order to stand for parliament, has failed to get elected and then wants to regain the renounced citizenship, why shouldn't they do so?

Mr BARRESI—That gives them an advantage over someone from section 44(iv).

Prof. Blackshield—So they have a mechanism of addressing the sacrifice that the public servant does not.

Mr MELHAM—At the moment, if they do that they lose their Australian

citizenship. They then have to reapply for that and then they will get back their Australian citizenship and not lose their Irish citizenship.

Prof. Blackshield—Something that does not solve the problems but that I was attracted by, in principle, was Justice Gaudron's suggestion that this whole question of allegiance should be determined for Australian purposes by reference to Australian law and not by reference to the law of the foreign country. I think it was only Justice Gaudron who suggested it. It does seem to me to be right in principle, but I am not sure that focusing on Australian law as the test really gets rid of any of the obscurities.

Mr MUTCH—A person can be an extremely important officer in the Department of Immigration, making decisions affecting people's ability to come to Australia, and yet can hold dual citizenship.

Prof. Blackshield—Yes.

Mr MUTCH—Yet we are saying that a backbench member of parliament with very few powers to actually affect that type of situation is in a different position. If we are going to have this prohibition, why should it not extend to the Public Service?

Prof. Blackshield—Yes, why shouldn't it?

Mr MUTCH—The other side of that coin is this: why should we be so adamant about single nationality? Why shouldn't we just ask people to suspend and to say that their main allegiance is to this country? If they can maintain another passport it is often of great value to Australia, so why are we so adamant about having one citizenship?

Prof. Blackshield—I appreciate Mr Melham's anxiety about not reducing it to a subjective test but, when we think about the issues, we have to start with subjective tests. When I look at the case histories in Sykes and Cleary and the case histories of Kardamitsis and Delacretaz, I would say that the reality was that each of them was an Australian citizen and part of the Australian community and fully entitled to stand for parliament. So whatever residual questions there were about the Greek nationality in one case and the Swiss in the other, they were not real grounds for disqualification. Once you have made that sort of subjective judgment, you have to try to limit whatever wording you come up with so that you ensure that the only cases it catches are the ones where you think there is a good reason for cutting somebody off.

Mr MELHAM—But isn't that the problem?

Prof. Blackshield—Again, you start from the presumption that everybody should be entitled to stand for parliament. To deny a person that right, you should have a good reason to do so.

Mr MELHAM—But if you are having a constitutional amendment and you start from that presumption, you put the question to the people and then it becomes a policy decision of the parliament as to who then becomes disqualified from running. You can then add your list in the Commonwealth Electoral Act that disqualifies people from running.

Prof. Blackshield—Yes; and that is basically the mechanism that I am recommending.

Mr MELHAM—So your basic presumption is that everyone is entitled to run, unless the parliament otherwise decides? It is similar to the privileges matter: we cop the privileges of the United Kingdom until we determine our own.

Prof. Blackshield—Again, I am advocating that as a presumption. Generally speaking, it is going to be better to have these disqualification provisions under parliamentary control than in the constitution. Once we start thinking about specific cases, there might be cases that are so clear and of such fundamental constitutional significance that we think, yes, it is justified to have them in the constitution. Again, I would start with a presumption against that.

CHAIR—Professor, we are running out of time. There were just two things I wanted to ask you. Firstly, if we accept your view that one of the underlying rationales for paragraphs 4 and 5 is the desire to ensure that members of parliament are free from influence by the Crown, in the context of recasting section 44, it seems to me that that is not in accordance with modern reality anyway. If you look at the potential for influence by the Crown—which I translate as the executive government these days—one of the greatest areas in which potentially there is the opportunity for influence is what happens to a member of parliament after he or she leaves parliament.

This is common to governments of both persuasions. It is common for members of parliament to be appointed to ambassadorial positions. It is not unknown for members of parliament to be appointed to the judiciary. It is very common for former members of parliament to fulfil a whole range of other functions in statutory bodies and the like. I do not know whether that is something that one can address, but it seems to me that the modern reality is that the perception of influence by the executive can actually be not the period before being elected but what happens to one in one's retirement from parliament.

I would be interested in your comments on that. Is that a fact of life that we simply accept? Or, if you are recasting section 44, is there any way to deal with that or is there some other way to deal with it, if it is desirable through the Commonwealth Electoral Act or some other provisions?

Prof. Blackshield—I suspect I would say that it is a fact of life. We do tend to accept it and many times we are right to accept it. In many of the cases, in appointments

by governments of both main parties, the person appointed is a distinguished public servant with a distinguished record and with qualifications for the job. They all get labelled 'jobs for the boys'—or sometimes 'for the girls'—but many of them are entirely proper appointments.

When there is a particular controversy about a particular appointment, it does tend to become a political issue. I think the ones that do raise questions do not slip by unnoticed. They get dealt with as political issues, which is probably the way they should be dealt with. But I would not want to see a blanket ruling-out of such appointments, because many of them are perfectly proper.

On the question of principle: yes, I think this concern about the Crown being able to influence the parliament is essentially an 18th century concern. It dates from a period in the evolution of British politics when there was still a real possibility of the Crown exerting its influence.

Mr MELHAM—It can certainly determine the parliament, given the 1975 dismissal, which is more than influencing the parliament.

CHAIR—But, apart from Daryl's reference to the 1975 dismissal, the modern reality, the modern tension, is not between the Crown as in the monarch or his or her delegate, but between the parliament and the executive. That is the modern tension.

Prof. Blackshield—Yes.

CHAIR—Executive government is the way in which our system has largely evolved; but, if that influence can be undue or inappropriate in some circumstances, surely that is what we should be trying to address in the modern context.

Prof. Blackshield—I am one of those people who think that the balance between the executive and the parliament has shifted, unfortunately, and that the executive does have too much power with too little control by the parliament. But I do not think that the reasons for that lie in these particular problems of individual members of parliament being subject to influence.

CHAIR—I will put one last matter to you that a member of the reserve forces who is also a lawyer raised with us. The nature of the reserve forces has changed these days so that there are two categories of reservists. The first is those who, by reason of their conditions, give time to the reserves on a regular basis—maybe fortnightly or monthly—and they are expected to, during that period of time, work wholly for the Commonwealth. It was suggested that there is ambiguity as to whether or not they are caught by the proviso to subsection (iv). It may not be something you have turned your mind to. The argument was—to put it briefly and probably insufficiently—that, because during the period of time in which they are carrying out their functions as a member of the Army

their time and effort, for which they are paid, are wholly for the purposes of the affairs of the Commonwealth, they are still caught by section 44, and it is at least as ambiguous as to whether that proviso would apply to them.

Prof. Blackshield—It is certainly ambiguous. I have never been able to arrive at an intelligible reading of either of these two qualifications about the defence forces. But the second one, certainly, relates to any person whose services are not wholly employed by the Commonwealth; and, if you have a person who for a certain period is wholly employed by the Commonwealth, on the face of it they are not covered by that protection.

CHAIR—Thank you very much for coming in this morning. I apologise for the interruptions, but that is the nature of this place. What you have said will be very useful in our deliberations.

Prof. Blackshield—Thank you very much for the opportunity.

CHAIR—I now declare this hearing of the committee closed.

Resolved (on motion by Mr Andrews):

That the committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at midday