HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

CANBERRA

Wednesday, 26 March 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Members

Mr Andrews (Chair)

Mr Andrew	Mr Mutch
Mr Barresi	Mr Randall
Mrs Elizabeth Grace	Mr Sinclair
Mr Hatton	Dr Southcott
Mr Kerr	Mr Tony Smith
Mr McClelland	Mr Kelvin Thomson
Mr Melham	

Reference:

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

WITNESSES

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HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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Present

Mr Andrews (Chair)

Mrs Elizabeth Grace	Dr Southcott
Mr Melham	Mr Kelvin Thomson
Mr Mutch	

The committee met at 4.07 p.m.

Mr Andrews took the chair.

CHAIR—I open this second public hearing of the committee's inquiry's into aspects of section 44 of the Australian constitution. I welcome the witnesses and those who will attend later. Yesterday we took evidence from the Liberal Party of Australia, the Australian Democrats represented by Senator Murray, Mr George Williams, an expert in constitutional law from the Australian National University, and Senator Minchin. We heard of some of the practical problems encountered by political parties in ensuring that candidates comply with the requirements of section 44 of the constitution and we heard some suggestions for overcoming the difficulties presented by that section, including a proposal that the Australian Electoral Commission could take additional steps to assist potential candidates for election to the Australian parliament. The Australian Electoral Commission is our first witness today and we look forward to hearing the commission's thoughts on these matters that have been raised.

BELL, Dr Robin Alexander Ian, Deputy Electoral Commissioner, Australian Electoral Commission, West Block, Parkes, Australian Capital Territory

DAWSON, Ms Peta Linda, Director Litigation, Australian Electoral Commission, West Block, Parkes, Australian Capital Territory

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false and misleading evidence is a serious matter and may be regarded as contempt of the parliament. We are in receipt of your submission dated 4 March this year. Would you like to make an opening statement or some comments in relation to it?

Dr Bell—Thank you, Mr Chairman, for that opportunity and for inviting us to give evidence. We will be pleased to assist the committee in any way we can. As set out in our primary submission, and you will be aware that we have provided other supplementary materials, we claim no special expertise in the legal interpretation of the provisions of the constitution relevant to electoral matters. But we are well aware of the practical difficulties that candidates and parties have encountered both in relation to what one might loosely call the effects of foreign citizenship and those of Commonwealth or other state employment.

We believe that the advisory expertise on that is properly with the Attorney-General's Department, and we have gone into some details of the difficulties that we would encounter if we were to attempt to give advice on individual cases. That is not to say that we should not be helpful and do what we can to equip candidates and parties to make decisions on the relevant matters. Ultimately, of course, the High Court makes the final decisions, and we have been closely involved in some of that litigation. However, we do have a lot of experience in the operation, and if there are particular matters that arise, we would be pleased to give you any additional background that you might like.

I think that there have been eight parliamentary committee inquiries into the operation of section 44—maybe, this is the eighth—over the past 15 years, so the matter has clearly had some very thorough analysis and has proved itself somewhat intractable in the fact that so far no action has been taken. Ultimately, it seems clear to us that the only long-term and effective method of dealing with the issues is to alter the constitution.

Quite clearly, amendments to the electoral act cannot affect the constitution; it has to be the other way around. We can do some things administratively, and we have tried very hard to do that. But, as I said earlier, if there is more that you believe we could do, we would be very pleased to look at that. Ultimately, we feel that the responsibility for ensuring that they are legally qualified rests squarely with the candidates themselves. Of course, for those candidates who are backed by a party organisation, they have the possibility of obtaining expert advice and counsel from that quarter.

Obviously, amending section 44 would require a referendum. Short of that, there is no immediately obvious legislative or executive action which we can see, beyond that which has already been taken, that would substantially alleviate the operational problems presented by section 44. But, as I have said, we would be very pleased to consider any further proposals from the committee.

CHAIR—Thank you very much, Dr Bell. In terms of your summary and drawing it together with some of the evidence we received yesterday, to put it briefly, there is obviously a conflict in the perception of the role that is and, perhaps, should be played by the Australian Electoral Commission. The suggestion summarised from a number of quarters yesterday was that the AEC ought to provide more information to candidates. In a sense, there were some suggestions that it should not arbitrate but that it should be able to answer questions in more detail than it has, or has been prepared to do up until now. Would you like to respond to that in some more detail?

Dr Bell—I have not seen the *Hansard* from yesterday's hearings. That difficulty aside, the main problem we have is that we are not an organisation which is qualified to give legal advice. Ultimately, most of these issues seem to me to come down to legal issues of constitutional interpretation. I think that this is a pretty arcane art in itself. These are not sections which until recently have been much litigated. They are in couched in what some might call 'antique' terms. There are references there of a kind which I do not think you would find in plain English today, or in current government language. Knowing quite what they mean, or were intended to mean at the time of the constitution, I believe, is difficult for key legal advisers, let alone for us.

When we want to be helpful to people and provide them with information, we have to be extremely careful that we do not end up misleading them, and do as much harm as good that way. When you are seeking to advise an individual candidate on his or her situation, be it in relation to foreign citizenship or public employment, you may need to know an awful lot of factual material about their personal situation and the history of it. And then you need to know a lot about the law to which it applies. In the heat of an election, we do not have the time or the facilities, as presently constituted, to go into the detailed factual inquiry that is necessary, nor do we ultimately have the legal expertise to interpret the legal questions which arise.

Of course, the Attorney-General's Department is available and, if it were felt that it should be playing a role in it, that would be a matter for government to consider. But I think that the policy of the Attorney-General's Department—and I used to be an officer of the department—has for a very long time been that they do not give private legal advice. Their function is to advise government. Obviously, conflicts can arise if you move outside that situation and questions of liability can arise, as well, with possible government liability being involved there.

In terms of what more we might be able to do, you would know as well as we do the very tight time frames which arise surrounding nomination. Typically, nominations have to be in within about two weeks of the poll being closed. The rolls close and then there is another period of a week or 10 days in which nominations can be lodged. There is a very short time frame in which a people can make final decisions on their eligibility. One would think that most intending candidates would have been able to consider that well in advance, of course, and where they have a party organisation, for example, would be able to speak with that party organisation about any difficulties that may arise and make plans to renounce, as best they reasonably can, any foreign allegiances.

We have considered whether there is additional material that we could put in our candidate's handbook which would be helpful but, obviously, that does not always get to people before they indicate that

they are interested in nominating. So the time frame there—which is not of our making—can be quite difficult. Likewise, on the nomination forms we do not think that we can put more on them that is helpful because they come into people's hands at the last minute. It may be that there is some way we could work with party organisations to help them to brief their members more fully and we would be happy to look at that. That will not help independents but, unless we know their planning, or they approach us earlier for information such as the candidate's handbook, then there is not much we can do until they get in touch with us and then we can provide the sort of material that we already have.

CHAIR—Do you have any record, or are you able to make any estimate of the number of candidates that have approached the AEC with queries relating to section 44?

Ms Dawson—That is not an easy question to answer. Candidates will come in at the divisional level if they are entering for the House and at the state head office for the Senate. Any difficult questions will be referred to us in central office. All our staff are briefed not to discuss constitutional disqualifications with intending candidates because there is too much danger that they will give wrong or inadequate advice, and that ultimately we would be held responsible for a failure in the electoral process.

I suggest that you have a look at the extract we provided from the candidate's handbook at the back of our submission. That has been carefully structured and carefully thought about and it is as much as we feel that we can tell candidates. That information is available to them, if you like, soon after the announcement of an election. It does not give anybody a lot of time to straighten out his or her circumstances. But, fundamentally, the information given there is what we know from Sykes v. Cleary, what we can guess beyond that—which is very little—and the sincere warning that people who are worried about their own personal circumstances take legal advice. We do not really feel that we can do much more than that.

I was here at the hearings yesterday and I heard some of the other submissions, particularly from Senator Minchin and Mr Williams. They both made it fairly clear in conversation with the committee that there are numerous borderline cases where even highly paid constitutional lawyers have absolutely no idea what the answer is. We cannot have our divisional returning officers attempting to interpret the constitution. That is about what we feel is safe to give people.

Dr Bell—We have considered, for example, where there is some way we could help people with possible foreign allegiances or having foreign citizenship to make contact with that country's authorities. We could certainly publish a current list of contacts for various countries. There are something like 150 of them, though, and it would be a great problem to keep that up to date. Our information would not generally be much better than the phone book unless we were in pretty frequent contact with the Department of Foreign Affairs.

It may be that we could identify some position in that department with whom we could liaise, so that at least when people came to us, we could put them in touch with someone who could say, 'Who is the authority for this or that country? Is there one in Australia or nearby or is there a ministry that they should deal with in that country?' That might help people a bit at least to make initial contact.

Ms Dawson—This is in relation to the Liberal Party submission yesterday, where it was suggested it

is a very simple matter for the AEC to go to the phone book, run through A-Z—Afghanistan to Zaire—and put up a list of all the renunciation laws and procedures for each of those countries. There are a number of significant problems with an exercise like that, the most significant being that, whatever we might say or research some six months before the election, would not necessarily be current at the time. Secondly, in many cases, you do not even have a stable government you can deal with. The case of Zaire is one classic example.

Thirdly, there may be huge complications to answering what appears to be a simple question. While you might, for example, be able to renounce dual citizenship, it is not clear in many circumstances how you go about renouncing certain rights and privileges, such as pension entitlements and so on. That might be a very circuitous and lengthy process for people to deal with. Trying to put all that into a list of does and don'ts would be tantamount to misleading.

The best way is for candidates themselves to be aware that they may have a problem. We certainly do what we can to make sure that that information is abroad that people should be very careful. Then that individual potential candidate should take the trouble to find out what the overseas situation is for their own personal circumstances. The commission can offer to provide a contact desk at DFAT, so that person can get through as fast as possible. But taking on a responsibility of summarising those circumstances for every country in the world is an absurd proposition.

Dr SOUTHCOTT—At the central office of the Australian Electoral Commission, what sorts of borderline cases have you encountered?

Ms Dawson—Probably the most famous is that of Mr Ian Sykes in 1993. He said on his nomination form that he was a subject of the Crown, with an Australian mother. He turned out not to be an Australian citizen and we rejected his nomination under the other means provision in section 170. That was a very, very difficult circumstance. We had something like three hours before the close of nominations when he resubmitted his nomination with the same reason for being an Australian citizen. We had to climb through a lot of fences in Immigration and in Attorney-General's in a very short time span to try and find the right advice, which we eventually got. That was an unusual situation.

Normally the divisional returning officer would not inquire into these questions on the nomination form. But in this case we had to because there is a little provision in section 170 which says that you can nominate if you can establish Australian citizenship by other means. It is not clear to anybody what 'other means' necessarily encompasses. We were forced to make those inquiries. It was very touch and go, and we finally rejected his nomination. He took us to the Court of Disputed Returns and lost.

Dr SOUTHCOTT—The interesting thing about that case is that because he did that it highlighted that in a by-election—where normally you get a lot more interest from the state directors of the parties—not only was the independent candidate ineligible to win, but both the Liberal and Labor candidates were also ineligible to take that seat. In terms of the office of profit and the allegiance to the foreign power, is it possible that there are a lot of members and senators who have a citizenship that they have not renounced?

Ms Dawson—The point is that all candidates, as you would know, have to make a declaration on

nomination. That declaration is accepted by the commission on face value, except in very rare circumstances, like those of Mr Ian Sykes. In each and every case where you have made that declaration, the commission is not authorised by law to go behind that declaration and query what you have said. The consequences of that are that there may well be members of parliament who are constitutionally disqualified, but it is not the responsibility of the Australian Electoral Commission to ask those questions.

You may be aware that in the last part of the Commonwealth Electoral Act there is a provision called 'Disqualifications for Parliament'—sorry, a part—where if the parliament has information that a sitting member is disqualified for any reason—and that may include that they have been charged under the Crimes Act or whatever—then the parliament can make a reference on a vote from the parliament to the Court of Disputed Returns, the High Court. That is in fact the way Senator Robert Woods's case got to the Court of Disputed Returns. It did not come as a result of a petition after an election. It happened while he was a sitting member and the parliament made the reference to the court.

Whilst you may have members sitting who are technically constitutionally disqualified, there is a mechanism, if somebody becomes aware of that disqualification, for remedying it by referring it to the court.

Dr SOUTHCOTT—From memory, Senator Woods's case was not a case so much of him being disqualified under section 44. It was actually that he was disqualified under the Commonwealth Electoral Act because he was not even an Australian citizen.

Ms Dawson—Yes, that is right. But, in fact, they sent it as a constitutional disqualification.

Mrs ELIZABETH GRACE—Are the divisional returning officers trained to answer any queries that come within section 44?

Ms Dawson—No.

Mrs ELIZABETH GRACE—They are not ignorant but they are—

Ms Dawson—In fact, they are advised not to answer, quite deliberately.

Dr Bell—Because of the complexity and the risks of a wrong statement.

Mrs ELIZABETH GRACE—What is the general way of handling a question, say, from Mr Sykes if he comes across to a returning officer and they have some—

Dr Bell—They generally refer it to us very quickly. That is the instruction, as I recollect.

Ms Dawson—The divisional returning officer is instructed not to enter into any debate about section 44 disqualifications. If pressed, the divisional returning officer is advised to tell the person to seek their own legal advice—if pressed further, to contact head office. If head office cannot deal with it, it comes through to central office. But, again, you are talking about extremely short time frames.

Mrs ELIZABETH GRACE—Yes. That is the thing.

Dr Bell—We understand the difficulty, but there is difficulty on our side too. We do not want to be unhelpful.

CHAIR—The difficulty arises, it seems to me, because attention is focused on these issues after nominations are called. As you say, there is a period of a couple of weeks. Up until then, no attention is paid to it or if it is paid to it, it is likely to be only by the major political parties. Any other person wishing to be a candidate is not likely to find out this information. Short of changing the constitution, is there any value in the commission undertaking some sort of public education campaign at an earlier date? It gets to a certain stage in the electoral cycle where we know an election is going to occur in the next X months, for example. Sometimes they come earlier. Has the commission done anything along those lines or considered it?

Dr Bell—I think we could work with parties on that sort of thing when you are looking at how preselection processes work, for example. That is a time when you would be considering whether the person you are thinking of preselecting is eligible. There is generally time, I would think, to be doing something about it if it is a matter that requires foreign contact, for example. That is somewhat earlier, isn't it? Ultimately, anybody, after the election is announced, can decide they want to nominate as a candidate and do it on the spur of the moment, as it were. If they have got the deposit and signatures, off they go.

I do not see how, short of a massive public education program, we would get to people like that. It would be very costly for the number of people involved. The bulk of candidates are associated with one or other party.

Ms Dawson—I think what you are driving at is how we can get in there beforehand. As Dr Bell has said, we cannot contemplate any large-scale education campaign that would wash across Australia. It has to be directed. To direct it, you would probably only be able to talk to the political party machines. There is nothing to prevent us doing that and we would probably be quite happy to move in that direction.

You have to say that in the end the political parties surely have this resident expertise to look into possible problems in candidacy, and even going back to preselection. There is only so much responsibility the AEC can take. We can certainly advise the headquarters of a political party of what the provisions are. But I would be fairly sure that the headquarters of political parties are not in any ignorance of these provisions.

Mr MELHAM—There is another problem: you have nominations from Independents and other candidates at five minutes to 12 and you are expected to do a draw of the hat shortly thereafter. Even if you were to have a protocol with the major political parties there is a problem, especially with the volatility of the electorate the way it is. Take the Cleary case, for example. It must help, though, to get an agreed code or some agreed guidelines that still have a qualifier—without binding people.

Dr Bell—We have attempted to do that through providing what we can coming out of the High Court decisions, for example. There are things in there that give people some guidance. No doubt we could get legal advice and express it in general terms so that it was not directed to an individual case, and see how much further we can go in providing some guidance on what some of the terms in the constitution mean. We

could look at that. We have a register of political parties and there is no problem writing to them all saying that this material is enclosed or available, if that is helpful.

Ms Dawson—The problem is that none of that would address what the real difficulties are.

Mr MELHAM—Exactly.

Ms Dawson—The real difficulties are in the borderline cases.

Mr MELHAM—I accept that, and in what is an office of profit.

Ms Dawson—You have to resolve each of these on an individual basis. We can provide generalised advise that will not be any better than what is in the first two pages of the candidates' handbook. That is the generalised advice you can get from Sykes v. Cleary.

Mr MELHAM—There is one other thing I would like to take up with you. What happens if you get a nomination at five minutes to 12, for instance? The deposit is handed in, and on the face of it there is material that shows that there could possibly be a problem with section 44 of the constitution. What happens then?

Ms Dawson—We have had that problem.

Dr Bell—That happened with Mr Sykes on one occasion.

Ms Dawson—We discussed that before you came in.

Mr MELHAM—Sorry.

Ms Dawson—I will run through it quickly again. The problem with Mr Sykes arose probably about 9 a.m. on the morning of the close of nominations.

Mr MELHAM—But you had three hours then.

Ms Dawson—We had three hours but it was a very close shave. In the end we rejected his nomination. That was an extremely unusual circumstance. He put his declaration in terms of acquiring Australian citizenship by other means. His reason was quite obscure and, upon inquiry, was found to be not good enough. In most cases, the declaration on the nomination would not be something that we would query.

Mr MELHAM—I accept that. That is why I specifically asked what happens if, on the face of it, you have a nomination at five to 12 and the deposit is handed in. You do not have that three hour period to make inquiries and reject it or whatever.

Dr Bell—Unless there is some straightforward basis for rejecting it—

Mr MELHAM—You will accept it?

Dr Bell—Then we have to accept it under the act. Some committee members may be aware that we have recommended to the Joint Standing Committee on Electoral Matters that there be a longer interval between the close of nominations—is that right?

Ms Dawson—Yes, but not to correct nominations.

Dr Bell—That would allow some breathing space.

Mr MELHAM—That is why I am asking the question. Because the way the act is written at the moment you are supposed to process the draw straight after the close of nominations.

Dr Bell—And the media and candidates are understandably all very interested.

Mr MELHAM—I know that in 1993 there was a nomination that was obviously rejected in Banks at about 20 minutes to 12, which is an inference that could be drawn from the receipt—

Ms Dawson—The act makes it quite specific, as you would know: we can only reject for technical defects.

Mr MELHAM—I accept that.

Ms Dawson—Even this extra 24 hours will not be in order to correct any defects, only technical defects.

Mr MELHAM—The technical defect in 1993 was that the Natural Law Party was ruled out in Banks on a technical defect, but survived in other electorates. That is the classic—

Dr Bell—Some people have suggested that there should be some way of getting a ruling after the close of nominations. If you do that, then—

Mr MELHAM—You leave yourself open to injunctive—

Dr Bell—Exactly. There will then be a desire to have appeal mechanisms, which would lead up to the High Court, I guess. You could not rule that out in this sort of area. So you would be looking at a much slower and a much lengthened campaign period or pre-election period—

Mr MELHAM—That is okay.

Dr Bell—And that raises other difficulties. On the other hand, the current system is a pretty costly one. We are talking about a quarter of a million dollars or more, plus all the court costs if somebody is challenged. It is not a cheap solution at the moment going to the Court of Disputed Returns.

Mr MELHAM—There was a terrific solution, but the High Court was not courageous enough to take it, and that was to knock out the disqualified candidate and have a count through. That would have a great deterrent effect on the major political parties.

Ms Dawson—You have got the whole court against you on that one.

Dr Bell—I am not sure what the litigation costs, but that would be significant too.

Mr MELHAM—We are now bound by the court's decision.

Mrs ELIZABETH GRACE—I just wanted to follow up the business about being employed under the Public Service Act and the little bit we looked at yesterday with some of the other witnesses about the outsourcing of government contracts. Basically, how far does profit under the Crown go? Have you got any comment to make about that side of it?

Dr Bell—Not one I really want to make. I think it has to be case by case because it must depend on the details of how that agency is established. There would be analogies perhaps with well-established law regarding the shield of the Crown, for example—what are and are not governmental functions. But I am not sure that the analogy is extremely close and it could be a bit misleading.

I think it is a very difficult situation. Hopefully, the court would come back to the test which appears to underlie what is in the constitution: is there a prospect of conflict of interest? Maybe that would be a useful touchstone, but I am not a legal adviser who can say that.

Ms Dawson—Can I suggest that that conversation yesterday, which I did hear, is, once again, a striking example of why advice cannot be given on individual cases because there is so much doubt on those borderline issues. That is the very demonstration of how dangerous it would be to give any form of advice.

I have to say that there is a very fine line between being helpful and giving legal advice. It is so easy, when you are having a conversation with somebody, for them to think that you are actually giving them the bottom line—the ruling, or whatever—and to go away and say, 'The AEC told me that this is the way to read it.' We have to be so careful not to mislead potential candidates.

Mrs ELIZABETH GRACE—Do you feel that there is some way that we could circumvent this part of the constitution to make it a little bit easier for people so they do not have to resign from probably a fairly lucrative and successful career for the sake of a six-week campaign or something like that?

Ms Dawson—The Public Servant Act for federal public servants already allows that.

Dr Bell—That is for some states.

Ms Dawson—Mr Melham was mentioning yesterday, frequently, the possibility of uniform laws. That was the solution proposed back in 1992 when the Democrats attempted to put a bill into parliament to amend the electoral act to fix up the office of profit problem which, of course, is not possible the way they were

doing it. So what Senator Bolkus decided at the time was that the best way to proceed was to try and get uniform resignation and reinstatement laws for public servants throughout the Commonwealth.

The feds legislated appropriately and public servants are now safe for the Commonwealth. That was then referred to the ministers' organisation, SCAG. There was model legislation drafted for all states and territories and it was put in their lap and, to the best of my knowledge, it has not really proceeded beyond that.

That is a prime example of how uniform legislation would be wonderfully effective in circumventing those terms of the constitution, although, of course, once again, we are only talking about public servants and we do not know what else has to be covered or could be covered legislatively.

Dr Bell—There has been no court guidance yet on local government people and that is a concern because it is a very large number of people who often are in a political stream.

Mr MELHAM—But the reality is that all the legislation can do anyway is just protect people's jobs.

Ms Dawson—That is right.

Mr MELHAM—If people do not comply by resigning too late, then they can still be disqualified because the constitution prevails.

Dr Bell—Yes. The electoral act cannot change the constitution.

CHAIR—In paragraph 7.9, you refer to legal advice from the Attorney-General's Department, on page 21.

Ms Dawson—Did you say 7.9, the government response to the 1992 report?

Dr Bell—Yes; it is a quote.

CHAIR—Would it be possible to make that advice, which has been received from the Attorney-General's Department, available to the committee?

Ms Dawson—Yes, I think that would be fine. We can get it to you.

CHAIR—Thank you. No doubt the position of local government council is raised with you from time to time.

Ms Dawson—Yes, and that is a huge worry.

CHAIR—Accepting your qualification of not being able to give legal advice, are you able to say what your approach to that is?

Ms Dawson—Yes. We have leant towards saying to people—and I think even the candidates' handbook says this; we do not go beyond what that says—that, given Sykes v. Cleary, which knocked out federal public servants as well as state public servants, even extending to schoolteachers on leave without pay, the general tenor of that decision suggests that local government employees may be at risk, so it is a good idea to consider your position. But we would not go further than that.

CHAIR—In terms of a constitutional change, if we go down that road in terms of recommendation, have you at all considered any redrafted alternative?

Ms Dawson—No.

Dr Bell—No. I think Mr Byers has given some useful pointers as to what could be left out because of its antiquity. The issue underlying it appears to be conflict of interest and perhaps if it were phrased more in terms of that rather than in terms of specific kinds of positions, then it might turn out to be more readily understood, or more readily applied.

Ms Dawson—The 1981 Senate report, which I am sure everybody is very familiar with, probably made a very important point which was that the question of qualifications for parliament is something that will change. I mean, the values and the attitudes about what we think is appropriate for parliamentarians is likely to change over time. In a sense, it might be better to leave those issues open for the people to decide or the parliament of the time to decide through statute—that is, what should be disqualified from parliament. That is a general principle which I think is worth keeping in mind. On the other hand, as Maurice Byers pointed out, there are some very important principles that should not be left behind in considering redrafting section 44 and they go down to conflict of interest questions.

CHAIR—I think we have exhausted our questions of you. Thank you for your submission and also for the discussion this afternoon.

Dr Bell—Thank you, and if there is any further material that you need, if the secretary could let us know, we would be pleased to help.

[4.56 p.m.]

BURMESTER, Mr Henry Clifford, Chief General Counsel, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory

MARRIS, Mr Frank Sidney, Acting Deputy General Counsel, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory

POGSON, Mr Kenneth William, Acting Senior General Counsel, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission, which we received today. Would you like to make an opening statement in relation to it?

Mr Burmester—Yes. I apologise that it was so late in getting to you. Perhaps I will begin by summarising the key points of our submission. You will recall that this whole issue of sections 44(i) and 44(iv) has been the subject of previous studies by a number of bodies including the Constitutional Commission and the Senate committee. We have taken all that material on the public record and concentrated on the best ways in which some of the issues and problems that have been thrown up by these provisions of the constitution might be resolved.

In relation to section 44(i) of the constitution, we would support amendments which remove any uncertainty as to the eligibility of an Australian citizen to stand for parliament. We would, on that basis, support deletion of section 44(i) but substitute for it a new provision which would require that failure on the part of a member of parliament to retain Australian citizenship was a ground for disqualification.

Section 44(i) deals with more than just citizenship. It refers to concepts like allegiance, obedience and adherence to a foreign power. Those are obviously words of some uncertainty and could give rise to difficulties of interpretation. We would support amendments to Commonwealth legislation that would require candidates at the time of an election to indicate if they had any divided loyalties in terms of those words but, of course, such legislative requirements are of only limited effect; they would not act as grounds of disqualification.

We also note that it is not possible through administrative action to remove the various problems that might be raised by section 44 in its present form. Hence one is very much forced back to recommending a constitutional amendment if the uncertainty created at present is to be removed.

The deletion of section 44, as we have indicated, would remove a constitutional ground of disqualification, but citizenship is a qualification for membership. At present, in terms of the initial membership, one has to be a citizen pursuant to section 16 and 34 of the constitution and paragraph (1)(b) of section 163 of the Commonwealth Electoral Act. So there is this issue whether the failure to obtain or retain

citizenship should also be a ground of disqualification, as opposed to a ground for qualification, in the first place for election.

At present, the provisions for loss of citizenship are contained in the Australian Citizenship Act so if an Australian citizen went off and served in the armed forces of a country at war with Australia, for instance, under the Australian Citizenship Act, that person would lose their Australian citizenship. There are not comprehensive provisions in the Citizenship Act dealing with loss of citizenship; there is only a number of specified grounds.

We consider that there probably are good reasons, if section 44 is deleted, to replace it with something else so that one is not left with an absence of any ground of disability relating to the failure to retain Australian citizenship. Otherwise, you would be faced with the situation where a person could intentionally lose their Australian citizenship, by going off and intentionally acquiring foreign citizenship or taking other action such as serving in foreign armed forces at a time of conflict, without facing the possibility of losing their seat.

As I indicated, we suggest that it would be possible to require candidates to undertake to retain their citizenship, or not to take advantage of any foreign citizenship. However, a declaration of intention not to take advantage does not constitute a particularly strong safeguard against divided loyalty. That is another reason why we consider it useful to have a provision replacing section 44(i).

I wish to turn to the other provision which the committee is interested in, that being subsection 44(iv) of the constitution. This deals with disqualification on the ground of the holding of office of profit. Again, this provision has given rise to uncertainty in its interpretation, both as to what an office of profit might mean and as to the way in which one can divest oneself of an office of profit, if that is possible. It has also given rise to unfairness, or it has been seen to have given rise to unfairness, particularly as public servants and members of the defence forces have to resign before they are entitled to seek nomination for a place in the Commonwealth parliament. And there are uncertainties in relation to positions that members of parliament themselves might accept, such as that of assistant ministers or parliamentary secretaries. So it has been seen as a rather unsatisfactory provision as it stands at present.

The previous inquiries that have looked at this provision have all varied a little in the precise form of their recommendations, but they have involved a basic approach which is common: that a member of parliament who becomes the holder of a specified public sector office or position would be disqualified and that a candidate holding such an office who gets elected would cease to hold the office or position at the point of their membership of the parliament. This was seen to meet what was seen as the primary purpose of the provision, which was to avoid double dipping—in the sense of being able to get two sources of income—and divided loyalty.

As you know, the words ‘incapable of being chosen or of sitting’ has been interpreted to apply from the time of nomination and this of course has given rise to its own difficulties. That is one reason why the previous committees have focused on this mechanism of, rather than invalidating the election of a candidate, giving the effect that the candidate is deemed to have vacated the office of profit that they otherwise would have held.

One of the issues is the definition of 'office of profit'. Our submission from about paragraph 43 onwards deals with that issue. One can identify core components of it in the sense of central public service departments but, of course, in this fluid day of the form of government administration, it would be desirable to avoid any particularly rigid definition of the term. But that in itself gives rise to practical difficulties of how one identifies a particular class of public sector positions that might be covered by the provision.

However, in our submission, it would be possible to specify core public sector positions to indicate what is not included within that term, such as assistant ministers or parliamentary secretaries, and then possibly to adopt an approach similar to that recommended by a Senate committee back in 1981 that would allow parliament to identify particular positions or particular statutory bodies which would or would not be covered by the provision. We also see no reason to retain the particular reference to the payment of pensions in section 44(iv). That seems no longer relevant.

That is, in a sense, the constitutional solution we suggest, which draws on that of other inquiries. In relation to this question of office of profit, there are of course possible administrative or legislative measures that might be taken to ameliorate some of the difficulties. This is dealt with at paragraph 52 and in the following paragraphs of our submission. We refer there to existing statutory provisions such as in the Public Service Act and the Remuneration Tribunal Act, which try to ameliorate some of the difficulties.

Two separate approaches are adopted. One is to define certain offices in a way which does not involve remuneration and hence there is no office of profit. The other approach is to ensure that certain offices are vacated before subsection 44(iv) is triggered. We know from recent cases, for instance, in the case involving Miss Kelly, that sometimes that provision can create practical difficulties in the sense that the paperwork, if you like, is not completed in time. That may give rise to difficulties.

Of course, if the constitution was changed in the way we have suggested, we would not have those particular difficulties. But certainly one could examine those pieces of legislation to see if they adequately deal with this practical issue of trying to facilitate vacation of an office before the time of nomination.

The provisions essentially give the relevant employing authority discretionary power to reappoint or reinstate the relevant persons. We flag in paragraph 62 the particular difficulty about guaranteeing reappointment; that, if one, as it were, were guaranteed reappointment to the particular position then there could at least be an argument that he really had not vacated that office of profit.

In relation to section 44(iv), we have noted that administrative action is not able to provide much comfort in terms of overcoming the practical difficulties that have been identified. That is a brief outline of our written submission and we are obviously happy to elaborate or answer questions.

CHAIR—In your initial discussion about possible constitutional change to section 44(i), have you actually drafted a proposed alternative wording?

Mr Burmester—Not that I have here, but I think there is probably a draft in the Constitutional Commission's report.

Mr Marris—I think they did provide some draft provisions in accordance with their recommendations.

CHAIR—You are relying on their suggestions, are you?

Mr Burmester—Yes.

CHAIR—That is fine. We can check that then. As I understood what you were saying, rather than the wording that currently exists relating to allegiance, obedience or adherence to a foreign power et cetera, it is the notion of citizenship that you would replace it with?

Mr Burmester—That is right. Citizenship is an understood legal concept. It is something that is clearly established as a status in our legal system. A requirement that you be a citizen we think is a fairly precise legal requirement. Once you start trying to deal with these other concepts then it is a little more difficult.

A suggestion in Sykes v. Cleary was that you had to have some probably active acknowledgment or allegiance, but it is often difficult to define. It seems to us that if you have a requirement of citizenship and citizenship can be taken away in cases of particular offensive conduct—offensive in the sense that parliament judges it offensive, such as service with an armed force with whom we are at war—then that should adequately cover the problem. At the same time, you could couple it with at least a requirement that candidates are given some indication that if they had any connections with another country—

CHAIR—So what about the position of dual citizenship then? Are you accepting that dual citizenship would not lead to disqualification?

Mr Burmester—That is correct. The only suggestion we make is that perhaps there be some requirement on candidates to indicate, for instance, at the time of nomination, whether they had any other citizenship that they were aware of. That could then be taken into account by the electorate. We do not see dual citizenship in itself as a ground that need lead to disqualification. None of the other inquiries seems to have done that.

Dual citizenship, as I am sure you are aware, is now a very common feature. While Australia in the past has had a restrictive view towards dual citizenship, and section 17 of the Citizenship Act reflects that to some extent, I think there has been a greater readiness to accept dual citizenship. My understanding is that the government itself has not yet made any decision, for instance, on the report of the Joint Standing Committee on Migration from September 1994, which would suggest a relaxation of dual citizenship. Even apart from that, there seems no requirement to seek to disqualify someone from election or from their continued membership just because they have another citizenship.

CHAIR—This may not be an appropriate question to ask you because it may be outside your expertise or consideration. The question that goes through my mind is whether or not a constitutional change that moved away from what we have here to allow dual citizenship would actually be acceptable to the Australian people. I wonder whether they might see that as a watering down of the degree of allegiance, if I

can put it that way, to the nation that they would expect of their members of parliament?

Mr Burmester—All I can say is that that is the sort of argument that might be run against such a proposal. I am not in a position to judge whether it is likely to meet with considerable support or not. All I can point to is that these other inquiries that have looked at it have thought citizenship was the criterion. I suppose the complaint that is made against the current provision really tends to be that it prevents proper full Australian citizens from standing because there is this complication that they cannot get rid of some other citizenship. It has been seen as operating unfairly as a result. That is the basis on which the current provision is criticised. If you removed it and only had a citizenship requirement I could not really speculate what the reaction of the electors would be.

Dr SOUTHCOTT—In terms of the office of profit under the Crown provision, what is the opinion of the Attorney-General's Department on this matter, because we have had some differing advice? In terms of someone who has never been a regular officer in the military but who serves in the reserve, is that person protected by that last paragraph of section 44? What is your opinion?

Mr Burmester—I am not in the business of giving opinions on these provisions generally divorced from particular facts. As I said, as government lawyers we tend to avoid giving advice to members or people who might be potentially affected although, obviously, we do advise government. Certainly, if one reads that paragraph at the end of section 44, I think the accepted understanding has generally been that a person in the reserve is not wholly employed by the Commonwealth and hence they may well be protected by that provision and that it is really only designed to get those who are serving full-time in the military forces.

Dr SOUTHCOTT—It has been put to the committee that people being bound by the Defence Force Discipline Act and so on may actually, in terms of that, be wholly employed by the Commonwealth even if it is only for a period of two weeks.

Mr Burmester—I suppose it is an argument. I guess I would have read 'wholly employed' as being on a long, full-time basis. I understand what you are saying, that a short-term period of service might be seen as wholly employed for that particular short period, but I guess it highlights one of the many uncertainties with this provision.

Dr SOUTHCOTT—Sure. A lot of these things have not been tested so it is hard to know. In terms of a medical practitioner who is receiving payments from Medicare, that is very much a borderline case but is that something that potentially could involve disqualification under section 44?

Mr Marris—It would not give rise to a section 44(iv) problem, there would be no office involved.

Dr SOUTHCOTT—Could it be section 44(v)?

Mr Marris—There may be problems under section 44(v). I think the approach we have tended to take, in an unofficial way, is that the High Court, if called upon to rule on that sort of issue, would probably find some way of saying there was no disqualification in those circumstances.

Dr SOUTHCOTT—There has also been the matter raised of local councillors, and it does differ from state to state. A number of local councillors have come into the federal parliament and they have made sure they resigned before the nominations closed. It even varies from council to council, is my understanding. Would they have the potential for disqualification under section 44?

Mr Marris—Any person in that situation would have to face the possible risk of disqualification and I think that is why the practice has been for those people to resign prior to an election.

Mr Burmester—It was a question left unanswered in Sykes v. Cleary, unfortunately—the extent to which it applies to local government.

Dr SOUTHCOTT—What about the position of senators-elect? It is possible that you could have an election in October, let us say, yet the senator-elect would not take their position until 1 July of the next year. My understanding of the constitution is that the sections in the 40s which deal with qualification and so on just mention senators, they do not deal with the problem of senators-elect. Do you have any advice on what the position of senators-elect is?

Mr Marris—There is no High Court decision dealing with the matter but, as I recollect, I think Attorney-General Durack in about 1980 gave advice on that issue. He was of the view that senators-elect were in danger during that period you mentioned.

CHAIR—It is increasingly the case that governments at all levels, rather than employing people directly, are entering into contractual arrangements where services are delivered by people. I was reminded of an example when Dr Southcott mentioned medical officers. In Victoria recently, for example, the courts ruled that a person who is a family day care provider, and in receipt of funds indirectly from the Commonwealth for that purpose, is an employee of the body through which the funds were channelled—in this case it was a local municipality. In that case, funds came in that direction. I take it from what you said about medical officers that you would not think that that would be caught by section 44(v).

Mr Marris—Not 44(iv); 44(v) would be the danger, I guess. One would hope that the High Court would conclude that that was not the sort of situation that 44(v) was intended to cover. The only High Court authority on 44(v) was the Webster decision back in about 1975, where the High Court took a fairly liberal approach to that situation and ruled that the provision had not been contravened.

Dr SOUTHCOTT—I think Peter Walsh this week said that Garfield Barwick effectively emasculated section 44(v), if that decision was made.

Mr Marris—That is one way of putting it.

CHAIR—Going back to 44(i), we have spoken about the citizenship aspect of that. How wide do you think section 44(i) is at the present time with the words ‘acknowledgment of allegiance, obedience, or adherence to a foreign power’? Do you have any examples of activities that you believe would fall foul of those provisions?

Mr Burmester—The Sykes v. Cleary case shows that the High Court would at least try and read it in the way that required some active conduct, rather than just something happening formally without any control of the person. Having said that, it is hard to be more precise. The example I gave of serving in foreign armed forces might well be seen as a direct form of allegiance to a foreign power. If you joined the United States civil service and, for some reason they did not have a citizenship bar or employed you under contract at a high level of government, that may well be seen as caught.

CHAIR—Being seconded?

Mr Burmester—I might be able to distinguish that in the sense you made.

CHAIR—Still contracted to the Australian government?

Mr Burmester—You are still contracted to the Australian government. It is probably those sorts of things. One example is an honorary consul, for instance. I guess there are arguments either way there as to whether that is an infringement of the provision.

CHAIR—Can I raise another one which came to mind when I was reading it? I know it is not recognised diplomatically by Australia, but the Vatican State is recognised by many countries around the world as a sovereign state. Does that mean that one who is an adherent of the Catholic faith has adherence to a foreign power?

Mr Burmester—That issue was raised in the High Court in the Crittenden case in about 1947 or the 1950s. In Sykes v. Cleary, the original statement of claim had some such claim in it, and it was struck out by Justice Dawson before the substantive hearing.

CHAIR—What was the original case?

Mr Marris—Crittenden v. Anderson, I think.

CHAIR—And what did the High Court decide?

Mr Marris—The High Court decided that there was no breach in the circumstances of that case. I am not entirely sure what the facts were.

CHAIR—No. But that gives us some parameter as to the extent—

Mr Burmester—The adherence to a religion will not be—

CHAIR—Is not sufficient.

Mr Burmester—It will not be seen as contrary because the constitution makes it clear you cannot have religious tests applied. So, in a sense, the court took some comfort from section 116.

Mr Marris—The question of Papal knighthoods might have arisen in relation to Arthur Caldwell at some stage but, there again, they did not reach the court.

Mr Burmester—Normally, foreign awards are seen as held on an honorary basis and are not seen as—

CHAIR—So if you are given the Legion of Honour or something, it is not going to disqualify you—not that any of us expect to get it.

Mr Burmester—That is right. They would probably not be seen as caught by this provision.

Dr SOUTHCOTT—Before the Woods case, which disqualified him, Fred Nile took a case about two years earlier in which he said that because he was protesting against visiting warships he obviously had allegiance to a foreign power, which he did not even name.

Mr KELVIN THOMSON—Mr Marris said that one would hope that the High Court would find a certain way in relation to the application of section 44(v), but that just highlights, from my point of view, the difficulties with all of this and the uncertainty about the application of those provisions. I think your point was quite valid: where people are increasingly entering into contracts with state governments or the federal government for the provision of services, the area is getting greyer than ever before and more difficult to interpret, and it is uncertain as to how the High Court will interpret these provisions. That suggests to me the need to clarify what we now think this provision is designed to achieve and what we now think is appropriate in terms of qualifications for office.

Mr Burmester—When one tries to work out what the purpose is, it does seem to be this divided loyalty that someone might have or the dual payment.

Mr KELVIN THOMSON—Yes. My view is that there are some valid policy ideas underlying section 44 and the provisions of it and you can see why they have been put in there. But in terms of trying to interpret them in a modern society and make it clear to people as to what they can do and what they cannot do, they no longer meet that purpose.

Mrs ELIZABETH GRACE—I have just one other question. We were talking about the Senate and the election being six or eight months out from taking office. The Clerk of the Senate submitted that a senator-elect could not contravene section 44 because they had not taken their seat so therefore they were not eligible for disqualification. Have you any comment on that? That is a bit like a catch-22, isn't it?

Mr Marris—Yes. The problem with 44 is that it is not dependent on taking your seat; it relates to the choosing process as well. That was the primary consideration behind Attorney-General Durack's view that senators-elect were caught as well as senators who had taken their seats.

Mrs ELIZABETH GRACE—So they say they are deemed to have taken their seat.

CHAIR—As I understood the clerk's advice, it was that where a person was not in contravention of section 44 at the time of being chosen but then took an office of profit in the period between having been chosen and taking their seat, in that intervening period there could be no contravention of section 44.

Mr Marris—I think Attorney-General Durack dealt with that particular situation and felt that the conclusion might well go the other way.

CHAIR—Would it be possible to provide us with Attorney-General Durack's concern? Sorry, we have it. Dr Southcott has pointed out to me that the clerk's advice was slightly different: a senator-elect could not resign his or her seat because they never held it.

Mr Burmester—Right.

CHAIR—There are two other matters I would like to take up with you. One is that we have been informed that there was model legislation that went to the Standing Committee of Attorneys-General in relation to public servants being able to resign and then be reinstated. So far as the states were concerned, nothing seems to have happened there. Can you advise us about that? This was when Mr Melham said Senator Bolkus was the Attorney-General.

Mr Burmester—It is not something I am aware of. I think back in the early 1980s, at the time of the Senate committee, there may have been some closer examination of the Defence (Parliamentary Candidates) Act and the Public Service Act. But I am certainly not aware at this stage of any consideration by the standing committee or of any draft model that has been sent out. I will make some inquiries.

CHAIR—I appreciate that. When Mr Melham returns, he will be able to clarify what was being raised and, if not, we can pass that on to you so that you are looking for the right thing.

Secondly, and this was raised by discussion with officers of the Electoral Commission who are here, in terms of advising candidates for office, the Electoral Commission's evidence has been that they are not in the position to give legal advice to candidates or potential candidates for electoral office, partly because they do not necessarily have the expertise and partly because it would—although they did not say it—raise questions about potential liability of the Electoral Office or its officers in relation to that. At the same time, the Attorney-General's Department conventionally has not provided advice to private citizens but provides advice to government.

Therefore, it seems, accepting that this is a somewhat confusing section of the constitution that none of us really knows the extent of—perhaps not even the High Court, unless it has to deal with a specific instance before it—that people who are possibly in contravention of section 44 face some difficulties. Firstly, they have to obtain their own private legal advice, with the costs and expense involved in that. Secondly, the time frame for doing this is usually fairly short because people do not turn their minds to it until they are considering nomination for office. Is there any assistance that the department can provide in relation to this or, short of a constitutional change, do we just have to put up with it?

Mr Marris—Certainly the usual practice of our department has not been to advise members or

candidates, the reason being that that is not really an issue that affects the Commonwealth. Of course, we are the Commonwealth's legal advisers. Apart from that, it is really not something we can provide a definitive opinion in relation to. We think they are better advised in consulting their own legal advisers to find out what their position is.

CHAIR—The previous matter I was raising is set out in the submission from the Electoral Commission, where it says:

> At its meeting on 24 June the Standing Committee of Attorneys-General (SCAG) considered some model provisions for public servant reinstatement rights, on which both federal, State and Territory jurisdictions could draw. SCAG recommended that Ministers endorse the model and referred the provision to the appropriate State and Territory Ministers with a recommendation that it be enacted, while recognising that it is a matter for each jurisdiction to decide what approach they adopt. The matter is currently in the hands of the State and Territory Ministers.

That is why we are seeking to find out what has happened with it and, if it has not occurred, what is the reason for the hold-up, if you are aware of it, in the various states and territories.

Mr Burmester—Thank you for that. I was not aware of that. I guess trying to get the states and territories to enact uniform laws is always a slow process. Perhaps they have not seen the political importance of it. I will see if I can find some further information for you.

CHAIR—From their perspective it does not have a great deal of political importance because it does not relate to their parliaments—it relates to the Commonwealth parliament. I can understand that it is not necessarily high on the list of priorities for legislative action.

Dr SOUTHCOTT—I have one further question and it is, again, an elaboration of what I was speaking to earlier. One of the other witnesses to our committee asked if we could determine what the status is of people who are not members of the Commonwealth Public Service but who do perform services for government departments. I suppose people can do that for, say, the Commonwealth Rehabilitation Service or whatever. Do you have anywhere that you can point us towards in terms of whether they would be considered as holding an office of profit under the crown?

Mr Marris—For the reasons I mentioned earlier there is probably no office involved, so 44(iv) would probably not be a problem for them, but 44(v) and 45(iii) might be.

Mr KELVIN THOMSON—It seems to me that the real question in all this is the extent to which these difficulties can be met through legislative change or whether we can only properly address them through constitutional amendment. We all know that constitutional amendment is very complex and not certain of success at all. I suppose in relation to both the issues that we are dealing with, the question is the extent to which you feel we could deal with them via legislation. The one about office of profit seems to be quite hard to deal with in terms of legislation. That is my impression. I think, perhaps, in the case of the loyalty to a foreign power we might be better able to satisfy the High Court's concerns. I would be interested in your comments on that issue.

Mr Burmester—I think, as our written submission indicates, there is limited scope for solving

problems under either paragraph through legislation. In relation to the office of profit, you can try to build on what we already have under the Public Service Act to see if there are other ways of improving that process of resignation and reinstatement. That really goes to the issue at the beginning, the time of election, and does not deal with the state public services or people in other statutory bodies where there may be questions raised. It cannot deal with the general question of what is an office of profit within the meaning of the constitution. There is only limited scope there, I think, for dealing with the issue.

In terms of the allegiance one, again there is not a great deal of scope for dealing with that legislatively. One can take administrative steps to try to ensure candidates are aware of this provision and take all reasonable steps to divest themselves of any other citizenship to meet the requirements the High Court has now clarified.

Mr KELVIN THOMSON—If, for example, you had on the nomination form for any candidate some form of words renouncing all other allegiances et cetera which is designed to meet the concerns expressed by the High Court in its judgment—do you think there is scope for doing something like that?

Mr Burmester—I am not sure that would necessarily be effective. In the Sykes v. Cleary case, two of the candidates had taken citizenship oaths and in those oaths renounced all other allegiance. That was held not to be sufficient. That was in relation to citizenship, but I am not sure by statute that you will be able to cure the uncertainty. You can try to educate people and make them aware of the problem so that they might take whatever steps they think they are able to take. Ultimately, I do not think the problem will go away.

CHAIR—There are two other matters I might raise with you. In their submission yesterday, the Liberal Party made two suggestions on which I would be interested in your comments. One is that they proposed that in section 44 there be an amendment to it so that after the subparts (i) to (v) where there appears the wording 'shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives' that the words 'being chosen or' be deleted so that it simply read 'shall be incapable of sitting as a senator or a member of the House of Representatives'.

The reason advanced for that was that a person could still stand for election and if they were subject to disqualification because of allegiance to another power or because of an office of profit under the Crown, then provided that situation was regularised they would be capable of taking up the seat to which they had been elected. I would be interested in your comments about that proposal.

Mr Burmester—It may ameliorate some of the problems at the time of nomination, for instance, but I am not sure it would necessarily avoid the problems entirely. It might just move them to a different time and there might still be practical difficulties in terms of, for instance, getting resignation in the Defence Force to take effect before you actually take your seat. In relation to things like foreign citizenship or allegiance, you may still be left in a situation where you are still disqualified because you cannot get rid of it or you have not taken all reasonable steps. So while it might remove some of the practical problems, and move it down the track, I am not sure it necessarily overcomes the issues completely.

I was aware of that proposal and reflected on it earlier today. I notice in Sykes v. Cleary, where they ended up holding that 'chosen' meant from the date of nomination, one of the reasons they gave for reaching

that interpretation was that it might be a little unfair to allow someone to stand as a candidate in a situation where, unless they did something, they would be disqualified. In a sense, you let someone get elected, and through their failure to do something they might then end up being disqualified; and isn't it better to disqualify them at the point of nomination? That at least seems to have been the thinking that was behind some of the High Court's reasoning. I guess that is a factor. On the other hand, it does tend to be at that early stage where most of the practical problems we have had have so far arisen, so I suppose there are arguments both ways.

Mr Marris—I think that is right. I suppose a person could be left in some kind of limbo, in a sense, if the person became elected and then endeavoured to rid himself or herself of foreign citizenship. That may take quite some considerable time and the seat would remain vacant until it was sorted out.

Mrs ELIZABETH GRACE—I think part of their argument was that a lot of candidates do not get elected, because there are only 148 people who are successful throughout Australia each time, out of however many hundred stand, and it puts an unnecessary burden on a lot of people who would otherwise choose to be a candidate but will not take that final step that will perhaps do them out of a career, or whatever the case may be, because of the uncertainty of whether they were going to win or lose at the final point.

Mr Marris—It would seem that their proposal would certainly deal with that situation quite well, but it would leave these other situations a bit doubtful.

CHAIR—There was another matter they raised. I will quote from the Liberal Party summary of recommendations which said:

(b) seeks clarification of the definition of 'office of profit under the crown' and suggests that the AEC with other legal authorities establish a clear list of offices that are, or could be construed as, 'offices of profit under the crown'.

I took the reference to 'other legal authorities' to be you. Let us assume that for the purpose of discussion.

Mr Marris—I am just concerned about the word 'other' actually!

CHAIR—As I take it from your submission—and correct me if I am wrong, as I do not want to put the suggestion into your mouth if it is not correct—there are two difficulties with that. One is that, unless you have something clearly set out in the constitution, it does not matter what you say, it can have only some sort of guiding effect. Secondly, I took your evidence to be that we do not know what the range of offices of profit under the Crown are—it is going to be a matter of looking at the factual circumstances of each case. Is that correct?

Mr Marris—I think that is right. If the formula 'office of profit under the Crown' remained, there would always be questions as to whether a particular office was or was not an office of profit. If the proposal were adopted that the Commonwealth parliament were to be able to legislate as to which offices were or were not caught, then that would certainly go some way towards dealing with the problem.

CHAIR—That would be helpful, but it would not finally be conclusive because presumably the High

Court could still say that the parliament got it wrong.

Mr Marris—It would depend on the terms of the constitutional amendment. If the amendment were such as to confide in the Commonwealth parliament the power to determine which officers were or were not caught, then that would be that.

Mr Burmester—It assumes an amendment.

Mr Marris—Yes.

CHAIR—But it would seem to me that that sort of amendment—and this is a guess, I suppose—would be less likely to find support in that the argument would probably be advanced that, surely, this is a matter which the constitution ought to set out with some clarity and that it ought not be left to the parliament to be able to vary from time to time as to what constitutes election to itself.

Mr Burmester—I suppose the previous considerations have tended to try and define core offices of profit—say, the membership of a public service—and then deal particularly with other government bodies, like statutory authorities, by giving a power of decision to parliament in relation to those. But I agree—if it gave parliament a complete power, that might be a ground of criticism.

CHAIR—Yes. As there are no other questions, can I thank you for your submission and for the discussion this afternoon. We would appreciate it if you could give us some advice about that matter we raised with you about the Standing Committee of the Attorneys-General and what is happening there.

Mr Burmester—We will follow that up. Thank you.

Short adjournment

[6.01 p.m.]

CHARLES, Mr Bob, MP, Parliament House, Canberra, Australian Capital Territory

CHAIR—Welcome. I will dispense, in the circumstances, with the usual warning about being truthful as you are a fellow chairman of the committee. We are in receipt of your submission of 14 February and we are grateful for it. We invite you to make some comments in relation to it.

Mr Charles—As I said in my brief letter of submission, I do feel strongly about both of these issues. In my circumstances—as Dr Southcott called to my attention a few minutes ago before we commenced—my citizenship of the United States where I was born was taken from me by the United States government when they found that I had sworn allegiance to the Queen and had become a citizen of Australia. It required no overt act on my part to divest myself of that citizenship.

That circumstance is no longer true today. It is my understanding that US citizens who take out Australian citizenship—become citizens of Australia—have the right to regain their United States passports if they decide to renounce their Australian citizenship and leave. That, therefore, gives them continuing rights, and it would be unreasonable to try and somehow force them to forever divest themselves of their right to re-engage. By the same token, we know—and I am sure you have received evidence—of some European countries that refuse to ever consider that their citizens have left their shores and divested themselves of their entitlements and their citizenship.

I think that a person needs to make an absolute commitment to Australia in order to be a member of this parliament. It seems to me that if people are able to hold two passports and two allegiances—forget about the future rights business—they are not truly committed to Australia, and I find that an anathema. So I believe that we need to retain the requirement, not only for citizenship in Australia, but also for people doing all in their power to divest themselves of other loyalties.

We have had this question come up several times now and you are all aware of the circumstances. I think that a statutory declaration that a person has made every effort to renounce citizenship, or that the person has renounced his or her allegiance, citizenship and rights in that country ought to satisfy that. I am sure a change in the wording of the constitution is required in order to give effect to that and to make it clear. I do not think it is possible to do it by regulation and I would ask the committee if that is its view as well.

CHAIR—The evidence we have is that short of a constitutional change we are bound by the High Court's advice in the Sykes v. Cleary case, which is that you have to take all reasonable steps. What 'all reasonable steps' are will be dependent upon the circumstances of each individual and the country from which they came. But to respond to your question more precisely, simply swearing a statutory declaration that you have renounced, or were thereby renouncing, the citizenship of another country would not be sufficient to meet the test currently applied. If the proposal were, for example, that the swearing of a statutory declaration renouncing citizenship was sufficient, then the constitution would have to be changed.

Mr Charles—In my submission I did comment that I assumed that changing 44(i) of the constitution

would have to be by referendum, in order to effect what I would like to accomplish. I believe strongly that you need to make an absolute commitment to Australia in order to be a member of this federal parliament. I recall an instance in Papua New Guinea, in July of 1993, when I was a member of a delegation to a five Pacific island nation. At the time there were at least two ex-patriot Australians serving in the Papua New Guinea parliament, but they had just held an election prior to us getting there and there had been a third. That individual lost his seat. He immediately upped camp, came straight back to Australia, took his passport back again and said he wanted nothing more to do with Papua New Guinea.

They were incensed, absolutely incensed that this individual could leave Australia, come to Papua New Guinea, stay for a few years, get elected to parliament and, as soon as he lost his seat, disappear back to Australia again. In a sense I became embroiled in the argument because the two Australian ex-patriots still there were concerned that there was a move to change their constitution to require all members of parliament to be native-born Papua New Guineans. I can report to the committee that that did not happen. The motion was made in the House and it was defeated, so sense prevailed. That kind of a circumstance, of course, sours, if you will, the game for everybody. We ought to be able to demonstrate to the public that we have a commitment to Australia. That, I think, is the largest part of that argument.

The second part of that, on the same 44(i), is that it is virtually impossible to relieve an individual who is born overseas of all of their potential residual rights in the country of their birth, or a prior country of occupation. I cite for the record the fact that because I grew up in the United States, where there is a different kind of social security system from what we have here, at age 13, when I took my first job, I applied for and gained a social security number, which meant that I paid taxes to the American government for potential social security benefits and continued to pay those for many years. That amount has accrued to my account.

While I understand that that scheme is in some financial difficulty, that is to say the expected future load exceeds expected future assets so they have a few problems—they might have to up the tax rates or reduce the benefits or something—nonetheless, even though I am an Australian citizen I have an absolute right to that benefit. It would be unconscionable for you to say to me that I could no longer be a member of this parliament because I have a right to a social security benefit for which I worked in another country at another time. I guess the larger part of that argument is that these inconsequential rights and entitlements certainly should not disqualify one from office.

On the second issue—the office of profit under the Crown—it is not that I feel so strongly about that, but I have views that I have held for some time. That is, it seems to me patently ridiculous that we force people to resign from their jobs because of an old-fashioned clause in a constitution. At the time the constitution was written, it seems to me that they were trying to divide responsibilities to make sure that people with an allegiance to the Crown or the government did not also get elected to the government and have two loyalties. I completely understand the reason for that, but times have changed and we have moved on.

It does seem to me to be fair and equitable for an individual to resign their position at any time up to the declaration of the poll. If they failed to do that by the declaration of the poll, they should be in violation of the constitution and lose their seat. But I do not know why you need to resign your job—as a teacher or as

a CES officer, or be on leave from a position, or be in another country and take leave from there and come back and stand for election—and have to give up completely your right to future employment in order to have the right to stand as a member or a senator. I do not think I can state it any differently or any more succinctly than that.

CHAIR—That would require a constitutional change as well, because of the provision that says, 'any person who'—and then (i) to (v)—'shall be incapable of being chosen.' That was interpreted by the High Court as being from the point of nomination.

Mr Charles—Thank you for that, Mr Chairman. I am not a lawyer, as you are well aware.

CHAIR—I am just pointing that out for the purposes of discussion. We would need to make another constitutional change in order to effect that sort of change. Assuming an agreement with the sentiment you are expressing, is the declaration of the poll the most appropriate time or—I don't know—return of the writs?

Mr Charles—Let us think about Phil Cleary as the prima facie example. He was on leave from the education department as a teacher. For him to divest himself from that, he had to quit before he signed up to go on the ballot—totally resign—which meant he lost all his rights and entitlements in the education system where they had legitimately given him leave. He had not been working for some time.

You may not know—as some of our colleagues on all sides of politics will know—the disposition of the electorate until very late in the game. I do not think it is fair to make people resign these offices, because there is minimal chance anymore for a conflict of interest anyway. To make them resign before they stand, or at any point before they know whether or not they are going to hold the seat—be it a House seat or a Senate seat—I think is totally unfair for people who happen to work in the public sector or in one way or another happen to be under office of profit for the Crown.

What makes them so different from a contractor or a consultant who supplies goods and services to the Commonwealth government? I fail to see the difference between someone who goes on leave from their job in order to stand and someone who is a contractor. There is no practical difference, but there is a huge technical difference in terms of the constitution, and it has had huge implications, certainly for Mr Cleary.

Dr SOUTHCOTT—In terms of proposing that we delete section 44(i) and replace it with the words 'has not in writing to the appropriate foreign power renounced all allegiance, obedience or adherence to that power, including citizenship', it is my understanding that that is the case as it exists now anyway. In the High Court's decision in Sykes v. Cleary they outlined what they described as having taken all reasonable steps to renounce foreign citizenship. As you mentioned, there are some nations where you cannot actually renounce your citizenship. As far as the High Court is concerned, they are satisfied if you can show that you have taken all steps possible to try to renounce it.

Mr Charles—Notwithstanding the High Court's decision, the language of that decision is going to believe that every case will be an individual case. I would assume that that is what you are trying to come to grips with—to not have individual cases to create rules that everybody can play by and they know what the rules are, and we do not have to run off to the High Court every 10 minutes over these issues. I do not know

the appropriate words; again, I am not a lawyer. I suspect that there are some very good legal minds that could come up with the right words.

All I am suggesting is that all the individual ought to have to do is write to the prior country of origin and say, 'I am not a citizen of your country any more; I renounce my allegiance to your country and your flag.' Regardless of what you say, that ought to take care of it. All you have to do is post a registered letter. The country does not have to accept it.

CHAIR—That is more liberal than the High Court decision because my understanding of the High Court decision is that if the foreign country in question has some procedure for the renunciation of citizenship, you have to go through that procedure. You are saying that you can make a unilateral declaration of renunciation of citizenship. The irony that I pointed out to one of the witnesses yesterday is that it is in cases where countries do not respond to you, for example, or do not have some procedure that a unilateral declaration will suffice. But if they have much more strict provisions, a unilateral declaration will not suffice and you have to go through whatever those provisions are. So your proposition is that we take a more minimalist approach to what is necessary and, in effect, a unilateral declaration will be sufficient.

Mr Charles—In a sense, yes, you are right. I have not gone so far as to say that dual citizenship is acceptable. I have tried to make that point strongly. I simply tried to come up with a mechanism that I thought was reasonably fair, straightforward and simple which gave people a right to say that once they had notified the foreign power that they are not subject to them any more, as far as Australia is concerned, they are not. You will recall that at one point our oath of citizenship did require us to renounce all foreign citizenship rights. We took all that out; in fact, I think I swore that at my citizenship ceremony in 1974.

CHAIR—But, interestingly, the High Court said that was not sufficient.

Mr Charles—I am aware of that, but remember that the High Court is making a judgment on the words that are in the constitution, not on the words that I propose to change them to.

CHAIR—Bob, that has been very useful. Thank you very much for your submission and also for coming along and discussing it with us today.

Mr Charles—Thank you, Mr Chairman.

[6.20 p.m.]

MINCHIN, Senator Nick, Parliament House, Canberra, Australian Capital Territory

CHAIR—Thank you for coming back this afternoon. I was trying to pick up on where we were at. Daryl Melham was asking you some questions last night when the division occurred.

Senator Minchin—He asked me about uniform Commonwealth, state and territory legislation in relation to public servants resigning and then contesting the seat. My in-principle view is that uniformity should not be worshipped as a god and that the only uniform laws that are any good are good laws, and they are not good because they are uniform. So I do not necessarily believe that is the way to go. I would not necessarily want to dictate to states and territories, but obviously it would be better if there was a coordinated and agreed approach as to how this is dealt with.

I must say my view is that we really have to ask whether this prohibition should apply to candidates. On balance, I think it should only apply to members of parliament and not to candidates for office. The fact that someone is a public servant, a teacher or something like that, should not bar them from being a candidate. Why should they have to go through the business of resigning? Their job is a feature of them that is known to the voter, and I cannot think of a good public policy reason for requiring candidates for office—the majority of whom do not succeed in becoming members of parliament by definition—to have to go through this process and potentially be caught out simply because they failed to take the correct steps in becoming a candidate.

A very simple amendment would be simply to delete the words 'being chosen or of' where it says 'shall be incapable'. It simply would read, '. . . shall be incapable of sitting as a senator or a member of the House of Representatives . . . '. That would be the simplest amendment and it would achieve what I think, on balance, is probably what we are trying to achieve, and that is lack of conflict of interest potentially inherent in an office of profit when you are a member of parliament. I cannot see that being a candidate produces that. That would be a very simple amendment to make, but it would be worth you testing whether that would be satisfactory.

The other thing I want to mention is to encourage you to take an interest in, if you have not already, the changes made to the South Australian Constitution Act in 1994 to deal with both the question of citizenship and contracts with the Crown. I am not an expert on them and you may want to invite a South Australian official over from the Attorney-General's Department to explain their purpose and effect.

My understanding is that, in a sense, they have produced a situation where, so long as you are an Australian citizen, having another passport would not debar you from being a member of the South Australian parliament and, in relation to office of profit, what they have done is restrict the bar to just members of parliament and not to candidates, and provided a mechanism whereby they have gone further and said that members of parliament who are engaged in a contract with the state need only register that contract. In other words, it gets onto the public register. It is not, of itself, an automatic disbarment—and the Webster case raised this issue.

If a member of parliament is a director of a company that has a contract with the Commonwealth then the potential hazard of that should be looked after. Certainly, South Australia has done that by way of saying, 'From a public policy point of view, let's provide a mechanism whereby that is placed on the public register of registers of interest and is removed as being an automatic disbarment.'

Dr SOUTHCOTT—Is that an act to change the South Australian constitution?

Senator Minchin—Yes.

Dr SOUTHCOTT—So presumably that will be—

Senator Minchin—It says that it is an act to amend the Constitution Act 1934 and the Members of Parliament Register of Interests Act 1993, and it was assented to on 2 June 1994.

Dr SOUTHCOTT—So presumably that will be a referendum item at the next state election?

Senator Minchin—No. Not all sections of the South Australian Constitution Act are entrenched. It is possible for the parliament itself to amend certain parts of the Constitution Act without that going to a referendum of the people of South Australia. That is what happened in this case.

Mrs ELIZABETH GRACE—Concerning what you are saying about leaving the words 'chosen for' or whatever, what is your reaction or thoughts on how the Australian public will react to that if we got the chance to take it to referendum? My personal opinion is that the Australian public would find it all rather a bore and would not be terribly interested and as a consequence would vote no because that is the safest way to go. Their attitude would be, 'We are not giving the government any more power and we are not going to vote them any more chance to do anything else,' which seems to be a general opinion. They think, 'Hang on, they want more power. They are grabbing more power so we will vote no and that will stop them from doing it.' Because it is relatively obscure and affects very few voters, in that it only affects people if they come up for candidature and then have one of these problems, what is your opinion of how the Australian population would react?

Senator Minchin—I have never seen any market research on the subject so I cannot speak with quantitative authority but my sense is that it is unlikely that there would be significant institutional opposition. That is the factor that you have to assess in terms of whether or not a referendum is going to be carried. Presuming that you had—and you would not proceed unless you had—the major political parties supporting it, you would have all the public sector union officials and others supporting it so it is difficult to see where the opposition would come from. Therefore, I would have thought, even if the Australian people do not think it is all that important, they would be inclined to support it. If their particular party was saying, 'We think this is a good idea,' I think you would automatically have one-third of the electorate in your pocket because everyone on the public payroll would automatically be a beneficiary of it. Therefore, I think it would have very good prospects of passage.

Mrs ELIZABETH GRACE—Do you think, providing it went through, that that would solve a major proportion of the problems that this section of the constitution creates?

Senator Minchin—As I said yesterday, my experience of the section and its difficulties are in relation to candidates and, latterly, senators-elect, and it would cure both of those problems. I must say, as someone who has been involved professionally in politics for 20 years, I have yet to be convinced that this section should apply to candidates or senators-elect. So yes, I am happy to state for the record that I think it would cure the principal problems of this section, in relation to offices of profit. The citizenship issue is another question and I am not here to give evidence on that.

CHAIR—Presumably, for the candidates that are not elected it solves the problem. That is a matter of convenience for those people, that they are not put to the difficulties associated with having to either resign from some position or to renounce some dual citizenship or something like that, on the off-chance that they will be elected to parliament. So there is a convenience argument there.

For the candidate who is successful, all it does there is to delay the time period in which some action needs to be taken. At that stage there would still need to be some trigger mechanism to alert that person that, if they are falling foul of one of the provisions of section 44, they then have to do something about it if they wish to sit.

Senator Minchin—That is right.

CHAIR—Say that a person does have dual citizenship and therefore falls foul of section 44(i), he or she would have to go through whatever process is required to renounce that citizenship before being able to be sworn in as a member or senator.

Senator Minchin—That is right.

CHAIR—Potentially, there could be some delay in being sworn in if that took more time than whatever was available. Or the office of profit in those circumstances would be much easier because it would be a matter of simply rearranging your affairs, having been elected.

Senator Minchin—Exactly.

CHAIR—So we have largely overcome the section 44 problem for all. There could still be some difficulties in 44(i) concerning the time frame needed to renounce some foreign adherence or citizenship.

Senator Minchin—That is true, and it would still require some prudence on the part of the candidates who thought that they had some prospect of success to ensure that they knew what steps they would need to take and when, were they to be successful. If that required them to take action prior to the election in order to complete the process before being sworn in, then they would need to move. But at least they would have some forewarning. It would overcome the sort of Jackie Kelly problem, potentially, where someone is not expecting to be able to be elected. Hopefully, it would allow candidates sufficient time to rearrange their affairs—particularly in her case—so that they could be sworn in and not have this sword of Damocles over their heads.

Dr SOUTHCOTT—Just to play devil's advocate, if we did this with a constitutional change, then

there would be a scenario that, say, between the election and the opening of parliament two months later, there would be no constitutional bar to a prime minister offering any member or senator a consultancy position within the government, or any government post. The person could hold it only for one or two months. The gap between the election and the opening of parliament, presumably, would be when you take your seat and subscribe for the Governor-General or another person the oath of office. That could be a two-month period. Essentially, the way I see it, the office of profit provision is there to try and stop that sort of situation. If someone wants to accept patronage from the executive, that person has to resign his or her position.

Senator Minchin—Are you forecasting that a future member of parliament could be influenced in terms of future voting behaviour in that brief period by largesse from the executive?

Dr SOUTHCOTT—My understanding is that is the whole reason we have got the office of profit provision. If someone wants to take up a post as administrator in Norfolk Island, or whatever, he or she has to resign to take up that position. There is debate about whether you have the cut-off period as being the close of nominations, which is what the High Court has decided, or whether it is the election, the declaration of the poll.

Senator Minchin—Yes.

Dr SOUTHCOTT—Yours is a very simple constitutional amendment but it does mean that it goes right out to the opening of parliament. It is an interesting thing. I am playing devil's advocate. I am just saying that is the reason for the provision. There are plenty of other checks in terms of public opinion, but it means that there is no constitutional check to something like that.

Senator Minchin—One can always find potential avenues for exploitation in whatever law one passes, but I think the constitutional provisions in this area should be restricted to avoiding the conflict of interest inherent in sitting in the parliament. What may occur in the brief period between an election and that occurring is unlikely to be a problem which the constitution should be required to deal with. I cannot foresee that being something that is going to be a significant problem. What I am saying to you is that the evil is in relation to a sitting member of parliament, and that is dealt with. I am not suggesting that we get rid of the section altogether, but that what we deal with are members of parliament. That is what we focus on and not until they become members of parliament should this provision operate.

Dr SOUTHCOTT—They become members of parliament essentially at the declaration of the poll and there is that period there when they will be free to do whatever they want to do—be it work for the government, or take a government job, or whatever—between that and the opening of the parliament.

Senator Minchin—I just had brought to me what the South Australian provision now is in this area. It says:

If a candidate for election as a member of parliament holds an office of profit from the Crown he shall, unless he resigns that office before the date of declaration of the poll, be incapable of being elected . . .

So they are taking the declaration. There is constitutional interpretation available of what 'sitting' means. They have declared it to be the declaration and it may be that you actually want to consider something of this kind if you honestly believe that the period between election and the sitting so defined is a potential risk area.

The period between the election and the declaration is never all that long. You may want to contemplate moving it, or changing this provision, so that it operates from declaration. I would not be averse to that. My main aim is to ensure that senators-elect and candidates who are unsuccessful, or candidates who are successful, have the opportunity to rearrange their affairs so that the provision only affects them from the time they become members of parliament. If you want to make that declaration, rather than sitting—

Dr SOUTHCOTT—I think declaration of the poll is preferable to the opening of parliament because, even for sitting prime ministers, interesting things can happen. It is the reason—

Senator Minchin—Not under coalitions, of course.

Dr SOUTHCOTT—No. That is, as I see it, the reason that that provision is there is that you would not want Dr Metherell type jobs and people being able to stay in the parliament and still accept jobs in the government.

Senator Minchin—But that would not affect that situation. That was offering an inducement to get out of the parliament. The job did not commence, nor did the office of profit commence, until he had ceased to be a parliamentarian. That problem was inducement.

Dr SOUTHCOTT—I understand.

Senator Minchin—What you are suggesting—

Dr SOUTHCOTT—The reason he had to leave the parliament was because you cannot hold an office of profit.

Senator Minchin—That is the same with anyone. Jim Short has just been offered a position in London, so he resigns one position before he takes the other one up. That should continue to operate, and it operated in the case of Metherell. I am not suggesting that that change. I am just saying that it should not apply until you become a member of parliament. I am not fixed on whether you take that point as being the declaration of the poll, or the other.

What we do not want is people's behaviour in the parliament being corruptly influenced as members of parliament. If you think that that is possible between the election and becoming members of parliament, even though they are not members of parliament, but that it could affect their future behaviour, I would defer to your view that it should be the declaration.

Mrs ELIZABETH GRACE—If it comes to declaration, Jeannie Ferris would have been still affected because the declaration was some four months before she was able to take her place in the parliament.

Senator Minchin—We are talking in terms of House of Representatives. But, you see, I am not a member of the House of Representatives. Do you receive remuneration from the point of declaration?

Mrs ELIZABETH GRACE—No, from the day of election.

Senator Minchin—Is that right?

Mrs ELIZABETH GRACE—Yes. It is backdated to the election day. But then that would be an administrative problem that would be adjusted if this were—

Senator Minchin—That is right. I think that you need, in terms of this question of declaration, to take account of the fact that senators do not receive remuneration as members of parliament until 1 July after their election. Therefore, I certainly would not want to see any suggestion of the kind made by Dr Southcott affecting the thing that I am trying to cure, which is that senators-elect can work for their nation, and therefore for the public sector, prior to that 1 July.

Mrs ELIZABETH GRACE—The Australian Democrats through Senator Andrew Murray put a submission in. Their main complaint was, again, the number of potential candidates who would not stand because of section 44 in the constitution. What you are proposing would possibly be quite acceptable to them, too, as perhaps one way of making it a bit easier for their small constituency. I believe quite a large proportion of their membership is public servants or paid officers under the Crown.

Senator Minchin—Yes, that is right. It is not my natural inclination to do anything that the Democrats want done, but I do think their focus has been right on this problem of candidates. Certainly, as a state director of the Liberal Party, that was something that cropped up often for me when talking to people about potential candidacy. Therefore, I would have a similar objective. We did touch on the question on whether their bill was really the way to do it. That is why I suggest that my simple proposition might be more effective and not encounter the sort of problem the chairman pointed out yesterday. But I do share their objective and I do think there are many worthy Australians in the public sector who ought not to be discouraged from nominating for parliament.

Dr SOUTHCOTT—When you were state director, did you have any borderline cases that you had to consider?

Senator Minchin—I always drew to candidates' attention this section and our advice as a political party that they would need to resign to ensure this section did not catch them. But I related yesterday, when you were not here, the problem I had in 1993 when we received legal advice that anyone in receipt of a dollar from their position as a local councillor could potentially be caught by this section, which had not previously been thought to be the case. We had to get eight of our 12 candidates to withdraw their nominations, resign their council positions and renominate in the space of a week, spread all over South Australia. It was a nightmare of an occasion. That has been my worst experience of the potential reach of this section. Some of them were receiving literally only a few hundred dollars a year for reimbursement of expenses incurred in being a local councillor. Yet, the legal advice to those people was that that could potentially be contrary to section 44.

But certainly there were cases where I had discussions about candidacy with senior public servants and others who were not prepared to resign in order to contest and be reinstated even though the state had provision for that. They really felt that was fraught with danger for them.

CHAIR—Thank you very much, particularly for coming back this evening. It has been a very useful discussion for us.

Senator Minchin—Your committee has been useful for me today in talking about the constitutional convention because I have pointed out to the journalists that the government has initiated a review of one particular section of the constitution already.

CHAIR—The one that affects us.

Senator Minchin—No, it affects one-third of the nation.

CHAIR—You have got that—

Senator Minchin—Yes, I have; it is terrific. I congratulate you on it. It is tremendous.

Mrs ELIZABETH GRACE—Have you been plugging that with the journos too?

Senator Minchin—I will.

CHAIR—I thank all for attending.

Resolved (on motion by Mrs Grace):

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

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

Committee adjourned at 6.43 p.m.