HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

CANBERRA

Tuesday, 25 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

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

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Present

Mr Andrews (Chair)

Mr Barresi	Mr Randall
Mrs Elizabeth Grace	Mr Tony Smith
Mr Hatton	Mr Kelvin Thomson
Mr Melham	

The committee met at 4.06 p.m.

Mr Andrews took the chair.

CHAIR—I open this first public hearing of the committee's inquiry into aspects of section 44(i) and (iv) of the Australian constitution. I welcome the witnesses, members of the public and others who are present at this meeting of the committee.

Section 44 sets out the conditions which disqualify intending candidates from being chosen as sitting senators or members of the House of Representatives. From time to time, subsections (i) and (iv) of section 44 have caused practical problems for candidates in political parties, which has resulted in calls for review and reform. Some commentators have also suggested that the philosophies underlying parts of section 44 are out of keeping with contemporary attitudes.

The committee has received a number of valuable submissions raising issues and containing suggestions for overcoming the problems presented by section 44. Today the committee is looking forward to discussing some of the issues and suggestions raised in submissions to it with the political parties, members of the parliament and a constitutional expert.

CROSBY, Mr Lynton, Deputy Federal Director, Liberal Party of Australia, PO Box E13, Kingston, Australian Capital Territory 2604

SMITH, Mr Dean Anthony, Manager, Parliamentary and Policy, Liberal Party of Australia, PO Box E13, Kingston, Australian Capital Territory 2604

CHAIR—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 of March of this year, which we thank you for and for coming today to discuss it. Would you like to make any opening remarks in relation to it?

Mr Crosby—Thank you, Mr Chair. There are just a few brief comments which Dean Smith will make. The Liberal Party views this area very importantly and believes it is an area where further action needs to be taken because of past problems and concerns that we have about the impracticality of the constitution and the laws as they presently stand. I will hand over to Mr Smith to give you a very brief indication of our current thinking on the issue.

Mr Smith—Thank you. Over a number of years, the Liberal Party has made submissions to numerous parliamentary inquiries raising its concerns about section 44 of the constitution. In particular, we have highlighted that procedures need to be simplified with a view to clearly outlining what candidates need to do to be properly qualified to stand for parliament.

In our 1996 submission to the Joint Standing Committee on Electoral Matters, we noted that greater certainty needs to be developed by the committee to remove continuing concern and ambiguity over the issue. Of particular note, I would like to draw attention to the comment made by the Australian Labor Party in its submission to the same committee. It noted the disinherited position adopted by the AEC in respect to this matter, which is a point that I will come back to. Specifically with regards to section 44(i) of the constitution, which deals with foreign allegiance, the party believes that the intention of section 44(i) is very clear and it exists to ensure that members of parliament do not have dual allegiance and cannot be subject to any influence from foreign governments.

Clearly, there is an onus on each member to show that they have renounced, or made every reasonable effort to renounce, foreign citizenship. The party believes it is quite appropriate that members of parliament do not hold dual allegiances and, in that context, believes that the existing section is quite appropriate. In addition to that, I think the Cleary case has cleared some of the ambiguity with regard to what steps candidates need to take in order to meet that particular qualification. It has also clarified a number of issues which previous committee inquiries had suggested as solutions. In particular, it made important reference to the fact that it was not sufficient for candidates to unilaterally renounce any foreign citizenship and that, in particular, makes some recommendations of previous committees inappropriate.

The Liberal Party has suggested, in its submission, a number of ways that candidates may actually seek to take reasonable steps to renounce any foreign allegiance. While we recognise that it is difficult for

legal counsel, political parties, and the AEC and other associated parties to list exhaustively all the reasonable steps which might be taken to renounce foreign citizenship, we do believe that there needs to be an attempt to clarify this matter by listing, as far as possible, the range of steps a prospective candidate can take in renouncing foreign citizenship.

Specifically, with regard to section 44(i), the Liberal Party believes that the AEC has a responsibility, in conjunction with other legal entities, to establish appropriate guidelines on the application of section 44(i) and that these guidelines should be more effectively communicated to political parties. The Liberal Party is opposed to any repeal of section 44(i) on the basis that members and senators of the Commonwealth parliament should not owe allegiance to any other foreign power. The party also considers that political parties have a responsibility to communicate the constitutional qualifications to candidates and that political parties should be encouraged to incorporate proper screens for foreign allegiance in their preselection procedures. Finally, it recommends that the nomination form should include a renunciation procedure which could be used, in addition to other reasonable steps, in developing a case for a particular candidate.

With regard to section 44(iv), which deals with officer profit under the Crown, the Liberal Party recommends two points. Again, the matter needs to be more clearly defined by the Australian Electoral Commission. In conjunction with other legal authorities, we do believe that there is a capacity for them to do that. The present candidate check list and candidate information, which appear in the candidate handbook, are really not sufficient. I think that previous committees have found that to be the case also.

Specifically, the Liberal Party proposes an amendment to the Commonwealth constitution which would retain the office of profit under the crown restrictions, but only for candidates who had successfully been elected to parliament. So those restrictions would not apply to candidates being chosen for parliament, only for those candidates sitting in parliament. We think that would make the situation much clearer than it is at present and it would clearly apply only to a much smaller number of individuals. Those are the specific recommendations that the Liberal Party brings to this committee in relation to the two sections.

CHAIR—Thank you for those comments. Perhaps we could take each of the subsections one by one with regard to any comments and questions which members of the committee have in relation to them.

Mr BARRESI—In regard to ‘unilateral renunciation’ versus ‘taking reasonable steps’, I still have trouble understanding what is the legal standing of ‘taking reasonable steps’. To some extent, the fact that you are filling in a form, or you are writing a letter to the Ambassador or to the Minister of Foreign Affairs back in Greece or Italy, is a unilateral approach as well because that is a unilateral movement. I take my own example. I wrote and never had a reply. I have got no idea whether they excepted it or not.

Mr Smith—Our understanding is that before the Cleary case there was a commonly held view that a candidate would simply have to renounce on his own behalf his foreign allegiance. What the Cleary case said was that it is the application of the foreign country’s law with regards to renunciation which is important. It is not good enough for a candidate simply to renounce—

Mr MELHAM—Except where it is oppressive. If it is so harsh that it is difficult to renounce, you then take reasonable steps.

Mr Smith—This is where the comment about 'reasonable steps' comes in. For some countries for example, and I take the example of New Zealand, the process for renunciation is very clear and it is user friendly as compared with some countries where there are no procedures and they do not recognise renunciation. Then it is necessary for a candidate to develop a series of steps, which in the eyes of the AEC or the court, would be deemed to have been reasonable. In our submission we outline what those steps may actually include. Perhaps I could just run through those for the committee.

The Liberal party believes that the following action may be construed as having taken 'all reasonable' steps. This would particularly apply to candidates who owed allegiance to countries which did not provide for renunciation procedures. Firstly, the nominee would contact a representative office of the foreign country of citizenship for advice as to procedure to be followed and then follow that procedure. Secondly, if on that contact it is established that the foreign country has no particular procedure, then the nominee should write to the foreign country's nearest representative office notifying the relevant government of the nominee's renunciation of its citizenship and if applicable, delivering up the nominee's passport issued by that foreign country. Thirdly, if there is no representative office in Australia, then the nominee should write or cause inquiries to be made to the relevant department in the government of the country or, where the department is unknown, then to the head of the government in that foreign country seeking advice as to procedures and then following those procedures.

The Cleary case has made the process easier, though not definitive. It said that unilateral renunciation is not appropriate. Secondly, 'reasonable steps' need to be defined in terms of what is actually applicable to that foreign country as well as what a particular candidate may pursue.

Mr MELHAM—On that point, I notice you have not made any recommendations in relation to the citizenship ceremony or the oath of allegiance or words that might be used in that ceremony that also can be part of that process. Does the Liberal party have a view on that?

Mr Smith—What you are advocating is that through the process of citizenship someone renounce—

Mr MELHAM—I am saying that is an option. That is part of it.

Mr Smith—That is an option. We would argue that renunciation procedures like that one and including a renunciation declaration on a nomination form could be used to build a case for renunciation. The Cleary case clearly says that that alone would not suffice.

Mr MELHAM—What I am also interested in though is how this squares off. In the last parliament, for instance, the Joint Standing Committee on Migration produced a unanimous report in relation to dual citizenship where after an inquiry all members of that Committee recommended that we should be looking at allowing dual citizenship in Australia. It is basically our citizens who are being discriminated against because they are not getting the benefit.

How do you see that dovetailing that into this? In other words you would have dual citizenship for the normal population but if you want to be a member of parliament or run then there is this higher burden on you in terms of renunciation and—

Mr Smith—We hold to our original opinion. We do not think it is appropriate for members of parliament to hold dual allegiance. I think that is a personal choice with others that respective candidates make.

Mr MELHAM—I accept that.

Mr Smith—I do not think those recommendations of that joint standing committee—I may be corrected—have been tested in the community.

Mr MELHAM—No.

Mr Smith—I think that there may be popular support for ensuring that Australian citizens or members of parliament do not hold dual citizenship if they become members of parliament.

Mr MELHAM—I am not arguing. My understanding of the way that committee operated is that it was only as they started to take evidence that, as a result of the evidence, it started to dawn on some members who are violently opposed to dual citizenship that it was actually Australian citizens who are being disadvantaged by not giving them that capacity. But obviously if you want to run for parliament and sit in the national parliament then that is a different ball game altogether.

On the second aspect in terms of constitutional change as against different sorts of change, why isn't it the best solution for the Commonwealth parliament and all state and territory parliaments to basically legislate uniformly in terms of a code that allows people—this does away with a constitutional change—to resign but be reinstated with full entitlements should they not be successful? Isn't that an easier, cleaner way if all the political parties and all governments agree that we do not want people precluded from running?

Mr Smith—The Victorian model is a particular example which has been floated in a number of committees previously. It has a deeming provision. My understanding is that those particular options are restricted in their applicability. The High Court in the Cleary case made two particular points which have a bearing on those particular procedures and those particular options. They are, first, that a candidate needs to be qualified at the point of nomination.

Mr MELHAM—I accept that.

Mr Smith—Secondly, that the taking of leave and that sort of thing does not remove the office of profit under the Crown restrictions.

Mr MELHAM—I accept that. I am not disputing what the High Court said—indeed, I actually agree with the High Court. I am saying that, as an alternative to a constitutional change, why couldn't all parliaments—federal, state and territory—bring in legislation that protects people and allows them to resign prior to the nomination to be able to participate fully in the election, and then gives them the guarantee of a restoration of full entitlements should they not be successful? What I am basically doing is putting up an alternative that we all agree with that protects candidates but does away with the need for constitutional change.

Mr Crosby—Obviously constitutional change is something that is—

Mr MELHAM—Difficult.

Mr Crosby—It is difficult, and you look at it carefully. I think our view would also be that, because of the fact that over time interpretations have changed, clarifications have varied and particular activities, occupations and so forth have been subject to, if you like, different interpretations as to whether they are officers of profit under the Crown, there could well be a case where, at a subsequent stage, some activity—not employment as a teacher or being in the armed services, but some other activity—may be judged to be an office of profit under the Crown although it is not apparently so.

Mr MELHAM—I accept that.

Mr Crosby—Therefore, we think that it is better in terms of a sort of ultimate conclusion to this issue to make the change.

Mr MELHAM—But isn't that why legislation will be the great protector? If it was a government employee and if there was any doubt, you could utilise the provisions of Commonwealth and state legislation to tender a resignation so that you were not in the grey area. You then have the protection of the legislation in terms of reinstatement. Doesn't that overcome the problem?

Mr Crosby—That may overcome the case in relation to government employees, but if there are other issues of uncertainty as to whether a position, such as in local government, is an office of profit under the Crown, then surely the most conclusive way, in our view, is to settle it once and for all through constitutional amendment.

Mr MELHAM—I do not disagree; it is just a question of the nature of the chances of success of the constitutional change. That is all that worries me.

Mr Crosby—I think generally the community would be supportive of this issue, but you never know until you try it.

CHAIR—On that point of the constitutional change, as I understand the suggestion you are making it is that section 44(iv) be amended by removing the words 'being chosen or' so that it reads 'shall be incapable of sitting as a senator or a member of the House of Representatives'. Is that the proposition?

Mr Smith—That is right. What we would do is that the sentence beginning 'shall be incapable' in section 44(iv) be amended to read 'shall be incapable of sitting as a senator or a member of the House of Representatives'. So you would take out the words 'or of being chosen'.

CHAIR—My question about that is: have you addressed the potential difficulty with that, that a person could be chosen and not subject to disqualification but not capable of sitting, and therefore could a situation arise that a person who was chosen whilst subject to the disqualification against sitting is then elected as the member, and then you have got a member who has been duly elected but cannot sit. Let me go

one step further, and suggest that the person then dug his or her heels in and said, 'Well, I'm not resigning.'

Mr MELHAM—What is an example? Have you got an example?

CHAIR—No, I have not got an example. I am just trying to tease out what seems to me a difficulty of simply removing those words without adding more.

Mr Smith—Under this option, a successful candidate could not sit in the parliament until he had met all of the criteria. So he or she would have to resign any position of office of profit under the Crown and then sit in the parliament. You could not then sit in the parliament and then not resign your office of profit. Before you could actually sit in the parliament—and by sitting in the parliament, the point by which someone actually becomes remunerated and I think the—

CHAIR—Sworn in.

Mr Smith—Exactly. There is a particular section in the constitution that would cover that.

Mr MELHAM—But they are actually remunerated from the date.

Mr BARRESI—No, it is different. Sworn in and remunerated are two different dates. It could be months apart.

Mr Smith—That particular point could be easily ascertained. But you would not be able to reach that point until you had actually met the criteria. So you would still have to resign any positions that you have.

Mr MELHAM—And if you do not resign those positions, then after a period of time you can be disqualified from sitting, through other sections. I actually favour the time that the High Court has picked, being the closure of nominations, on the basis that you might be unopposed.

Mr Smith—Exactly. I think that is the most important justification, that at the point of nomination a candidate could be elected if he does not have any competition. If there are no other candidates, the candidate becomes successful at the point of nomination. So that point of application of the qualification requirements is quite proper, in our opinion.

Mr HATTON—I suggest there is a further problem in terms of remuneration at this present point in time because a member is paid on election—as of election day. So, if there was a period of time following that, the person then had to resign from the office of profit or clear up the citizenship situation. You would then have to have a determination as to when that person should be paid from: as at present, the day the person was elected or an ex post facto basis, after they had cleared up the relevant situation. That is another factor that would have to be taken into account.

Mr Smith—But is that the same as someone sitting in parliament?

Mr HATTON—It is a question of being elected. Once you are elected to the parliament, they pay

you from the election day. So, if it takes a week or a month for a person to regularise their situation, what would have to be taken into account then is the fact that there is that pay period and there would have to be an adjustment for that as to whether that should not be taken into account because the person was not eligible at that particular time.

Mr Smith—And under our particular proposal, that would be possible. They would have that time up until the point where they actually sat in the parliament.

Mr HATTON—But you need a consequential amendment of the legislation to indicate that a person in that position would only be paid from that point in time and not, as it is now, from election on the day.

Mr Crosby—Or if they have to repay.

Mr HATTON—Yes.

Mrs ELIZABETH GRACE—I have a bit of a problem with that because, on our own election, we were elected in March, but we did not actually get sworn in until 30 April or something like that, and yet we were operating electorate offices and working as parliamentarians for that period of six or eight weeks. If you are looking at not being eligible until then because of section 44, that makes it a bit awkward, does it not?

Mr Crosby—I think payment is an administrative arrangement which you can come to an arrangement about, as distinct from the integrity of the issue itself.

Mrs ELIZABETH GRACE—That is what I mean. Where is the point? Is the point at election, at the declaration of the poll, or at being sworn in in parliament? Each of those varies, depending on what happens in each electorate and when parliament is recalled. In Michael's case, it was only a matter of a few days, was it not?

Mr HATTON—Yes. I was elected on the Saturday and I was sworn in on the Wednesday.

Mrs ELIZABETH GRACE—They are the variations that, in section 44 under your suggestions, would have to be considered.

Mr Smith—I would envisage that a well-organised candidate and a well-organised political party would ensure that their candidates, even if they were not successful, were not going to have these disqualification points brought against them at such a late point in the election process.

Mrs ELIZABETH GRACE—Then you have the Kelly case coming up in this parliament.

Mr Smith—I think building on from these particular points that we make in our submission, the strong point is that there does need to be a greater emphasis given to communicating not only that qualification criteria exist, but also what these actually mean in terms that candidates and political parties and political administrators can understand.

When you have a look at the candidate handbook, when it details these particular points and when you look at the candidate check list, they are very wanting. They are very difficult to understand, and party administrators have a responsibility to communicate that and vet candidates in their normal preselection procedures. We do not have a problem in doing that and encouraging other political parties to do that.

But for candidates who do not belong to political parties there needs to be a greater effort to actually communicate what the application of these particular criteria means for them. With regard to the nomination form, there is a capacity for the AEC or political parties to identify where they may run into problems.

When we go back to the foreign allegiance difficulty, if you were to identify the citizenship or nationality of a candidate's parents, you would have a number of signals available to you to forewarn you of where there may be difficulties and, similarly, with regard to office of profit under the Crown, when you start to inquire about the professional background of a particular candidate. So these arrangements are really worst case, if candidates actually get through the net, so to speak.

Mr Crosby—Whilst one can understand in some respects a reluctance on the part of the Australian Electoral Commission to lead with their chin by defining what may be an acceptable or unacceptable practice or what have you, I think it is fair to say that there has been quite a frustration on the part of a number of candidates—and certainly on the part of political parties—at the reluctance of the AEC to be more helpful in this regard.

One can understand that they do not want to leave themselves open to legal or other challenges subsequently, but there does seem to be a reluctance on the part of the AEC to give advice—and I think it is fair and reasonable for them to give it—in relation to this sort of issue, but not just this sort of issue, but in relation to other matters about the other provisions of the electoral act.

We have often found when we have gone to the AEC to seek their assistance, in trying to establish the applicability of the provision of the electoral act to some activity that may be going on in the course of an election, that they say, 'We can't give you advice on that. You need to get legal advice and it is a matter for interpretation before the courts.'

We would argue in the context of these particular issues that, yes, that ultimately may be true, but on a no obligation basis it is fair and reasonable to expect that the AEC can assist candidates and assist registered political parties to better understand the likely implications of particular activities or qualifications within the context of both the constitution and the electoral act.

Mr Smith—I think that the Cleary case and others have given the AEC a greater opportunity to define these particular issues without necessarily compromising their position, and I think it would be relatively easy for the AEC, in light of these recent cases, to set out more clearly and more definitively what may be required, but including a necessary disclaimer which says that the candidates may need to further seek legal advice if, as a result of these procedures and this evidence, they think that they may be in a particularly difficult situation, or a unique situation.

Mr BARRESI—I would like to go back to section 44(i) for a brief moment. You have suggested that

you are against the repeal of section 44(i) for various reasons. You have also outlined what you believe are the reasonable steps, and on face value they certainly appear reasonable. I, however, have a problem accepting that the High Court judgment, in light of recent High Court judgments, is a definitive statement on what 'reasonable steps' are. Surely it is far better for us to make amendments to the constitution to take out the doubt that there may be in years to come. That is the first one. Secondly, would it not be far better as well to have it clearly defined what actually is meant by 'unilateral action' versus 'reasonable steps'? I am not convinced that what you have got here could not be challenged, or what you are suggesting could not be challenged in years to come.

Mr Crosby—In terms of any decision of the High Court, the most recent decision is the precedent on which anything is based, so we have developed our submission in light of the precedent they have established. We do not believe it is appropriate to amend the constitution to start specifying 'reasonable steps' and so forth; we believe that that is better covered in other ways. We think that the constitution should deal with matters of principle and the principle is that you should not owe allegiance to another power, and the implementation of that should be dealt with in other ways.

CHAIR—My difficulty, Lynton, with the proposed 'reasonable steps' that you set out is that surely the objective here is for clarity and certainty; that is, if you are a candidate or a political party fielding candidates you want to know clearly what is required, and that if you do what is set out there is a high degree of certainty that will not bring you to a position where you have offended the provisions of the constitution.

When we follow your reasonable steps the difficulty is that, unless you know the vagaries of the country of origin of the person concerned, then you may or may not have taken reasonable steps. I am wondering whether what we ought to be looking for is a set of steps that would be required of any candidate to move through and tick off, if you like, so that if you have done that you are certain it does not matter which country you have come from—that is, whether your country of origin is a country which has procedures for the renunciation of citizenship or not; whether it is a country when you write to the ambassador or some other similarly placed official replies to you or not, et cetera. If you have done those two, three or four things then you will have satisfied the provisions. I suppose I am looking for some more—

Mr Crosby—That is a simplistically attractive proposition which initially one would support, I think. However, is it reasonable to take an action which you know, because of the law of another country, will not render your allegiance to that other country invalid or eliminate it? The fact is, your allegiance to a country comes from the country to which that allegiance is attached, not from the new country in which you reside. That is, it is not Australia's decision, it is the decision of the country of origin.

Therefore, a reasonable step, in our view, has to be a step that takes account of the laws and practices of that country of origin. Regrettably, they are not consistent from nation to nation. Therefore, different steps apply. That is the fact of the matter. I do not think it is beyond the wit of the Electoral Commissioner or anyone else to establish what are the accepted practices of the range of countries from where people come to settle in Australia and to make those clear.

CHAIR—Despite what the High Court said, ultimately if the other country does not provide for

renunciation of citizenship, or does not cooperate in the process, a unilateral action is sufficient.

Mr Smith—That is right, only where a country does not have a particular renunciation procedure. I was surprised to learn that the New Zealand government does have a renunciation procedure. The difficulty at the moment is that a candidate cannot go to a specific reference point, speak to someone about his national origins or background and then they can readily say to him, 'These are the procedures.' What we would suggest is that the AEC, as a first point of reference, should have available to it details about the renunciation procedures, if they exist, about the great majority of countries where Australians can expect to have dual allegiance.

Just going back to the particular point with the proposed steps that we make in our submission, they are proposed steps in the context of the particular laws of the foreign country. For example, you could easily, and we would encourage you looking at those particular points, build into them the particular requirements of particular countries. It goes back to the question, as Lynton pointed out in his opening remarks, that it really does depend on the law of renunciation as it applies to a foreign country. That point, I think, would be relatively unknown to many candidates and certainly many political operatives.

CHAIR—Your proposal is that there be some administrative guidelines, if you like, developed by the AEC along the lines that you have here and that in addition to that they should have available, either in a published form or on file, the latest information so far as they are aware of renunciation procedures for every country it is possible to obtain that information from.

Mr Smith—Yes, if that information exists, and I do not think that that compromises the role of the AEC at any point.

Mr Crosby—Nor is it a difficult task, you start with Afghanistan and go through to Zaire. You just work your way through the list.

CHAIR—Are you suggesting that if one went to the AEC and obtained the information that they have and followed the steps that relate to that information that that then ought to be sufficient to satisfy the requirement for reasonable steps?

Mr Crosby—Ultimately, anything can be tested in the High Court, but we believe that as a matter of assistance and to minimise to the greatest possible extent, confusion, and to maximise the opportunity to get it right, as I say, on a no obligations basis, the AEC should be in a position to prepare and provide that information.

Mr BARRESI—I have one last one on section 44(i). With the office of profit, you suggest a timeframe from the sitting. Do you have a view about when the reasonable steps renunciation should take place in terms of the latest possible date? I do not see that in your submission. Is there a similar sort of view about it taking place at least prior to sitting?

Mr Smith—The renunciation requirement needs to be met by the point of nomination. That is very clear.

CHAIR—Where a person does not hold a foreign citizenship but has some entitlement to rights or privileges in another country—for example, someone who is born to a parent who was born in the UK and who, therefore, may have certain privileges or entitlements so far as the UK is concerned—are there any problems in section 44 that you have come across in relation to people in those circumstances?

Mr Smith—Not that I am particularly conscious of or aware of.

CHAIR—In relation to section 44(iv), do you have any comments about senators-elect in relation to them holding an office of profit?

Mr Smith—I think that comes back to the earlier comments the committee was discussing in relation to the point at which the law should apply. We would hold that it should apply once they actually sit in parliament. So, under our proposed amendment, senators-elect would not have a problem until they sat in the Senate.

Mr Crosby—To pick up Mrs Grace's point, the fact is that candidates for the Senate frequently get elected many months before they actually sit in the Senate and there may not be a lot of people in the world who actually want to employ someone who they know is going to nick off and go to parliament in a short period of time. Therefore, the very problem that you talk about in terms of income and so forth is obviated if people who subsequently sit in the Senate have the opportunity for employment in this way.

CHAIR—On the other hand it might be attractive, in some circumstances, to employ a person who is going to be a senator in six months time.

Mr Crosby—It may be. It is a noble house of which to be a member.

Mr HATTON—Would you think it would be useful, given the problems that I think all political parties have had in talking to the Electoral Commission, to actually get some assistance from either the Attorney-General or the Solicitor-General and to have one of them liaise with the Electoral Commission in regard to these matters? My guess is that the commission, being very administratively bent, would be somewhat backward in making these determinations, as past experience has proven, where you have all the technicalities of the High Court rulings and so on. What do you think?

Mr Crosby—I think that all the relevant agencies should be consulted and included in the process. Obviously that, in my view, should include the Attorney-General and other such law officers, as appropriate or available.

Mr Smith—There has been a reluctance on the part of the AEC to do that. I think that is hinted at in one of the points they make in the summary of their submission to this committee. But it is certainly something that needs to be encouraged.

Mr HATTON—It may also require us in the parliament to revisit the electoral act and to bring those sources together in order to make it easier for the AEC to be in a solid position to assist people.

CHAIR—Thank you both very much for your submission and for coming along this afternoon and discussing it with us.

[4.50 p.m.]

MURRAY, Senator Andrew, Australian Democrats, 10-12 Brisbane Avenue, Barton, Australian Capital Territory 2600

CHAIR—Thank you for attending the hearing today. 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 or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission of 7 March 1997. Would you like to make some comments in relation to it?

Senator Murray—I should first of all qualify my evidence accordingly. Some of my colleagues would be surprised that a senator is willing to appear before you.

CHAIR—We are very grateful that you are.

Senator Murray—I do not hold to that particular kind of protocol but, naturally, I reserve the rights and respect accorded to my House here, and I do not bow to your committee. I see you as equals in this matter and therefore my evidence should be reflected in that light.

I appreciate your calling me to speak to you. I appreciate the opportunity of expressing our views on this matter. You should be aware that the Australian Democrats have sought to alter section 44(iv) of the Commonwealth constitution through the introduction of constitutional alteration bills. We have done that three times.

For the purposes of the *Hansard*, I will spell out the bills we have tried. We tried with the Constitutional Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1985. We tried again with the Constitutional Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1989. And we tried a third time with Constitutional Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1992. Mr Andrews, you are one of those who has managed to get a private member's bill through, so perhaps you will help us with the technique in future. There we are with our history on this matter.

CHAIR—Were those three bills substantially the same bill?

Senator Murray—Unfortunately, I only brought with me the latest bill, but I think they are essentially the same. If you would like to have a look at it whilst I am away, you may. My apologies, but there is division in the Senate—I will be back as soon as I can.

CHAIR—We will adjourn the hearing until Senator Murray returns from the division.

Short adjournment

Senator Murray—I should indicate in what capacity I speak. I hold no official status with the

Australian Democrats, apart from my parliamentarian status. But I do hold the portfolio of electoral matters, which is obviously why I should speak to you for us.

I think we should talk about section 44 in the sense that it deals with disqualification—that is, that it prescribes that certain persons or classes of persons shall be incapable of being chosen or of sitting as a member of parliament. It is our view that the time has come for this clause to be changed. It has bitten the Labor Party, it has bitten the Liberal Party, it has bitten every other party, in the sense of restraints, and it really is time we got on with it.

The requirement that officers of the Crown resign from employment before they can nominate as a candidate for election—and the Sykes v. Cleary case helped there—means that it disadvantages Australians who cannot afford to give up income for the period of the election. The provision disadvantages potential candidates and is discriminatory towards some 20 per cent of the work force who are denied the right to stand for election without incurring significant financial penalty.

The two principles which must be upheld, in our view, are to ensure that a member or senator is not simultaneously a member of the parliament and a Commonwealth public servant, and in particular is not in receipt of two salaries; and, secondly, to ensure that Commonwealth public servants are not effectively discouraged from standing for parliament. I will outline for you the fact that we believe it affects about 20 per cent of the population. Our own indicative figures are that it affects about 30 per cent of our members. We are weighted, if you like, in membership towards what we could call middle-class, tertiary educated, public sector persons. For a small party like ours it is particularly onerous and disadvantageous in terms of getting the maximum candidates out of the membership we have.

The Democrats believe that the secondary recommendation of the Constitutional Commission, under the heading 'Employment by the Crown', upholds the two principles I outlined earlier. The recommendation, at paragraph 4.838, states:

> . . . a person in such a position who subsequently becomes a member of the Parliament would be deemed to have ceased to be so employed or to hold that office on the day immediately before becoming a member of the Parliament and so would be qualified to become a member.

This amendment, in our view, would avoid the difficulties that currently exist under the provisions in section 44 of the constitution.

I have said to you that it is particularly disadvantageous for the Democrats. I should also indicate to you—and you might be aware of this if you follow our party—that a substantial proportion of Democrats parliamentarians have indeed come from the public sector and a number of them have had to make financial sacrifices to take the risk of standing. I do not know how many of you are in safe seats, but you know that there is no such thing as a safe seat for the Democrats and therefore Democrats are always taking a risk when they stand. We think Australians should have the right to stand for election without incurring significant financial penalty. We think the recent example of Miss Kelly, and certainly the earlier example of people such as Mr Cleary, evidences the silly nature of these constitutional provisions.

I dipped into two of our nearby states to see what happened there. Quite conservatively, our office in Queensland advised me that 10 people at the last elections did not stand at all because of the onerous requirements set out in section 44 of the constitution. There are 27 seats in Queensland. So 10 potentially for 27 seats is an awful lot. Of those who did stand, three had to endure the circumstances of resigning their position as public servants. In this employment climate, that is a high risk to take when you are taking the high risk of trying to become a parliamentarian. In New South Wales, according to campaign managers there, on average six to eight potential candidates at each federal election do not stand for nomination once they are made aware of the section 44 provisions. So, from our point of view, it just lessens our quality pool and the breadth of our ability to cover all seats.

ACTING CHAIR (Mr Melham)—Couldn't that be overcome, Senator, by uniform legislation of the Commonwealth, state and territory parliaments that guarantees people who hold an office of profit the right to be re-employed without penalty should they be unsuccessful?

Senator Murray—There are many ways of skinning the cat. We certainly would not hang our hat on any one way of doing it, providing that the effect is that people can genuinely and without fear stand for parliament and get back their jobs.

Mr RANDALL—Senator, from my personal experience, having run as a state candidate in Western Australia, all I had to do was to take leave. That could be a sensible option.

ACTING CHAIR—But you cannot take leave under the current Commonwealth constitution.

Mr RANDALL—No, but I am saying that that could be an option for the Commonwealth, given that it is done in the states.

Senator Murray—The difficulty for our people is that, even when they resign, they end up with a loss of income.

ACTING CHAIR—Isn't that the problem, though, Senator? Are you saying that they should be allowed to take income right up until the day? They would have to take leave anyway, so there is a loss of income because they would have to be on leave without pay, at best, even if there were a change to the constitution. The very fact that they are prepared to stand—

Senator Murray—Our view is that the person in such a position who subsequently becomes a member of parliament would be deemed to have ceased to be so employed or to hold that office on the day immediately before becoming a member of parliament and so would be qualified to become a member.

ACTING CHAIR—I accept the suggestion, but what I am saying is that if they are public servants, under that suggestion they do not even have to campaign. They could continue to be on the payroll as public servants. Their brochures could be handed out by others. They could go to work nine to five, or whatever, and campaign outside hours and still be eligible for election. Does not that create a problem?

Senator Murray—No. I think for that you have to put yourself into the shoes of small parties. Minor

parties of whatever kind—from the right and the left spectrum—do not have professional politicians. They do not have politicians in waiting. What they have are members who are citizens, who are ordinary working employees. When an election comes around, they become part-time politicians. In that sense, we do not have a cadre of professionally trained, ready people. Our people come directly out of the community. To answer your question: it is therefore frequently a fact that, regardless of whether people work for a public sector organisation or not, when they work for a private sector organisation, they do their job from eight to five, and from five to 10 they do the politician's job of doorknocking and handing out leaflets. In other words, they do exactly what you are suggesting would happen with a public sector person. They do their job and, after hours and on the weekends, they campaign.

ACTING CHAIR—I would have thought that this could be attractive not only to the Democrats, but to the major parties, as well, because it would allow you to get people to run in marginal seats and not-so-safe seats. You could run quality candidates which would obviously add to your campaign. Previously, people would not be prepared, from a professional point of view, to place their jobs in jeopardy. What I am worried about is: does the principle, for instance, of continuing to take salary during an election period under your proposal not conflict with what we regard as independent public service?

Senator Murray—I do not think so because the principle of Australian political life and Australian democracy is that it does extend and should extend to the lowest and poorest stratum in our society. There is nothing which stops a gravedigger standing for parliament. But if that person is in such a situation, he needs his daily crust and cannot give up his $400 or $500 a week. I think that there is no principle of worth which attaches to that view. I cannot talk for the entire Australian Democrat experience but I can talk for the Western Australian Democrat experience. There we had 14 lower house seats, as you know, Mr Randall, and we put up three Senate candidates. So we had 17 federal candidates at the last election which is the complete ticket. Of those 17, only five campaigned full time; the rest had to work. That is a fact. That is what goes on now. We are saying that if that is the principle which applies and those people who work now are largely private sector, let that same principle extend across to the public sector.

ACTING CHAIR—Have you got a further submission you want to make?

Senator Murray—I think I have made the major points to you as to how it affects minor parties and I am happy to take questions.

Mr RANDALL—Can I follow up in a similar vein? Having been a successful and an unsuccessful candidate where I have not been able to work, I would have thought that the incentives to run as a candidate might have been sufficient to enable someone to forgo some sort of income in the interim.

Senator Murray—Yes, it may. But, again, you must have a look at the motivation and the nature of minor parties. Minor parties see themselves as expressing a proportionate view. They are well aware that they are not going to be in the role of assuming the mantle of a choice between the economic managers of this government.

Mr RANDALL—That is why we have a Senate.

Senator Murray—Exactly. But we still run in the lower House because we believe that we are expressing a point of view which is not expressed by any of the major parties. Incidentally, that goes for the National Party, the Democrats, the Greens and whatever small parties you want to mention. When that happens, our candidates know that they will not achieve much more than somewhere between six and 15 per cent depending upon the constituency. There are places in Australia where we might hit 25 to 30 per cent, but we do not expect, by and large, to win lower House seats. We have a chance in, maybe, a handful of the 148.

That being the case, where they are expressing a democratic viewpoint those people, I think, contribute to the process of it not being a bipartisan system, but it being a multi-party system where the major parties are reacting to the initiatives of groups which do not necessarily accord with their policies. I think—and I would think that naturally—that that contributes to the quality of our democracy. As you know from my background, I have experience in a number of countries and I believe that the quality of this democracy is something to be valued. What I would like to see is a change which contributes even more to that quality.

Mrs ELIZABETH GRACE—The previous witnesses brought up the fact that they thought the Australian Electoral Commission should pay more attention to explaining to candidates, or possible candidates, the effect of section 44(i) and 44(iv) on them as individuals. They feel that the candidate's booklet that is put out does not give sufficient information. Have you got an opinion on that? Have you seen that? Is there anything you would like to comment about?

Mr Murray—It is true that for candidates as a whole, there is not an easy access, easy to read, 'these are the main pitfalls you have to look out for' kind of document. They have got that wonderfully prepared book, but it does not have in red lights the most important things you should or should not do. Of course, it does not just relate to this issue, it relates to things such as how you can behave outside a polling booth and what kind of material you can hand out, and all that sort of thing. It is always helpful if the dangerous things are brought to the fore. So I would suggest as a general principle, that it is a good idea, and not just for this issue.

Mrs ELIZABETH GRACE—And, therefore, perhaps we should look at revamping that candidate's book, or getting the AEC to have a look at revamping that book.

Mr Murray—It could be a kind of executive summary of dos and don'ts. And, incidentally, as an aside, I think that it would be good for members and senators in dealing with such matters as parliamentary privilege, behaviour, conventions, how you fill in your travel allowance if you are a Queenslander—stuff like that.

ACTING CHAIR—When does the onus shift to the candidate? The Electoral Commission is not there to give people legal advice; it is there, basically, to facilitate elections. Surely, there has got to be an onus on the political parties and the candidates?

Mr Murray—Absolutely. But then you are assuming a level of expertise and professionalism across the full range of parties that exist. There is no doubt that the Labor Party and the Liberal Party, and the

National Party to an extent, have full-time staff, full-time officers and full-time people to give that sort of advice. Minor parties do not have those sorts of resources and professional abilities. So it very much depends upon the particular skills of the party organisation and the corporate memory that exists within that party in any respect. Whilst it is their job to be informed, if we already have an extremely professional outfit—and I think that the AEC is—it would a good idea if we can encourage the AEC to just make it that much smoother and that much more self evident and better. I will just add one thing, too. I was advised that since 1911, 494 minor parties have been created in this country. They are not going to be the repositories of excellence or of professionalism. It is impossible. They pop up for single issues or for particular campaigns and themes and they do need assistance in the process of democratic participation.

ACTING CHAIR—I just worried about the reliance on the Electoral Commission or on the Attorney-General providing this advice when you have still got parts of it evolving. Everyone blame them, saying, 'This is the advice we received,' if it happens to be wrong. I do not want to bring Wik into it at the moment, but you have all these experts running around saying, 'Pastoral leases extinguished native title completely.' And then you had another view and people went off and now they are blaming the previous government for giving all these assurances.

Mr Murray—You make two good points. Firstly, you are ultimately responsible for your own destiny, but it is the job of government to make that an easy relationship. Secondly, the constitutional nature of these provisions is such that they are uncertain. The purpose of our submission before you is to make them certain, to make section 44 amended or changed in such a way that this problem, which has bitten your party and has bitten the Liberal Party and has bitten our party, goes away.

Mr HATTON—I just want to follow up on the points made by Mrs Grace and Mr Melham in relation to the Electoral Commission and the Democrats. In your earlier evidence you indicated that across the states the Democrats candidates had selected themselves out based on a knowledge that they might not be eligible under either the citizenship provisions or under the office of profit provisions. Has the Democrats as a party relied upon information from the Electoral Commission or has the party itself got together guidelines for their candidates to assist them with that assessment? It is fairly obvious that where you get eight, six or 10 candidates choosing not to run, the party would seem to be playing a fairly strong part in that, even if you are relatively under-resourced, and you place a fairly high level on people being very aware of that.

Senator Murray—Both is the answer to your question. As you know, you only receive the AEC booklet once you have actually nominated and put your name down—you do not get it in advance. So the party provides a preset selection criteria, if you like, and advises candidates accordingly. Once again, I refer you to the nature of small parties. If your Australian-wide organisation and management is not equivalent and of the same standard in every division, you can have a differing application. I am sure that is so for the major parties as well, not every division is as good as another, not every branch is as good as another. But it is reinforced a little more for the minor parties because you are very much dependent upon a few people whereas you have a wider spread of management.

Mr HATTON—And it is a simpler situation because it is, in the main, the public office provisions and the fact that people would have to resign their jobs.

Senator Murray—That is right.

Mr HATTON—That is the main motivator in that regard.

Senator Murray—And to repeat, we say 20 per cent of the employed population, by and large, is in that category. For us, it would be anywhere up to 30 per cent. It matters more to us.

CHAIR—I do not think there are any more questions, Senator. Thank you very much for your submission and also for participating in the discussion this afternoon.

Senator Murray—I appreciate the opportunity of being on this side of the table. My warm wishes to you and your House.

[5.28 p.m.]

WILLIAMS, Mr George John, Fellow, Research School of Social Sciences, Australian National University, Canberra, Australian Capital Territory 0200

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are legal proceeding of the parliament and warrant the same respect as the 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 dated 24 February 1997. Are there opening or general remarks you would like to make in relation to it?

Mr Williams—In my view, section 44 is anachronistic in that at the time it was drafted it met specified needs of the drafters of the constitution. It met the needs as the drafters of the constitution saw them in the 1890s. At that time, Australians had a very different concept of what they saw as being important in citizenship. It seems to me that that has changed quite significantly to the present day.

That itself is quite evident from the wording of section 44, including the reference to the Queen's ministers of state and the Queen's navy or army. By that I am referring, of course, not to the Australian army or navy but to the British army or navy. That is one example. However, it is one thing for section 44, in its language, to be anachronistic. In my view, it is another when in operation it works to the detriment of Australian democracy. In the provisions we are focusing on, it does that in several ways.

As to section 44(i), dealing with allegiance to a foreign power, I think a central problem with that provision is that its scope is most unclear. As a result of the High Court's decision in Sykes v. Cleary, it is not clear how that provision applies to many people who might be candidates for parliament, primarily because the interpretation reached by the High Court is not immediately obvious from the reading of the provision and also because the interpretation reached by the High Court requires a candidate to satisfy the demands of the High Court under the law of the foreign country, if that person holds dual citizenship.

So we are looking at renouncing allegiance under, say, the law of Greece or the law of Switzerland, not necessarily under the law of Australia. That places quite a difficult impediment in some cases upon potential candidates. It also means that in advising candidates, you must advise that person with regard to the law of the other country and not necessarily Australia. That makes it quite difficult to set down general rules or general guidelines for candidates, and it makes it unduly complex.

As to section 44(iv), that also has not operated well. Again, it has come primarily out of the High Court's decision in Sykes v. Cleary. In my view, one of the central problems is that the words being chosen that operate upon section 44(iv) include the nomination process itself, meaning that if you are, for example, a public servant or a full-time member of the army, you must resign your position prior to nominating, at which point you may not have any firm idea as to your chances of election. I think that places much too high a burden on candidates from those areas. Indeed, that is the sort of thing that this committee should look at if it would seek to amend that provision.

CHAIR—Can we take section 44(i) first. In relation to that, are you suggesting that any provisions

relating to renunciation of citizenship should have been more appropriately determined by the High Court to relate to Australian law rather than the law of the country of origin of the person in particular?

Mr Williams—No, I am not suggesting that the High Court decision was wrong. I am suggesting that it is probably quite a natural inference from the words there. In my view that means the words themselves perhaps should be amended to more clearly reflect the policy objectives of a provision like that—that is that, under Australian law, a person should have a clear allegiance to Australia alone. If they have done all they can under Australian law, perhaps by example going through a naturalisation ceremony, then that should be sufficient. They should not be forced to also undertake steps under the law of another country, simply because that seems to place too high a burden and no longer be appropriate, given the level of, for example, globalisation and the distance we have moved since the 1890s.

CHAIR—On the underlying issue of dual citizenship, are you saying that a person can hold a dual citizenship but still meet the objectives of primary allegiance to Australia?

Mr Williams—That really comes down to the policy decisions as to what the provisions should stand for. Obviously, as it is drafted, dual citizenship will cause considerable problems.

I have looked at the submissions carefully. The policy basis for the provision stand—that is, that somebody should be a citizen of Australia alone—but, in becoming a citizen of Australia alone, it should not be necessary to undertake all of the extra steps which the High Court has required in Sykes v. Cleary, as long as, for example, somebody went through the procedure of naturalisation and also of perhaps renouncing a foreign citizenship under Australian law.

Perhaps an even better way of meeting it might be, for example, by amending section 44(i) to take into account the wording suggested by Bob Charles MP, where it might be simply a matter on the face of the law of writing to the foreign country renouncing the citizenship. At least that gives you a definite criteria applicable to every country, as opposed to potentially different criteria for each country.

Mr MELHAM—It is only an advisory opinion that the High Court has given. We are really now bound by that, aren't we?

Mr Williams—We are. It is clear that if section 44(i) stays as it is, every candidate who has dual citizenship—and in the evidence it seems there might be some four to five million Australians in that category—must go through the process of renouncing their dual citizenship under the foreign law.

Mr MELHAM—Because it is not just citizenship, it is really allegiance and obedience. Aren't they really the key words in that section?

Mr Williams—Yes, I think that is right, and I am oversimplifying, I think, by just referring to citizenship; that is just the most obvious example. It could be that there are other ways of owing obedience or allegiance that do not cover citizenship. I am not sure what they necessarily will be. That, again, is a case by case question, but it is not just citizenship, it is anything that falls into those words.

Mr MELHAM—Why shouldn't a person be required, if they want to sit in a national parliament, to have that strict allegiance and obedience and adherence to only Australia as a nation?

Mr Williams—Yes, I agree with that, and I agree that that should be expressed in section 44(i). What I would say is that should be more clearly put in section 44(i) and should not require somebody to undertake to do that under foreign law; it should be sufficient that they do so for the purposes of Australian law, because if you do not do that, what they need to do is most unclear and could be prohibitively expensive in terms of the legal advice you need to get from, say, some country as to what you need to do under their law.

Mr MELHAM—But I think in one of the judgments, if it is oppressive or if it is a bit harsh in terms of what you have to do, isn't that something that the court has said you can look at as well?

Mr Williams—Yes, it is, and the court has simply said, 'You need to take reasonable steps.'

Mr MELHAM—Yes.

Mr Williams—But that is really where the problem lies, because they have not told us what steps are needed in every case. The steps will be different in different situations. So what would happen is you would need legal advice in every instance you are dealing with. You would need to look at the foreign law: is it oppressive or is it not. In many of these cases it will be a fine decision as to whether it is oppressive or not, and the only way of testing that would be via a High Court challenge. If the only way you can gain certainty under the constitution is by taking it to the High Court, that is a strong case for redrafting, particularly where we are dealing with such an important democratic provision.

CHAIR—So what you are saying is that there ought to be a process by which a person wishing to stand for parliament can unilaterally renounce a foreign allegiance?

Mr Williams—That would be one way of dealing with it, yes.

Mr MELHAM—But you would have to write that into the constitution now?

Mr Williams—You would, because that would not be sufficient as the constitution currently stands.

CHAIR—That is right.

Mr Williams—So, to get past this problem, we are necessarily looking at a constitutional amendment.

CHAIR—One of the difficulties, it seems to me, in talking about citizenship is that in my recollection the word 'citizen' does not appear in the constitution.

Mr Williams—No, it doesn't, and at the convention debates themselves in the 1890s there was quite a difficult debate over citizenship. One of the reasons it doesn't appear there is because the drafters of the constitution were concerned that in drafting citizenship, firstly, they might bestow certain rights upon Australians that they did not wish to do so; and, secondly, they were concerned that it might include some

migrants to Australia, particularly Chinese migrants, who they wished to enable the states to continue to discriminate against on the basis of employment. They were concerned, for example, that if Chinese migrants were counted as citizens, the states might have to remove legislation which stopped Chinese immigrants from working in the goldfields or factories during the 1890s. So it was really those concerns, quite racist concerns by modern standards, which stopped us having clear definitions of citizenship in the constitution.

CHAIR—Have you attempted a redraft of section 44(i)?

Mr Williams—I have not, and that is because I am unsure of exactly which policy basis the committee wishes to adopt. The basis, for example, suggested by Bob Charles that I referred to a moment ago is the sort of thing that I am looking at, that is, that section 41(i) will clearly state exactly what a candidate needs to do. That might be, firstly, going through a nationalisation ceremony. That would seem an obvious step; you have got to be a citizen in the first place. But being a citizen, of course, is not sufficient in itself because it might be you still have some allegiance there, and it might simply be a matter of, for the purposes of Australian law, writing to the appropriate foreign power renouncing all allegiance, obedience or adherence to that power, including citizenship. That will be the case often in any event under the High Court's ruling, that that is what you would need to do, but at least this gives certainty that if you do that in every case that will be sufficient under the constitution.

CHAIR—The difficulty, it seems to me, from a practical point of view of the High Court's ruling, is that, if you are dealing with the most difficult overseas country in terms of renunciation and citizenship—that is, a country which does not recognise renunciation of citizenship or one in which the administrative procedures, for whatever reason, are so slack that, if you contact them, you do not get a reply to whatever communication you had—in those circumstances, a unilateral declaration of renunciation will suffice because that is the only reasonable step you can take. Whereas, in circumstances in which there are procedures available or you could expect some reply, you have to go much further. There is a twist in that it seems that the easiest step is available for the most difficult case, if I can put it that way?

Mr Williams—No, I do accept that in that this course, even though it has the advantage of being uniform across all foreign jurisdictions, might mean doing less than you otherwise would do for a country such as Switzerland which does have definite procedures to go through. But that is where you get to the fine decision as to what is preferable requiring you to go through those extra steps under foreign law or at least setting down some uniform standard that, in all cases, will suffice. I suppose my view is that the uniform standard is better here because, unless we go that route, we are requiring candidates to investigate the steps required in each country and, in many cases, they may not be clear or may put the candidates to significant cost.

If we are talking about a small percentage of candidates, may be that would be appropriate but, given the figures that we are looking at four to five million Australians with dual citizenship, it would seem to me that it is more appropriate to go with a uniform method, unless we are going to have some quite significant impediment to people with dual citizenship standing for parliament.

Mr RANDALL—Mr Williams, before I ask my question, I am pleased, as an expert witness, to see that you are of my opinion that somebody should certainly denounce their previous citizenship and show

loyalty by being manifestly an Australian to stand for parliament. I am more about section 44(iv) and that is running as a candidate under an office of profit. As I said to the previous witness, as somebody who has had to sacrifice salary doing this myself, I believe that it is some sort of way of showing how determined you are to achieving your goals. What is your opinion upon receiving, in particular, taxpayer funding to run as a candidate? Do you see a problem with that or do you think that should not happen?

Mr Williams—Taxpayer funding to run as a candidate?

Mr RANDALL—In other words, if you are a public servant and you are receiving a salary which is paid by taxpayers—

Mr Williams—While you are campaigning?

Mr RANDALL—There are some opinions that say that is not such a bad thing, given that the last witness, Senator Murray, said that they had such a small party that they did not expect to win and, as a result, they should not lose income. I am saying there could be an argument saying that because the taxpayers are paying your salary that essentially taxpayers are funding you to run for office. Do you have an opinion on that?

Mr Williams—Yes, I do. I think the policy basis again for section 44(iv) is basically a good one, but the wording leaves much to be desired. To focus in on your question, I do not see the same problem that you might with a public servant running for office while they were receiving income from, say, the Commonwealth, as long as they are fulfilling their proper duties. If that person is not fulfilling his or her duties—for example, if they are not at work—then that is obviously inappropriate. But, if they are able to take appropriate leave, either with or without pay and if they have earned that leave via their service over a year, they should be entitled to use it as they want.

Mr RANDALL—Like long service leave, for example?

Mr Williams—Exactly. I think that is entirely appropriate that they should be able to do that. They are making the choice of running for parliament and spending their time doing it that way as opposed to, say, taking a holiday to Fiji. That is up to them. I do not have any problem with that, because, I think, again, it is their entitlement to use their time as they want. The policy basis only kicks in when they are actually elected to parliament, because of problems of corruption and also potential conflicts of interest. That seems to be the thing that should be focused upon. I accept your question but in my view it is not a problem.

Mr MELHAM—Constitutional change is rare.

Mr Williams—Very rare.

Mr MELHAM—Why should not consideration be given to uniform Commonwealth, state and territory legislation basically guaranteeing people the right to be reinstated without loss of rank or seniority should they be unsuccessful? Admittedly there is still the problem with the constitution because if they do not resign they could be later disqualified.

Mr Williams—That is eminently sensible. That would be the appropriate first step because if you look at the figures some eight out of 42 referenda have succeeded. It is notorious that referenda are both expensive and unlikely to succeed without bipartisan support. Even what might be considered quite reasonable changes, such as the ones I am advocating, have seemingly failed in the past. The first step would be to introduce such legislation to work around some of the impediments of the constitution so as to perhaps guarantee somebody leave of absence—effectively to resign and then to be reinstated. That would be the way you would have to do it. You could not give them a leave of absence.

That is really only getting you a small part of the way there. That is ameliorating some of the problems. It is not getting you around the more significant impediment in section 44(i). Also in section 44(iv)—

Mr MELHAM—I recognise the impediments. This is a priority for members or potential members of parliament but there are others in the community who would like to see more fundamental change. It might be something we could pick up if there was going to be an overhaul or a reconsideration of the constitution, but to turn around and to spend the necessary dollars just for a constitutional change along these lines, one would have thought was being a bit indulgent.

Mr Williams—Yes, I would agree. The cost involved in a change such as this would not—if you are going to hold a referendum only on this issue, then you are really weighing it up and in my view that would not be a reasonable step or a reasonable use of taxpayers' money.

Mr MELHAM—I would suggest a policy initiative by all state and territory governments and the Commonwealth government legislating people's rights if they were to resign in accordance with what is required under the constitution, and allowing for reinstatement. That is a simple clean-cut way. As I say, it does not overcome the problems should people not comply and resign after the day of nomination, for instance. That is achievable.

Mr Williams—It is achievable and it is much more achievable than a referendum. If you are looking at it pragmatically it is certainly better than nothing.

Mr MELHAM—Yes. It sends a message.

Mr Williams—As a constitutional lawyer my perspective is that we cannot lose sight of the need for constitutional change. This is simply one small example of where the constitution generally needs change to bring it into the 1990s. It has worked well generally but this is a provision that does not seem to have worked so well and there are many other instances of that—particularly if there was going to be a referendum dealing with the republic at some point. If there were going to be issues flowing from the people's convention, I had in the back of my mind that this is exactly the sort of issue that might also be considered at that time. It is a provision that should have bipartisan support. It is also quite clear that you can retain the important policy bases of both 44(i) and (iv) but re-word them in a way that would work.

Mr MELHAM—There is some suggestion that the Australian Electoral Commission should be a bit more proactive in advising political parties and potential candidates of their rights and obligations under this

section. Have you got a view in relation to that? Or do you think that the onus should squarely and fairly lie with the candidates and the major political parties?

Mr Williams—I think it should be the latter. The onus must ultimately rest upon the candidates themselves and the parties they stand for. That is because the Electoral Commission will not be in a position in many cases to provide any certainty on issues of dual citizenship unless they are going to be funded to do the research necessary for that.

Mr MELHAM—Indeed, they cannot be in a position to provide certainty as to what constitutes an office of profit either, can they?

Mr Williams—No. I saw some suggestions that, for example, offices of profit might be defined by legislation. In my view that is something that simply cannot be done.

Mr MELHAM—Can I give you a couple of examples? I am interested in your views. I just give them as an illustration. If you were a member of the Sydney Cricket Ground Trust, for instance, that is an honorary position. I notice it is a position that Herbert Vere Evatt once held when he was a member of parliament. There was no remuneration. Would that be considered an office of profit?

Mr Williams—I think it is probably unlikely. It seems to fall outside it. If you look at what exactly an office of profit is, it is an honorary position, as I understand it, without remuneration, and they are the sorts of factors the High Court might take into account. Other ones which are getting closer to the borderline are, for example, maybe even executives working at the ABC or other semi-independent statutory authorities—where do they fall? We do not have case law upon that. I think they are much more on the borderline.

If I were asked to advise as a constitutional lawyer, I would find it extremely difficult. I would eventually have to form a view by looking at the historical provisions, but when I have done that in some cases I have not been able to give any degree of certainty in that decision or that advice.

Mr MELHAM—I just throw these examples up to show why it is hazardous for the Australian Electoral Commission to be required to give this definitive advice.

Mr Williams—Exactly.

Mr MELHAM—Another example: if I was a private barrister who held a practising certificate in New South Wales and was briefed by the Legal Aid Commission of New South Wales, which is funded—at the present moment—55 per cent from the Commonwealth and 45 per cent by the state, let us say I did not receive a payment and did it pro bono, would you consider that could fall within an office of profit?

Mr Williams—No, I wouldn't think so, it is not an office. It is not a position in the sense of your perhaps being an employee of a body or a government department. So, no, I would not have thought that would. You really are dealing mainly with the borderline positions of where somebody works for a body created by Commonwealth legislation and you have employment within that organisation, and then you come

to the very difficult analysis of whether that organisation falls under the rubric of the Crown or not.

Mr MELHAM—What about bodies created by state legislation or, indeed, bodies from local government authorities? Labor Party candidates were required to resign all positions where they held positions of mayor or councillors or aldermen because it was felt that could constitute an office of profit under the Crown.

Mr Williams—It could constitute an office of profit. That is another borderline case. I could not tell you which way for sure the High Court would go on that issue, and that is the inherent weakness of this provision. It does not say public servants, which would give some more clarity, it says, 'office of profit under the Crown', and constitutional lawyers are still arguing some 100 years later as to how far the Crown extends. We do not know. We have not had cases on it.

Mr MELHAM—Thank you.

Mr HATTON—I just want to pick up a couple of those things. On the last one that Daryl was dealing with, there is another provision outside 44 that deals with contractual arrangements with the Crown. If you are dealing with a company that has less than 25 shareholders or employees—I cannot remember which—then a person could be ineligible because of that. With the instance that Daryl gave there, if that barrister was incorporated as a company, and there were just one or two people in that company, because the company had less than 25 in it, then they could be knocked out on that ground as well—would that be right?

Mr Williams—You are referring to section 44(v). I will not answer specifically as to where that situation falls because you raise a host of difficult issues, but that is another provision that is equally problematic in its scope, and equally unclear in its scope, given the lack of High Court guidance. We have only had one case of Webster, which Chief Justice Garfield Barwick decided on his own and, therefore, has never gone to the full court. All I can say is that the proposition he put is arguable and, like many of these provisions, we are simply waiting for determinative guidance from the High Court.

After all, when you think about it, Sykes v. Cleary is really the only case we have got that gives us some clear guidance, and we had that some 90 years after Federation.

Mr MELHAM—Even then they gave an advisory opinion on citizenship which some people might have thought was judicial activism.

Mr Williams—They might have even made law, that is right. It was advisory opinion in a sense that they did not strictly need to answer that question, but personally I think they did us a favour by at least giving us some guidance as to what they would decide. I accept that that is what you mean. Also, the point I really want to make is that, even though it might be considered advisory, or obiter to use the technical word, there is no doubt that that really does amount to the position at law, if we are to deal with it again. So at least we have something on paper.

Mr MELHAM—Tell me, have you got a view about nomination or declaration of the poll?

Mr Williams—I think it should be the declaration of the poll, because I think if you look at the policy reasons behind the provision, what we are really looking at is a provision which should preclude people from sitting as members of parliament. That seems to be where the conflict of interest is likely to arise.

It also seems that that is the point at which it would be appropriate to exclude people. It does not seem so appropriate to exclude people from the process of electioneering because you do not have the same corruption problems or potentialities and you do not have the same conflicts of interest as you do when you are actually voting on legislation. And that is what it should be aimed at.

Mr BARRESI—Mr Williams, you ended your submission by saying either that the wording of section 44(i) should be amended or that you should allow persons to stand for parliament where they have gone through an Australian naturalisation ceremony. We just heard some comments about that in terms of the High Court's judgment. How does that sit with the notion that allegiance is determined by the country of origin and not by us, so the fact that you have gone through a naturalisation ceremony would not necessarily qualify you for standing for parliament?

Mr Williams—I accept your question because I think the wording there is a little bit unclear. It does not sit at all with that. As the constitution is currently interpreted, there is no basis upon which you could free somebody from the problems of section 44(i) simply by going through a naturalisation ceremony unless—

Mr BARRESI—That is how you have ended your submission. There is a recommendation.

Mr Williams—That is right and that is why I accept that it is unclear. What I meant to say there is that it should be amended to make its scope clear—that is, that it should read that you have to actually remove allegiance or obedience under the law of the foreign country or it should be amended such that, under Australian law via, for example, a naturalisation ceremony or some unilateral declaration that itself is sufficient, and that is what my submission is meant to mean.

CHAIR—If there was a provision relating to naturalisation ceremonies which had the effect of deeming the removal of allegiance by the process of going through the naturalisation, would that be sufficient?

Mr Williams—Not under the constitution as it is currently interpreted, no. Again, the High Court would say: is that deeming enough under the law of the foreign country? And, in many cases, it will not be. The foreign country will itself require a letter or some process to be gone through in that country.

Mr HATTON—The previous answer in relation to 44(v) indicates that there could potentially be a lot more cases arising out of that than we have already seen arise out of 44(i) or, in particular, 44(iv). That is more so the case now because so much outsourcing has been undertaken. There are a lot of contractual arrangements with small companies with the Commonwealth and the indication we have now is that it can be more. I think 44(v) needs to be looked at pretty carefully as well, given that that is an area that is as yet effectively untested as far as we know, is that correct?

Mr Williams—Pretty well. We have only had one judge decision on that provision, so it is untested and we do not know how far it goes. Yes, section 44, as a whole, is a minefield in terms of what impact it might have upon candidates for office, and section 44(v), if it is interpreted broadly—and we do not know whether the High Court will do that or not—could, in this era of outsourcing, of privatisation and other changes to government catch particularly business people in a situation where they are contracting out of their ability to stand as candidates for office without fully realising that that is the effect. We cannot know whether or how far that will go until the High Court gives us some guidance or until it is amended.

Mr HATTON—I will pick up on the point that I made about the Sydney Cricket Ground Trust. In that situation, there is no remuneration but there is probably a benefit which could be translated. It is not given in money, but you could argue that there was a benefit given in that. So that situation would not be particularly clear.

Mr Williams—No. Again, we are waiting for High Court guidance, and that is one of the problems. I took a narrow definition of what might be meant by 'profit' and I accept that. It is arguable that 'profit' should be interpreted much more broadly and might include any benefit or remuneration, whether financial or otherwise, and might simply include being entitled to have a free seat at the cricket. That might be it. I think what the High Court would do is it would have to draw some line between financial and non-financial benefits. I thought that that example probably fell over the line of something that would not amount to profit, but I can see that it is at least arguable that that might not be the case. With the example of Herbert Vere Evatt, it is the sort of thing that could cause problems.

Mr HATTON—And it is untested, because no-one has tested that before, but it is always possible.

Mr Williams—No, but, as we are seeing in the last decade, it is coming to a position where it is increasingly being tested. As we are seeing with the recent case Sykes v. Cleary, also the case more recently of Free and Kelly, there are unresolved problems here and people are increasingly discovering that the law really means what it says. The High Court is not taking a narrow interpretation of these provisions. If it did, it might be that many of the consequences could be escaped. That has not occurred thus far. It is taking an extremely robust view of who should be excluded. If it continues to do that, provisions like 44(v) could have quite a significant impact.

Mr HATTON—Just a passing comment before I go back to 44(i), and that is that we could have a referendum on this in concurrence with a general election. The question of cost then goes out the window because you have got the general cost and it is not much more to actually put those questions at that time. We have done it before. It has been difficult, but that certainly would resolve that kind of problem.

Section 44(i) runs on the question of the allegiance to a foreign power. I want to tap your historical knowledge in relation to this. Up until 1949, Australians were British subjects. So, up until 1949, they actually owed allegiance to the British government and the British Crown. Therefore, by definition, all of those people who were members of parliament from 1901 to 1949 could have been challenged—probably not successfully—on the basis of owing allegiance to a foreign power. At that time, people who came from all of the countries in the Commonwealth—India, Pakistan, and so on, South Africa and all of those—because they owed, effectively, allegiance to the British Crown, they would not have come into the ambit of this. But post-

independence, for all of those countries, they are now in that. Do you have any comment to make? Am I aiming slightly in the right direction?

Mr Williams—I think it is unlikely to lead to the result you have put, and that is because I do not think, at law, British subjects were considered as coming from a foreign power.

Mr MELHAM—What about the situation now?

Mr Williams—Now it is quite different. I think that, yes, they would be considered to be coming from a foreign power.

Mr MELHAM—Can you just have a look at the oath of allegiance that we as members of the parliament swear. There was a recommendation from a 1988 constitutional commission. We are still swearing allegiance to the King of the United Kingdom of Great Britain and Ireland, or the Queen, as it may be.

Mr Williams—Yes, that is true, though, of course, in constitutional law the Queen, or the Crown more particularly, is considered to have a range of capacities, if you like. I think modern-day interpretation of that would be that in fact you are not swearing allegiance to the Queen of Britain, you are swearing allegiance to the Queen of Australia as she is constituted under the various Australian legislation. I think that would be the correct answer to that question.

But on the question you have put, yes, there has been an evolution here between British subjects being considered effectively Australian subjects for the purposes of this legislation to the point where, via changes such as the Statute of Westminster, which was passed in 1942—it came into force in 1939—and other changes in the international community culminating in the Australia Act in 1986, it is quite clear that Australia is now a separate country. For that reason I think you would get a different result from what you had nine decades ago.

The other point that shows that out is that, if you look at other provisions of the constitution, that permeates the understanding of the constitution, that somehow Australia was inextricably linked to Britain at that time. And you have got provisions such as section 59 which still say that the Queen can annul acts of the Australian parliament. It is also shown in the Australian external affairs power which was worded ‘external affairs’ and was thought not to include relations with the British parliament, perhaps because the British parliament did not fall into that class of foreign countries. It was, again, intimately concerned with the Australian nation.

Mr HATTON—So we have a time-bound document that is the result of the circumstances of the 1890s and gaining federation as a result of an act of British parliament. So they saw it in that way. But technically—maybe not legally but technically—I think you can put the argument that it could have fallen into that if they had wished to pursue it. It might not have succeeded. But there is a discrimination between that situation and a situation for everyone else now, given that times have changed so dramatically—even those people who were previously British subjects in the Commonwealth.

Mr Williams—Yes, I think that is right. Another thing that shows out that distinction and that change

over time which does underlie some of the problems with section 44—particularly those provisions relating to, say, the Queen's navy and army which is obviously inappropriate in such a provision today—is that if you asked an Australian in 1901, and probably up until at least the 1950s, where the power to enact their constitution came from, where in a sense the efficacy of that document came from, the answer would have been, 'Of course it comes from the British parliament. It is an act of the British parliament.' Today, if you asked that same question, the natural answer is that of course the efficacy of the constitution comes from the Australian people themselves. That underlies that shift. It is also evidenced in High Court decisions where the judges now are saying that we do have popular sovereignty in Australia. That is emerging for the first time in the last five years. That is how recent these changes are.

Mr HATTON—In the current situation, with 44(i), what is the renunciation process? Have they spoken about that in relation to Britain?

Mr Williams—What would they have to do in relation to Britain?

Mr HATTON—Yes.

Mr Williams—I do not know. I do not know what the process is under British law, but it would be a matter of looking at the relevant British legislation and checking what process you need to go through under that legislation. That will be exactly the same process you would need to go through with every other country—you would need to check their laws and see what you need to do. That is easy. It is quite easy to do in Britain and the US. It is when you get to some countries whose legal regime is quite different from our own, or that perhaps are having internal problems or maybe a civil war, that you get to the issues of whether this is oppressive to go through. That can only be looked at on a case-by-case basis.

Mr HATTON—Thank you, Mr Williams.

Mr BARRESI—Mike asked a question about outsourcing. In the modern world of joint arrangements between Commonwealth and private enterprises, what is your view about that? Where would we stand in terms of those sorts of arrangements in regard to section 44(iv)?

Mr Williams—I do not think it would be an office of profit under the Crown. While it is arguable—

Mr BARRESI—Would 50 per cent ownership of—

Mr MELHAM—So privatisation is the answer to 44(iv)!

Mr BARRESI—Is it 51 per cent ownership? It is only an opinion. As you say, it has not been tested yet.

Mr Williams—It is not tested and whichever line you drew would be completely arbitrary, of course. That is what you would have to find the High Court to do. The High Court has not answered almost any of these questions arising out of privatisation and it is one of the enduring questions that constitutional lawyers ask, about the scope of Commonwealth power, for example, after the privatisation of Qantas. There are big

problems there. I could give you an opinion, but it would not be worth anything until the High Court gives us guidance, because there are a range of possible answers. All I can say is that it is completely uncertain and that it could go either way. Privatisation could answer some of these issues. If it is 100 per cent owned by private individuals, well of course it is not under the Crown.

Mr MELHAM—But partial privatisation throws up more questions.

Mr Williams—It does. Qantas, for example—is that under the Crown or not? Probably not, because it is basically an independent statutory authority, in some respects anyway, though of course not totally. You would have to look at all the criteria that link it to the government—appointments of boards, whether there is a power of a minister to direct Qantas to undertake a certain activity. I am not saying they are present in that case, but they are the sorts of things you would look at and those are the criteria that would indicate whether the connection between the body and the Crown is strong enough. We do not have any cases to answer that on semi-privatised bodies.

Mr TONY SMITH—I am sorry to have been coming in and out—I have been at debates, and so forth—so if this question has been covered I apologise. Having regard to the history of successful 'no' cases in relation to the amendment of the constitution, can you sum up your minimalist amendment to section 44?

Mr Williams—One pragmatic minimal change would be to delete the words 'of being chosen or' towards the end of section 44. That would be a minimal change that would at least meet some of the problems connected with section 44(iv) that prevent public servants from standing for office unless they resign, although that might be ameliorated by simply passing legislation giving them their position back if they are unsuccessful.

Mr MELHAM—But, if you do that, wouldn't that then allow judges and senior figures to contest elections and not have to resign their position?

Mr Williams—Not necessarily. You could put it in the legislation of, for example, the High Court Act. You could prevent High Court judges standing for election by putting an additional requirement in that legislation. And that in my view would be the appropriate way of meeting that, because in some cases, yes, I would agree they should not even be able to stand, but in most cases they should be able to stand. It is a fairly select group.

Mr MELHAM—So you would maybe top up the Electoral Act, for instance?

Mr Williams—The Electoral Act or the High Court Act or whatever an act that would affect it. You could simply put in a provision in the Electoral Act which said, 'In addition to section 44, these certain persons are incapable of being chosen for parliament' replicating the words that were taken out. That would have the effect of barring them without them having resigned.

Mr MELHAM—But that dovetails in with that minimalist amendment to the constitution that you have just answered on.

Mr Williams—Yes, of course we are dealing with a very rare situation. Apart from H.V. Evatt again in 1940 standing for election, we have not had any other High Court judge—to take that example—actually standing for parliament coming from the judiciary, nor as I understand it has it been prevalent of other judges from any other court.

Mr MELHAM—It is generally the reverse.

Mr Williams—Very much so, yes.

Mr TONY SMITH—Evatt resigned, did he not?

Mr Williams—Yes, he resigned before nominating.

Mr BARRESI—I have a very picky little question. I have been reading section 44 of the constitution. It says here who it does not apply to in terms of the Queen's navy or army. Is this up to date?

Mr Williams—This is the up-to-date version, that is right.

Mr BARRESI—So in Jackie Kelly's case, what happens with the air force? Is there a technicality there, because the air force is not included?

Mr Williams—I think one of the reasons that Jackie Kelly was in problems was because she actually moved from being in the air force after the point of nomination. So she fell into the same category as Cleary, that is, he resigned his position as being on the roll of teachers after he was nominated, but before the poll was declared. If Jackie Kelly had done that before being nominated, she would not have fallen into the problem of the 'being chosen' process, which is what effectively excluded her.

Mr MELHAM—Yes, but forget about that. There was no air force and the air force is not referred to. The reality is that on a quick reading of the constitution, we had a navy and an army who were catered for, but not the old flyers.

Mr Williams—But I do not have any doubt that the flyers would be included if the High Court was to read this today. This question has been raised both in the United States and here.

Mr MELHAM—So you would take it to mean military forces?

Mr Williams—Yes, otherwise we might have a problem when we look at 51(vi) the Commonwealth defence power. If you interpreted that as the words were meant in 1901, the naval and military defence, strictly that might not include an air force. Even though I agree it is less precise than 44, I think in both cases what the High Court would clearly say is, 'What we are really dealing with is the Defence Forces of Australia.'

They have shown some latitude in saying that, because something has been invented since that time, it can fall within an existing definition. That is the reason why the Commonwealth can, for example, regulate

television. Because even though television is not specified, it falls within an existing definition of telegraphic services in that case, so they say it comes to include new things. So it would have included Jackie Kelly for that reason.

Mr HATTON—Can I interpose? I do not think we had a navy until 1908.

Mr Williams—We did not.

CHAIR—In relation to the provision about 'incapable of being chosen or of sitting', what is the position of senators-elect and office of profit?

Mr Williams—I have had some thoughts about that one. This is another instance where I think section 44 on its face suggests that, if you are a senator-elect at that point you are neither being chosen—that process has been gone through—and then again you are neither sitting as a senator at that point. So I do not think that section 44 would seem to cover it, but if you look at section 45 which is the provision which imposes the penalty it says:

If a senator or member of the House of Representatives—
(i) Becomes subject to any of the disabilities. . .

That arguably would extend out the time not just to include them being chosen or the sitting, but cover the time in between as well. If you look at it literally. that would seem to follow naturally and that would be the more likely interpretation if the High Court was to look at it. Otherwise you would have the situation where somebody is chosen, they are a sitting subject, but there is this anomalous period in between. I am not saying I agree with the policy of that, but I think that that is the likely result.

Mr HATTON—Where do we get our out as members of parliament? If you are a minister you have an out in the section just after 44(v). But where do members of the House of Representatives or senators get their out under the constitution?

Mr MELHAM—Because we are paid?

Mr HATTON—And that is not taken to be an office of profit.

Mr MELHAM—The member does not have an out. If you look at section 43, he cannot run for the other house unless he resigns.

Mr HATTON—Yes, I know you cannot do that. So the office of profit thing runs to ministerial salary except for this provision then? It says that it does not apply to office of any of the Queen's ministers of state for the Commonwealth.

Mr Williams—That is directed at another provision of the Constitution—the provision on the executive government, section 64. It says that a minister of state can basically hold office for three months before they are elected. So that is what that would be directed at, and that is the reason it is confusing. It is

dealing with the situation where you have someone who is acting as a minister and who wants to be elected. It is unreasonable under the constitution to force them to stop doing that because the constitution says they can do that. It is only there for that reason. I cannot see any other reason for having it there.

Mr MELHAM—It is also there because if there is a change of government, ministers still hold office after the day of the election. Take someone like Brian Howe, for instance, who did not recontest the election, but who, I would have thought, still held ministerial office subject to the new ministry being sworn in and the new Prime Minister.

Mr Williams—Yes, you could make that argument. It could have a transitional effect. I do not think that that is really what the framers were thinking of.

Mr MELHAM—I am not saying that that is what they were—

Mr Williams—That is right, but I can see it could operate to the benefit of that sort of situation.

Mr HATTON—My point about us as members is that we are paid by DAS, the same as Commonwealth public servants are paid by DAS.

CHAIR—Section 48 covers that:

Until the Parliament otherwise provides, each senator and each member of the House of Representative shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

So that, read in conjunction with section 44, is the exception?

Mr Williams—Otherwise you would have an illogical absurdity whereby every person who is paid as a parliamentarian could be challenged. They cannot sit while they are being paid, I suppose. But section 48 is the provision that clearly overrides—literally, you might take it that way. I can see the argument. But it obviously cannot follow for pragmatic reasons, and section 48 makes it clear in any event.

Mr MELHAM—That is why you cannot receive the allowance and benefit outside that from the Crown, because that is what then renders you incapable of continuing to sit.

Mr Williams—That is right. Section 48 covers your salary as a parliamentarian, but if you are receiving other financial benefits from the Crown, whether that be your pension or whatever, you just cannot do it under the constitution as drafted.

Mr TONY SMITH—You are talking about 45(iii) there are you?

CHAIR—Forty-eight.

Mr TONY SMITH—No, in terms of receiving any other benefits.

Mr Williams—No, I was referring to 44(iv)—if you hold an office of profit under the Crown or any

pension payable during the pleasure of the Crown. But section 45(iii) is, I suppose, related to that.

Mr MELHAM—And so is 44(v).

Mr Williams—Yes, it is a general concern of the constitution. There are a few provisions which deal with that.

Mr MELHAM—Otherwise than as a member?

Mr TONY SMITH—You are not here to interpret the constitution, I suppose, but just looking at 45(iii), does that mean that you, as a member of parliament, cannot take a brief from the Crown to appear in a matter—

Mr Williams—It does seem to state that. It says that if you indirectly take any fee for services rendered, for example, if you received a brief as a barrister from the Commonwealth and rendered a service to the Commonwealth for that fee, it would seem to fall within 45(iii). That is why, for example, if the Attorney-General is going to appear on behalf of the Commonwealth, he or she could not accept a fee for it. They would have to do it as part of their job. That is one of the bases for it: you are paid under section 48 but you should not be receiving extra money from the Commonwealth for other fees that seem under the Constitution to be part of the job.

Mr TONY SMITH—What do you say that the 'indirectly' goes to?

Mr Williams—I think it is probably there to cover agreements whereby, for example, maybe you received money through a trust or a corporate entity. That is the sort of thing it indirectly might cover.

Mr MELHAM—Service pensioners: when do they have to stop receiving their pension?

Mr Williams—The key words are 'incapable of being chosen' and the High Court has told us in Sykes and Cleary that that process starts at nomination.

Mr MELHAM—So, if you are a service pensioner or whatever, it really is at the time of nomination.

Mr Williams—That is, unless you fall within the exception that is put at the end of section 44. Taking that away, if you breach any of (i) to (v) in section 44, you must stop that breach prior to being nominated. If you continue after being nominated, that is a situation you fall into with the recent decision in 1996 flowing from the 1996 election, where the conduct was stopped after nomination but before declaration. That is not good enough.

CHAIR—Coming back to 45(iii), it is common these days for the Commonwealth to provide grants to all sorts of organisations to assist them in their activities. If you were employed by one such organisation and paid for that employment, do you think 45(iii) would capture that person?

Mr Williams—I think it would depend upon whether there are services being rendered to the

Commonwealth. If we are thinking of the same situation, often they are grants which do not require that organisation to provide certain specified services to the Commonwealth. Often they might be, say, to a think-tank of some kind, which is simply set up to undertake their own business and not to provide services. In that case, it does not seem that 45(iii) will apply.

If you, however, grant money to an organisation on the basis that that organisation will, say, train public servants or will undertake some report for the Commonwealth, and a parliamentarian, in providing that report is, say, a consultant, then that would seem, perhaps, to be indirectly receiving that benefit and might be a problem. But the key would be providing the service.

Mr BARRESI—Where does the issue of the workers compensation come into it? Is that office of profit? What happens if you have terminated employment and you still receive some sort of compensation payout?

Mr Williams—I would think it would have to be an extremely broad definition to cover workers compensation because it is not really an office of profit in that instance. There is an argument that it might include it, but it would seem, at least on a very quick view—and that is all it is—that it would fall on the other side of the line. But that is a matter of intuition as much as anything else. It seems to be a little bit too far removed.

Mr BARRESI—I am thinking of, say, military personnel who may have received a payout for an accident that may have occurred, or even a forklift driver in the Commonwealth.

Mr Williams—The constitution does not give us an easy answer to that question. One other point I might make is that a lot of the problems are based on the question: what is an office of profit? Some of the submissions and some other reports seem to be saying, 'Well, let's deal with this issue quite simply. Let's define in legislation what an office of profit is—that it does not include the Sydney Cricket Ground Trust, does not include this, does not include that. Maybe, even, define it so narrowly that it includes almost nobody and therefore you legislate section 44(iv) out of existence.'

In my view, that is something that cannot be done. The High Court will ignore the parliament's definition of what an office of profit is. It will make up its own mind about what that means and, if it thinks the parliament has not legislated for the High Court's own definition, the parliament's legislation will, in fact, be invalid.

That is exactly what comes out of the 1951 decision of the High Court in the Communist Party case, where the parliament had sought to define what the defence needs were of Australia and the High Court said, 'You cannot do that.' The bottom line is that, until amended, the parliament is stuck with this definition. It cannot restrict it, it cannot broaden it, it stands as the High Court sees it. Nothing can be done about it.

Mr HATTON—With 45(iii) but, more particularly, with 44(iv)—this is the one where any senator or member who is sitting now can get the flick if they do anything where there is a direct or indirect pecuniary interest with the public service of the Commonwealth and in 44(v), where it is with an incorporated company of less than 25—there may be a series of arrangements that people are involved with where there are small

incorporated companies in that position, where, through a consultancy or through taking a brief and so on, it could happen that present members—it is not a case of not being chosen, but they are actually ineligible and immediately ineligible and therefore—

Mr Williams—They cannot sit.

Mr HATTON—There is no question they cannot sit; they are out. That would run into 45(iii). Tony has a related question in terms of the medical profession. He might want to put that.

Mr Williams—To answer your question: what section 44(v) is directed at is that if you are a shareholder in an incorporated company consisting of fewer than 25 members, you should be extremely concerned about the activities of that company. If that company has a direct or indirect pecuniary interest in any agreement with the public service, you are invalid. You are excluded from parliament under 44(v). It just happens that that is something that has not been pursued and has not been a political issue, but it is sitting there waiting.

Mr HATTON—It is sitting there waiting.

Mr Williams—Yes. For example, a proprietary company frequently may have fewer than 25 members and if you are not sure of what that company is undertaking and it starts getting involved in governmental business then, yes, there could be a real problem under that provision.

Mr HATTON—So we could have a clearance sale of a large order?

Mr Williams—That is what is raised by the provision, yes.

Mr HATTON—Thank you.

Mr TONY SMITH—If you were a doctor and you were doing work for Medibank Private or Medicare, would you be in some difficulty there?

Mr Williams—I think that then you would have to decide whether, as a doctor, you are actually rendering services to the Commonwealth. I think that the view I would form is that you are rendering services to the patient. It would require an extremely broad view to make that fall that way in the example you have given me. It is arguable but I do not think it would be sustainable.

Mr TONY SMITH—Arguably, if you were crown prosecutor are you rendering services to the Commonwealth?

Mr Williams—I think that would be a much clearer example, either on the office of profit, which would be the first way of going, or secondly, as a crown prosecutor, you are rendering a service to the state itself in prosecuting alleged criminals.

Mr MELHAM—And your appointment is by the Governor-in-Council?

Mr Williams—Yes. That is a good clear indication of it being an office of profit.

Mr MELHAM—I had to resign as a public defender and wait for my resignation to be received and accepted and dealt with by the Governor-in-Council before I could nominate.

Mr Williams—Yes. That would seem to follow. It is a good clear indication if you are appointed by that method that it is likely to be an office of profit.

CHAIR—Have we exhausted questions? Thank you for your submission and for the discussion with us here this afternoon. The committee accepts the document tabled by Senator Murray as an exhibit and as evidence to the inquiry.

MINCHIN, Senator the Hon. Nicholas Hugh, Parliament House, Canberra, Australian Capital Territory

CHAIR—I thank you for participating. We appreciate the sensitivities of senators appearing before the House of Representatives committees and vice versa. I will dispense with the usual warning about misleading the committee, as a fellow member of this parliament. Would you like to make a statement so we can kick the ball off?

Senator Minchin—I may only take five minutes of your time. Having discussed with you last year the question of whether your committee might like to take some interest in section 44, I therefore felt compelled to appear before you and talk to you about this section. As the state director of the Liberal Party through the mid-1980s and early 1990s, I had a lot to do with section 44 in the nomination process and working with the Electoral Act et cetera. It was always a very difficult experience because of the vagueness and uncertainty about what the section really means and what it obliges parties and candidates to do. I had a particularly bad experience in 1993 when, despite Fightback, we actually did very well in South Australia. At one stage, after all our candidates had bulk nominated, we received some advice that any connection with local government might well constitute an office of profit. Even the receipt of a sitting fee or reimbursement of expenses even if there was nothing that could be properly described as a salary might well constitute an office of profit.

I think eight of our 12 candidates happened to be local councillors and I had to get all of them to withdraw their nominations. Fortunately, we received this advice and acted on it before the closing of nominations. But we had to get them all to withdraw, all to resign from their council positions and then all to renominate. As you can imagine, when you are running an election campaign that is the sort of headache and nightmare you do not need. That was just another demonstration of how difficult this section really is to work with and how complex it can be in that sense. That was a bruising and memorable experience.

The other matter is the question of how it applies to senators-elect, a matter with which I have also had some passing acquaintance. The facts of the Jeannie Ferris issue are all on the record. I think it does demonstrate a particularly difficult consequence of the vagueness of this section. In her case, she resigned beforehand. She was a parliamentary staffer in South Australia, she resigned before she nominated, on the basis that as a candidate she could not have anything that could constitute an office of profit, and then became a senator-elect. After the election she sought a position on my staff for the four months in between the poll and her becoming a senator on 1 July.

I said to her, 'I'd love to have you work with native title, but it could be suggested by someone that you might have a problem with section 44.' It was my view, and had always been, that it did not apply to senators-elect because you are neither being chosen nor are you a senator. But she sought legal advice on that question from a barrister that she knew in Sydney. The barrister's view, like mine, was that it did not apply. The barrister referred her to Professor Lane's commentary on the Australian constitution where he specifically cites an example and where he puts the view that it does not apply to senators-elect. Relying on that, we went down that path. Then it became an issue and others disagreed with that particular interpretation of the constitution.

Senator Ferris subsequently got an opinion from Christine Wheeler QC which I think this committee ought to get hold of and read. She goes into quite some detail in presenting her view and refers to the High Court cases on this subject in giving advice to Senator Ferris that it did not apply to senators-elect. Despite all of that, as you know, as a consequence she took the prudent course. She resigned and then was reappointed by the state parliament to overcome any potential problem with section 44. So the only reason I am here is to make the point that I think the application of the section is very problematic, particularly in relation to senators-elect.

If a public servant is elected at a Senate election in July, but then cannot take their position until the following 1 July, they have an 11-month period where, on the face of it, they cannot take up any public employment whatsoever. One-third to a half of the economy is not available to them. I do not even know, frankly, whether they could go on the dole. Is that an office of profit, if it does apply to senators-elect? It is a potentially absurd situation.

Mr MELHAM—There are a lot of people, Senator Minchin, who would not mind being in that position.

Senator Minchin—Perhaps. But, whatever the founding fathers intention with this section, I remain to be convinced that that was the intention or that any evil which this section is designed to avoid would apply in that period between having been elected and taking up the appointment on 1 July. I would be interested to see what your committee concludes as to what the nation should properly have as a purpose for something like this. There presumably is some purpose in avoiding conflicts of interest of the kind which presumably this sort of section was originally designed for.

In that period, particularly for senators—and I appear here as a senator—which can be as long as 11 months, there is good cause to amend this section to remove any doubt about the status of senators-elect. If we do not want people in receipt of public remuneration being candidates, that is one thing—although I am not even sure that that is necessarily the case—but surely that rule should not apply after the election and before they take up their position in the Senate.

It is quite different from the House of Representatives. You effectively become a member of the House of Representatives from declaration, although you are treated as being a member from election night. But with the Senate it is a fixed term and you do not become a senator until 1 July after your election and you are in no-man's-land.

Mr MELHAM—You get two for the price of one.

Senator Minchin—There are a lot of very worthy Australians who find themselves often in this position and should be able to serve the nation in what is a period of up to 11 months without fear of their election being voided because of uncertainty about what this section actually means. All I really want to do is encourage your committee to have a good look at the principle involved: whatever the purpose is in this, should it apply to senators-elect? If it should not, how do we amend the section to ensure that senators-elect are not caught by the doubt which surrounds it?

Mr MELHAM—You have just highlighted to me again the complexities with this section. Probably the main reason we should be resisting calls for the Australian Electoral Commission to be providing advice to political parties and candidates is because it is fraught with danger.

Senator Minchin—I agree with that. I have some sympathy for the Electoral Commission because it does get put in this position. They are in an impossible position. It is very dangerous for them to give advice. There are so many conflicting views about what it means. You can get the best QC's advice in the world that says it does not apply to senators-elect, and another one will tell you it does. It is quite unfair to place that burden on the Electoral Commission in relation to the current wording of the provision. This is another reason why it would be good if we could as a nation find common ground on clarifying it.

CHAIR—Nick, have you thought about how we might clarify it?

Senator Minchin—No, I have not. I do not want to put to you a particular amendment. I note that Senator Kernot has a bill. I am not sure what status it has now. Her bill provides that your office of property is automatically taken to have ceased on the day 'immediately preceding the day before he becomes entitled to an allowance as a senator or a member of the House of Representatives'. Presumably the effect of that would be that you can retain your office right through to, in the case of a senator, 30 June. That would certainly cure the problem. Whether it goes too far is a matter for discussion.

Having been a practitioner in the campaign field, I really do not see the public purpose in denying public servants and those who hold public salaries the right to run as candidates and forcing them to go through this business of resigning and being reinstated and all that sort of thing. The main objective should be to ensure that they cease to be in an office of profit or in receipt of a public salary the day before they become a member of the House of Representatives. Certainly the Democrat bill does achieve that purpose. It is a presumption. It is in essence saying that they are legally presumed to have ceased to have been so employed.

CHAIR—I still have a difficulty. They probably had legal advice about this but there seems to be a difficulty with the constitution deeming a member of a state parliament as ceasing to have been a member of a state parliament on such and such a day. I would have thought there was a direct conflict there that the constitution itself could not overcome. But anyway that is not an issue that you have to address.

Senator Minchin—There is not an easy solution. It requires going back to first principles and thinking very seriously about what it is we believe the constitution should try to prevent, in relation to the evil—whatever that may be.

Mr MELHAM—Given that there might be some problems about the wording we would put into the constitution, what are your views, from a policy point of view, of the Commonwealth, state and territory governments passing uniform legislation that guarantees people the right to reinstatement should they resign and contest?

Senator Minchin—I must leave now. There is a division. I am sorry about this, I do not want to leave. I would like to answer more of your questions but my main purpose was to seek to ensure that your

committee does address what I think is a very—

CHAIR—Would you like to come back? We are sitting again tomorrow. Come back then. Thank you.

Committee adjourned at 6.46 p.m.