

## Chapter 4 – Executive action

*The Committee considers that there is limited scope for action that could be taken by Commonwealth government agencies to address the problems relating to subsection 44(iv). However, various administrative activities which could go some way to lessening difficulties are canvassed. Recommendations in relation to actions that the Australian Electoral Commission, the Department of Immigration and Multicultural Affairs and the Department of Foreign Affairs and Trade could take to address problems are made.*

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### Australian Electoral Commission role

4.1 The Committee received a substantial amount of evidence that the Australian Electoral Commission (AEC) should take a more active role in providing information for candidates, political parties and political administrators about the disqualifications contained in section 44 and the effect of those disqualifications.<sup>195</sup> There are particular problems for candidates who do not belong to political parties and, it was argued, a much greater effort should be made to disseminate information to them.<sup>196</sup> While appreciating the AEC's reluctance to give advice<sup>197</sup> the Liberal Party argued 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

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195 See for example, Mr Dean Smith, Liberal Party of Australia, Federal Secretariat, *Transcript*, p. 11.

196 *ibid.*

197 Mr Lynton Crosby, Liberal Party of Australia, Federal Secretariat, *Transcript*, p. 11.

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.<sup>198</sup>

4.2 The Australian Labor Party argued similarly that the AEC must develop a comprehensive strategy to assist potential candidates to identify the impact of section 44 on their candidacy.<sup>199</sup>

4.3 Mr Cleary agreed that there is a role for the AEC to provide a simple set of instructions,<sup>200</sup> while Senator Murray considered that it would be very helpful to a small party such as the Australian Democrats if the AEC could provide information relating to the constitutional disqualifications. Senator Murray noted that since 1911, 494 minor parties have existed in Australia. They need professional assistance in order to participate in the democratic process.<sup>201</sup>

4.4 Associate Professor David Black also supported greater AEC involvement in disseminating information:

I see many advantages in the Commission preparing a booklet (for sale if necessary) giving advice to intending candidates on these and other issues including conditions governing loss of deposit and the like. At the front of such a booklet it would need to be made quite clear that the booklet is intended to provide helpful information but not definitive rulings on complex legal issues which can only be resolved ultimately in the courts.<sup>202</sup>

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198 Mr Dean Smith, Liberal Party of Australia, Federal Secretariat, *Transcript*, p. 12.

199 *Submissions*, p. S184.

200 Mr Philip Cleary, *Transcript*, p. 127.

201 Senator Andrew Murray, *Transcript*, p. 21.

202 Associate Professor David Black, *Submissions*, p. S128.

4.5 He pointed out that the AEC undertakes educational activities and:

is in a prime position to let people know what the pitfalls of running for parliament are and how they can be avoided.<sup>203</sup>

4.6 He argued that the provision of advice to intending candidates, given the sorts of functions they undertake now, is very much the AEC's business.<sup>204</sup> The AEC's reluctance to involve itself because it lacks legal expertise misses the point. Rather, Associate Professor Black contended:

The issue is that they should provide as much information as possible and point out where court decisions have created problems. I think some kind of booklet for intending candidates would be well within what I would see as legitimate functions of both the state and federal commissions.<sup>205</sup>

4.7 The contention that the AEC should take a more active part in providing advice to prospective candidates is largely rejected by the AEC itself. The AEC submitted that it does not hesitate to give guidance where the law has either been tested in the courts or is clearly unambiguous.<sup>206</sup>

4.8 The AEC argued that it should have no role in advising potential candidates personally. It stated:

...For sound legal reasons, the AEC has no responsibility for advising candidates personally on whether or not they are constitutionally qualified for election, and instead the AEC

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203 Associate Professor David Black, *Transcript*, p. 182.

204 *ibid.*, p. 183.

205 *ibid.*, p. 182.

206 *Submissions*, p. S228.

suggests that if intending candidates are in any doubt they should seek their own legal advice before nominating.<sup>207</sup>

4.9 In another submission the AEC asserted that it:

is not responsible in any way for terms of the Constitution or its interpretation - that is a matter for the Attorney-General's Department. In fact, the AEC takes particular care not to provide any possibly misleading advice or opinions in this complex area of constitutional interpretation, except to point to relevant case law...and as appropriate recommend the Parliamentary Research Paper [*Office of profit under Crown' and membership of the Commonwealth parliament*]...<sup>208</sup>

4.10 And again:

The AEC has no role in 'going behind' a candidate's nomination to query the validity of the declaration on constitutional qualifications, and nor should it. The professional expertise required, for example, to make a judgment on whether a foreign allegiance had really been renounced before nomination, would be well beyond the accepted duties and responsibilities of returning officers. Indeed, in *Sykes v Cleary*, the High Court itself found such issues complex in their resolution, because quite different rules for renunciations of nationality appeared to apply to Greece and Switzerland. Further, if the validity of all nomination declarations on constitutional qualifications were required to be investigated by returning officers, an election might require months to get under way.<sup>209</sup>

4.11 The AEC emphasises that it cannot go further than bringing candidates' attention to section 44 and advising them to obtain legal advice if they are in doubt about their personal circumstances. It is a candidate's responsibility to ensure that the declaration is a true statement.<sup>210</sup>

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207 *Submissions*, p. S36.

208 *Submissions*, p. S38.

209 *Submissions*, p. S39.

210 *Submissions*, p. S40.

4.12 Professor Hughes, a former electoral commissioner, supports the AEC. First, he contends that quite a lot prospective candidates are very hard to warn because they emerge minutes before nominations close. Second, he argued that the consequences of the Commissioner or the AEC itself giving wrong advice are far more serious than if an individual candidate obtains incorrect advice. In the latter case the error is contained, but if the AEC is involved the potential ramifications are far greater.<sup>211</sup>

4.13 Professor Hughes also argued that it is difficult to see how the Commission could provide a better explanation than it does already in the Candidates' Handbook. While he thought it may be possible to include more warnings he noted that in practice the more verbose the text becomes, the less likely it is that it will be read.<sup>212</sup>

4.14 The Committee agrees that the AEC should have no role in giving legal advice to candidates. The Committee recognises that the AEC's role in running elections must be protected from any criticism that it has given wrong advice. The Committee appreciates that AEC officials have no role in going behind a candidate's declaration that he or she is eligible to stand. If the AEC was required to perform such a function the election cycle would take months.

4.15 However, the Committee believes that the AEC could play a greater role in providing general information about the matters that prospective candidates should keep in mind before nominating. The committee considers that the AEC could develop a brief new booklet

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211 Professor Colin A Hughes, *Transcript*, p. 162.

212 Professor Colin A Hughes, *Transcript*, p. 166-167.

alerting potential candidates to issues that need to be considered. At present, the Candidates' Handbook is only freely available to candidates just before the elections. Such a publication could note, for example, that persons who were born overseas or whose parents or even grandparents were born overseas should check at the relevant embassy or consulate for any possibility that they may hold citizenship of another country. If the Department of Foreign Affairs and Trade (DFAT) develops a database containing information on citizenship in foreign countries (see paragraph 4.23 below), the AEC could direct candidates to that source of information. The booklet could also highlight the fact that certain public sector positions disqualify a person from standing for or sitting in the parliament. Some of the grey areas that exist under current constitutional arrangements have been identified as:

- employees of statutory authorities
- members of statutory authorities
- local government employees or councillors.

4.16 It may be possible to note simply that these are areas of uncertainty and that potential candidates should seek further advice.

4.17 The AEC suggested that it seek the permission of the Department of the Parliamentary Library to reproduce and distribute two papers published by it. It proposed that the papers, one on subsection 44(i) and one on subsection 44(iv), could be published as Volume 2 of the Candidates' Handbook and could be distributed to candidates.

4.18 The Committee considers that it would be useful to disseminate as much information as possible on subsections 44(i) and (iv). However, such information is only useful *before* nominations close and the

Candidates' Handbook is not distributed until after nomination. Therefore it would be more useful if the information were disseminated earlier.

4.19 In Chapter 3 the Committee noted that there are provisions in federal, state and territory laws providing for the resignation and re-appointment of public sector employees. The Committee considers that the AEC could make extracts of such material available to interested persons, including potential candidates.

4.20 The Committee believes that if these matters are highlighted there is no danger to the AEC's integrity.

Recommendation 8:

The Committee recommends that the AEC:

- publish a booklet, noting possible problem areas that should cause a potential candidate to consider seeking further advice
- disseminate other relevant information, for example, extracts of state and territory laws governing the resignation and re-appointment of public sector workers, and papers prepared by the Parliamentary Library, on subsections 44(i) and 44(iv) of the constitution, to interested persons including potential candidates.

## Availability of information on renunciation procedures

4.21 The Department of Immigration and Multicultural Affairs submitted that a key element in remedying subsection 44(i) is the provision of information to candidates. It suggested that the AEC could inform prospective candidates of the requirement to have taken "reasonable steps" to renounce citizenship. In this context the Department offered to assist the AEC in relation to the content of such information should such a remedy be adopted.<sup>213</sup>

4.22 Mr Sullivan of the Department of Immigration and Multicultural Affairs indicated that between his Department, the AEC and the Department of Foreign Affairs and Trade, information could be provided to potential candidates about renunciation processes in other countries. Mr Page indicated that this information could be provided on a case-by-case basis rather than by publishing details of every country in the world

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213 *Submissions*, p. S146.



just in case they are needed.<sup>214</sup> While this is a sensible suggestion it may not be possible to provide information on a case by case basis at very short notice.

4.23 Dr Jupp suggested that it would be appropriate for the Department of Foreign Affairs and Trade to collect information on renunciation procedures to be followed in respect of foreign countries<sup>215</sup>. Each Australian post overseas could be charged with collecting such information. The information could be made available through DFAT, the AEC or even on the Internet<sup>216</sup> to maximise its availability.

4.24 DFAT itself does not favour participation in developing such a database, noting that

... if it were to be reliable enough to be used by potential enquirers [it] would need to contain information on the citizenship laws, regulations and rules of perhaps 200 countries.<sup>217</sup>

4.25 The Committee agrees that it would prove an onerous task for DFAT to collect such information for every country. It would seem a reasonable compromise that a database be established and maintained on the steps required for renouncing citizenship for the ten countries from which most Australian citizens have emigrated. The Department of Immigration and Multicultural Affairs or the Australian Bureau of

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214 Mr David Page, Department of Immigration and Multicultural Affairs, *Transcript*, p. 221.

215 Dr James Jupp, *Transcript*, p. 234, 236. This suggestion was supported by the AEC – *Submissions*, p. S238.

216 The Committee notes that citizenship information for some countries is already available on the Internet at <http://www.geocities.com/CapitolHill/Lobby/1834/nation.html>

217 *Submissions*, p. S243.

Statistics could advise DFAT on those countries. The information should be accompanied by a warning that a person's citizenship status depends on a range of factors and persons should use the information provided as a first step in ascertaining their citizenship status. Individuals should seek further advice from the relevant foreign mission in Australia where necessary. The Australian Electoral Commission (AEC) should inform intending candidates of the existence of this database.

**Recommendation 9:**

The Committee recommends that the Department of Foreign Affairs and Trade establish and maintain a database on the renunciation of citizenship procedures for the ten countries from which most immigrants originate and that information be provided by the Australian Electoral Commission to intending candidates on the basis of this database.

**Department of Immigration and Multicultural Affairs to advise persons taking up Australian citizenship of the need to renounce the other citizenship if they wish to stand for the federal parliament**

4.26 Mr Sullivan of the Department of Immigration and Multicultural Affairs agreed that it would be appropriate for the Department to advise persons taking up Australian citizenship that if they wish to stand for election to the parliament and they hold, or are eligible for, dual citizenship they would need to take certain steps to renounce the other citizenship and meet the constitutional requirements. However, he argued that with 100,000 new citizens each year, there would be a huge administrative burden on the Department if it were required to advise

each new citizen of the steps that he or she would need to take in order to renounce citizenship under the laws of the other country.<sup>218</sup>

4.27 The Committee considers that there is merit in the suggestion that at the time people take up Australian citizenship, the Department of Immigration and Multicultural Affairs draw attention to the need to comply with subsection 44(i) in the event that the person wishes to stand for federal parliament. However, the Committee does not regard this as a solution to the problems presented by the provision because there is no certainty that a person would remember the warning. In addition it would not assist people who had taken up citizenship in the past. Finally, it would not help to alert the presumed large number of Australian born citizens who are also dual or multiple citizens.

**Recommendation 10:**

The Committee recommends that when the Department of Immigration and Multicultural Affairs provides information to persons who are taking up Australian citizenship, it draws attention to the need to comply with subsection 44(i) in the event that the person wishes to stand for election to the Commonwealth parliament.

## **Conclusion**

4.28 While the Committee has drawn conclusions and made recommendations which would help avoid future problems arising from subsections 44(i) and (iv) as they now stand, it is important to emphasise that the principles underlying these subsections are fundamental. It is essential that members of parliament owe allegiance and loyalty only to

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218 Mr Mark Sullivan, *Transcript*, pp. 224.

the parliament and the people of Australia. It is equally important that no member of parliament should experience any conflict arising from holding an office of profit.

Kevin Andrews MP

Chairman

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