APPENDIX 2

Letter from Attorney-General to Senator Evans regarding employment of Senator-elect as 'Legislative Assistant'.

ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

21 November 1980

Dear Senator,

I refer to your inquiry as to whether a person who was elected as a State Senator at the recent Senate election and is desirous of accepting employment on the electorate staff of an Opposition member of the Parliament as a "Legislative Assistant" for a period expiring not later than 30 June next would, if he accepted such employment, be disqualified from taking his place or sitting as a senator from 1 July next year.

Your inquiry raises an important point both of principle and practice as to whether an Attorney-General should advise an individual member or a member-elect on such a matter. Former Attorneys-General have refrained from accepting such a role and my Department has generally adopted a similar approach.

There have been sound reasons of prudence for this course. The disqualification and vacancy provisions in sections 44 and 45 of the Constitution are mandatory, and can only be altered by referendum. The decision of questions that arise still lies primarily, I believe, with the House concerned under section 47 of the Constitution, which may, however, refer the matter to the High Court sitting as the Court of Disputed Returns (Electoral Act, s.203). Moreover, any person can still sue in the High Court as a common informer for a penalty for sitting when disqualified, although the amount of penalty is now limited by the Common Informers (Parliamentary Disqualifications) Act 1975. No opinion by an Attorney-General or his Department can therefore be regarded as conclusive and binding on the matter.

I take a different approach to my predecessors to the extent of believing that where the Attorney-General can properly assist in the difficult questions that arise in this area, it is appropriate for him to do so, rather than leave persons completely bereft of any official guidance. Anything said, however, must be subject to the caveats referred to above, and the member or member-elect concerned should ultimately make his own decision, in the light of his own legal advice, on whether he is willing to take a course that may lead to questions of disqualification being raised.

Turning to the particular matter you have raised, a question obviously arises whether the disqualification provisions in section 44 of the Constitution are applicable in the interregnum between a senator-elect being chosen - which would be complete at least by the return of the election writ to the State Governor concerned - and his sitting after taking his place on the following 1 July.

This question arises because the language of section 44 is addressed to a person's status at the time of being chosen or sitting as a member or senator, and because the places in the Senate at present filled by State senators rejected at the recent elections will not become vacant until the occupants' terms expire on 30 June next, and the terms of the persons elected to fill the vacancies which will then occur will not begin until 1 July next. Consequently a person who is not at present a senator, but who has recently been elected a senator, will not become a senator until 1 July 1981. In the meantime he is a senator-elect, to use the usual description. He is not yet sitting, or entitled under the Constitution to sit as a senator; he has no senatorial place.

The circumstances may be contrasted with the circumstances on the occasion of the filling of a casual vacancy in the Senate under section 15 of the Constitution and the election of a member of the House of Representatives, where there is no interval of time between the choosing of the senator or member and the commencement of his term of service.

So far as I have been able to ascertain, however, the question whether section 44 of the Constitution is applicable to a senator-elect has never been the subject of debate in the Senate (though it was raised in the House of Representatives on 7 March 1962, Vol. H.of R. 34, pp.585-6), nor does there appear to be any established practice on the matter, the one way or the other. The particular issue that arises in the present case concerns paragraph (iv) of section 44 of the Constitution so far as it relates to holding "an office of profit under the Crown", where the mischief intended to be dealt with would be at least as acute in the case of a senator-elect - in fact probably more so - than at the earlier stage of being elected as a senator, to which the disqualification provisions are clearly applicable. On the other hand, the case for regarding section 44 as applying to senators-elect might seem less compelling where the alleged ground of disqualification was, for example, a temporary insolvency that was terminated before the senator-elect was due to take his place as a senator.

In In Re Webster (1975) 132 C.L.R. 270, Barwick C.J. said that as there were penal consequences of a breach of section 44(v) the paragraph should receive a strict construction. Elsewhere in the same judgment he said that the purpose of the presence of section 44(v) in the Constitution must be borne in mind. These two comments seem equally applicable in relation to the other paragraphs of section 44, including section 44(iv), but, if they are applied, they seem to point in opposing directions. A strict construction of section 44 as a penal

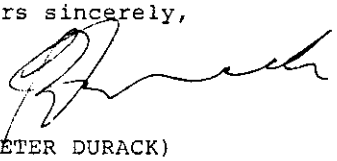
provision would indicate that it is not to be regarded as applicable to senators-elect. A strong regard on the other hand to the mischiefs that section 44 was intended to deal with would, I think, justify the implication that appears to be necessary to make section 44 applicable to senators-elect. The notion of disqualification provisions applying during the election processes and during the time of service as a senator, but being interrupted by an interregnum while the elected person awaits the time when he takes up his place, can only be regarded, I believe, as highly anomolous.

Although I appreciate that the matter is one on which a different view can be taken, my own opinion is that section 44 is applicable to senators-elect. I have concluded that not only is this the safe view to adopt, but that it is also the correct one. I think that the reference to "sitting" in section 44 covers the case of a person who, although not disqualified at the time of his election, comes subsequently under one or other of the disqualifications.

On this view, it would therefore be necessary to consider whether or not the position of Legislative Assistant in question would constitute an office of profit under the Crown within the meaning of section 44(iv) of the Constitution. In this instance also, the decided cases do not appear to give satisfactory guidance. If the test that appears to be adopted by Barwick C.J. in In Re Webster (supra) in relation to section 44(v) is applied, namely whether the situation is one under which the Crown could conceivably influence the holder of the position in question, I think the answer must be "no". On the other hand, the fact of the matter is that these positions are at present serviced by using the Public Service Act. The persons concerned are appointed as temporary employees under that Act even though, so I gather, their selection is completely a matter for the member of Parliament concerned, and they are expected to obey the directions of the member concerned. There can be no doubt that an engagement under the Public Service Act, even though not involving the holding of an "office" in the formal sense of that term, has been widely regarded as being one of the obvious cases of the holding of an office of profit under the Crown. Section 47C and 82B of the Public Service Act 1922 (as amended) clearly proceed on the assumption that persons engaged under the Public Service Act, whether officers or temporary employees, will resign to become candidates at an election.

I do not think that I can take the matter much further than this. There is no direct judicial authority on section 44(iv). I would only say that a conclusion that a position on an Opposition member's electorate staff constitutes an office of profit under the Crown would be highly technical in character, but the area is one in which, in the absence of clear judicial guidance, it may not be safe to ignore that possibility.

Yours sincerely,



(PETER DURACK)

Senator G.J. Evans,
Parliament House,
CANBERRA. A.C.T. 2600