

Australian Electoral Commission

**SUPPLEMENTARY SUBMISSION
TO THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
INQUIRY INTO ASPECTS OF SECTION 44 OF THE CONSTITUTION**

Canberra

29 May 1997

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1. Preamble

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the House of Representatives Standing Committee on Legal and Constitutional Affairs, in response to an invitation by the Committee Secretary to the Electoral Commissioner on 30 January 1997, and is supplementary to the AEC submission No 5 of 4 March 1997.

1.2 The Legal and Constitutional Committee would be aware that the Joint Standing Committee on Electoral Matters (JSCEM) is expected to table its report on the conduct of the 1996 federal election in mid-June 1997, and that the report will probably address many of the issues before this inquiry, in the broader context of the overall conduct of a federal election.

1.3 This submission addresses the particular issue of the role of the AEC in any proposed executive or legislative action to ameliorate the problems inherent in the operation of section 44 of the Constitution. The view of the AEC is that its role must remain of a limited nature in advising candidates for federal Parliament about legal aspects of the Constitutional disqualifications.

1.4 As indicated in the earlier submission by the AEC, a number of other parliamentary committees, particularly the Joint Standing Committee on Electoral Matters, have examined whether the AEC should be given expanded responsibilities:

Consideration has been given to increasing the responsibilities of the AEC in vetting the nominations of candidates to ensure compliance with section 44, but it has been concluded that such an extension of the role of AEC officers into areas of factual analysis and Constitutional interpretation in the limited time available at nomination would be impractical and unworkable. The responsibility for ensuring that they are legally qualified rests squarely with the candidate, and if in doubt candidates are urged by the AEC to seek their own legal advice. (*AEC submission No 5 of 4 March 1997, p 31*)

1.5 However, as a result of this inquiry, the AEC has identified a number of administrative ways, short of significant legislative amendments, by which it believes it can be of greater assistance to intending candidates.

1.6 The AEC makes this supplementary submission on the understanding that a referendum to amend section 44 of the Constitution is probably unlikely in the near future, and that as a result, some changes to the way in which the section is administered will be recommended. However, the AEC stands by its view that ameliorative executive or legislative action will not provide real and lasting solutions, and that constitutional amendment, perhaps as part of a package of constitutional reforms, remains the appropriate way forward.

2. The Provision of Legal Advice by the AEC

2.1 In written submissions and oral evidence the National Secretariats of the Liberal Party of Australia and of the Australian Labor Party have been highly critical of the “disinherited position” of the AEC with regard to the provision of legal advice to candidates, and the ALP has gone so far as to identify the “passive role” of the AEC as “part of the problem” in relation to the disqualification of elected Members of Parliament. Both secretariats have recommended a major escalation in the duties and responsibilities of AEC officers in ensuring that candidates are not disqualified at the point of nomination.

2.2 For example, In his oral evidence provided to this Committee on 25 March 1997, Mr Lynton Crosby of the Liberal Party Secretariat said the following:

While 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. (*Hansard, 25 March 1997, LCA 11*)

2.3 For the 1992 Wills by-election, both the Liberal Party and the ALP preselected candidates who would apparently have been disqualified under section 44(i) of the Constitution. Following the 1992 *Sykes v Cleary* case, everyone, including the AEC and the political parties, was made fully aware of the potential scope of section 44(i) and 44(iv).

2.4 As part of the ongoing inquiries into the conduct of federal elections, the Joint Standing Committee on Electoral Matters (JSCEM) then made a number of

recommendations which resulted in appropriate warnings on the implications of section 44 being included in the AEC Candidates Handbook for subsequent federal elections. The Nomination Form was also changed to require a candidate to formally declare that he or she is not disqualified under section 44 of the Constitution, and to provide the full text of section 44, a checklist for candidates, and warnings of the penalties for false information.

2.5 Nevertheless, and in spite of the formal warnings provided by the AEC in the Candidates Handbook and the Nomination Form, the Liberal Party endorsed a candidate for the 1996 federal election, Ms Jacqueline Kelly, who was subsequently found disqualified by the Court of Disputed Returns under section 44(iv) of the Constitution, and who was probably also disqualified under section 44(i) of the Constitution. The AEC rejects any suggestion that it is directly responsible for the failures of candidates (and their advisers) to give proper consideration to possible constitutional disqualifications before nomination.

2.6 The issue of whether the AEC should provide legal advice to candidates on their qualifications for election is periodically raised with the JSCEM. It is usually raised by the major political parties in the broader context of whether the AEC should provide legal advice on the interpretation of the more difficult offence provisions of the *Commonwealth Electoral Act 1918*. It is regularly put to the JSCEM that the AEC should be prepared to provide active assistance to the political parties and candidates in the legal interpretation of electoral law, particularly the offence provisions of the Act.

2.7 In fact, the AEC has no hesitation in providing guidance where the law has either been tested in the courts or is clearly unambiguous according to advice from the Director of Public Prosecutions or the Attorney-General's Department. Such guidance is provided to all interested persons, particularly the political party secretariats, who regularly complain to the AEC about alleged breaches of electoral law during election campaign periods.

2.8 For example, the Director of Public Prosecutions has consistently advised the AEC over the past decade that the Parliament's intention in enacting section 328 of the Act (which makes it an offence to publish unauthorised electoral material) is quite clear. The provision is designed to attack "irresponsibility through anonymity", not published material where the identity of the author is clearly evident but simply not in the particular format required by a technical application of the law (*for further discussion see AEC submission No 30 of 29 July 1996 to the JSCEM, p 43*). The AEC freely provides guidance on this provision to any complainant or other inquirer, including as printed on page 21 of the Candidates Handbook.

2.9 One other example may serve to make the point that the AEC willingly provides guidance on electoral law to the extent that it believes it is safe to do so. Section 329(1) of the Act makes it an offence to publish an electoral

advertisement that is deceptive or misleading. This provision is regularly misinterpreted by complainants to mean that “untrue” electoral advertising is an offence, despite the fact that a 1981 High Court case held that the provision has only a very narrow application. The standard AEC reply to a section 329(1) complaint is along the following lines:

This provision was considered by the High Court in *Evans v Crichton-Browne* (1981) 147 CLR 169 in which it was held:

that the words ... “in or in relation to the casting of his vote” refer to the act of recording or expressing the elector’s political judgement, e.g. in obtaining and marking and depositing it in the ballot box, and not to the formation of that judgement.

2.10 However, there are many areas of electoral law where the meaning is not unambiguously clear (perhaps because the law is old and the original intention of Parliament no longer has obvious contemporary application), and/or where the law has not been tested in the courts so that a firm judicial interpretation is not available. Where the law is either unclear and/or untested in the courts the AEC does not believe it is safe, responsible or indeed helpful to provide general guidance to the public at large where the basis of such guidance would be essentially speculative, and might subsequently be found to be wrong in a court of law.

2.11 With respect to individual cases where possible breaches of the law are discovered by or reported to the AEC (as opposed to requests for general guidance on the interpretation of the law from the public at large), the AEC assesses the evidence in each case, sometimes with the assistance of the Australian Federal Police, obtains formal legal advice from the Director of Public Prosecutions (DPP), and decides whether prosecution is justified on the basis of the available evidence, the advice provided by the DPP, and the public interest.

2.12 It should be self-evident that during the heat of an election campaign, many complainants, including the secretariats of the major political parties, are often disappointed that, because of lack of substantive evidence, legal applicability, or by failing the public interest test, the Director of Public Prosecutions and the AEC conclude that prosecution of an alleged offence is not warranted.

2.13 The AEC has submitted to the current JSCEM into the conduct of the 1996 federal election the following comments on the issue of the provision of legal advice on constitutional and electoral matters by the AEC to political parties and candidates:

The AEC does not provide legal advice to individuals, candidates, political parties or commercial interest groups for sound legal reasons, not the least of which is the possibility of providing an opinion which might be found wrong in law by a court, after the election is over, resulting in the possible voiding of an election.

Advisory opinions, which may or may not be provided by other Commonwealth agencies in other less critical circumstances, cannot be provided by the AEC in circumstances that could adversely affect the rights and interests of citizens in electing their Government.... (AEC Submission No 90 of 20 September 1996, p 22)

The AEC 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 such as *Sykes v Cleary* (1992) and as appropriate to recommend the Parliamentary Research Paper... The AEC Candidates Handbook provides a clear warning on the difficulties involved in the interpretation of section 44 of the Constitution, provides the relevant case law, and recommends that candidates who may be in doubt seek their own legal advice. The AEC will consider obtaining permission to publish the Parliamentary Research Paper in the Candidates Handbook for the next federal election. (AEC Submission No 90 of 20 September 1996, p 36)

2.14 In this context it is worth noting the views of a former Electoral Commissioner, Professor Colin Hughes, as expressed to this Committee on 17 April 1997:

It has been said in a number of submissions and repeated today that the Electoral Commission has a heavy responsibility to warn people. On the basis of my own past experience I would make the point to the committee that there are a number of candidates who are very difficult to warn, who appear very late - like 5 minutes to 12 - on nomination day. I can think of one who would not even come into the returning officer's office but stopped a passer-by in the street to take the nomination papers in....

I appreciate the point Mr McClelland made earlier that if you start giving advice in electorally disputed areas the advice may well be wrong. The consequences of the commissioner or the commission giving defective advice are much more serious than if somebody finds themselves a defective solicitor or a defective QC. That is contained. But if the body that is supposed to hold the ring gets involved in giving advice in these very uncertain areas (Hansard, 17 April 1997, LCA 162)

2.15 In addition, the AEC commented on the pitfalls of "being helpful" in areas of legal interpretation, during oral evidence before the Committee on 26 March 1997:

..there is a very fine line between being helpful and giving legal advice. It is so easy, when you are having a conversation with somebody, for them to think that you are actually giving them the bottom line - the ruling, or whatever - and to go away and say, "The AEC told me this is the way to read it. We have to be so careful not to mislead potential candidates. (Hansard, 26 March 1997, LCA 62)

2.16 Despite the strongly-expressed views of the National Secretariats of the Liberal Party and the ALP that the AEC should take a less “disinherited” and “passive” role in the provision of advice to political parties and candidates, the following instructive interchange between Mr Melham of this Committee (a former member of the JSCEM) and the Hon Senator Minchin (a current member of the JSCEM) occurred during Senator Minchin’s oral evidence to this Committee on 25 March 1997:

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. (*Hansard, 25 March 1997, LCA 48*)

2.17 It has been accepted electoral practice since Federation that, for both legal and practical reasons, electoral officers should not provide advice to political parties or candidates on the interpretation of untested electoral or constitutional law, and nor should they presume to interrogate intending candidates on the validity of their nomination declarations. Electoral officers are required by the law to ensure that nominations are technically in order, but have no authority to “go behind” the statutory declaration made by candidates that they are qualified to nominate. Such actions by electoral officers would be entirely impractical within the short time frame involved in the election period, and could lead to completely unjust outcomes. Any inquiries as to nomination qualifications are more properly dealt with by the courts after the event.

2.18 Many senior legal advisers and law academics who appeared before this Committee generously demonstrated their own lack of certainty about particular applications of the section 44 disqualifications, which reinforces the view put by Senator Minchin that AEC officers should not be expected to enter into an advisory role where highly qualified legal experts have difficulties.

The AEC recommends that the role of AEC officers in the conduct of elections not be expanded to include the provision of legal advice to political parties or candidates on the section 44 disqualifications or to inquire into the validity of nomination declarations prior to an election.

3. The Candidates Handbook

3.1 In the AEC submission No 5 of 4 March 1997, the gradual improvement of the Candidates Handbook and the Nomination Form, under the guidance of the Joint Standing Committee on Electoral Matters, has been described. Enclosed with this submission are ten copies of the 1996 Candidates Handbook and ten sample 1996 Nomination Forms to ensure that all members of this Committee are able to examine in detail the warnings already provided by the AEC to intending candidates about possible difficulties with section 44 of the Constitution.

3.2 It is important that this Committee recognises that the production of the Candidates Handbook for an election can only take place when it is certain that there will be no later amendments to the *Commonwealth Electoral Act 1918* that could change the information contained in the Handbook. For the 1996 federal election, for example, initiation of production of the Handbook had to be delayed until the very last day of the last Parliamentary sitting before the election, because there was an Electoral Bill before that Parliament.

3.3 Many of those who provided written submissions or oral evidence to this Committee appeared to be unaware that the AEC already publishes a Candidates Handbook and that the Nomination Form requires a formal declaration that the person nominating is both qualified, and not disqualified, to stand for election.

We suggest that advice should be provided to all prospective candidates possibly via the Electoral Commission clearly stating the conditions under s. 44 and a Statutory Declaration provided by the prospective candidate declaring that all conditions have been met. (*Submission No 10 of 21 February 1997 from the Social Credit School of Studies*)

The remedy for any embarrassment for prospective members of Parliament is to publicise the section and ensure that an explanatory note is attached to nominating forms. (*Submission No 13 of 3 March 1997 from Campbell Sharman*)

.... 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. (*Submission No 22 of 8 March 1997 from Associate Professor David Black*)

3.4 As mentioned above, in paragraph 2.6, the AEC has already suggested to the JSCEM that discussion of section 44 of the Constitution be expanded in the Candidates Handbook by the addition of a Parliamentary Research Paper, which has now perhaps been superseded by the publication (under permission) by this

Committee of the volume entitled "Section 44 of the Constitution", which collects the papers by K. Cole and S. O'Brien.

3.5 With the permission of the Parliamentary Library, the AEC could reproduce and distribute these papers as Volume 2 of the Candidates Handbook for all interested persons at the next federal election.

The AEC recommends that permission be provided by the Parliamentary Library for the AEC to reproduce "Section 44 of the Constitution" as Volume 2 of the Candidates Handbook.

3.6 The AEC would also welcome any views that this Committee might have on how the layout and format of the Candidates Handbook could be improved so as to perhaps make the warnings about section 44 clearer, but the concerns expressed by Professor Colin Hughes, a former Electoral Commissioner, in the following interchange with the Chairman of this Committee on 17 April 1997, are worth keeping in mind:

Prof Hughes: ... In respect of the candidates handbook, I find it difficult, short of changing the law - clarifying, expanding, refining the law - to see how the commission could safely advance on that sort of text. It might well be that "See your own lawyer" ought to be in bigger, bolder type, but I think that must be the bottom line - I do not see the commission or indeed the Commonwealth of Australia through the Attorney-General's office would be any better placed to start giving people advice on such a sensitive matter.

Chair: I am wondering whether, for example, in the candidates handbook, what the High Court suggested by way of reasonable steps should be spelt out in some more detail. Is there a problem if the Electoral Commission says that if the country of which you have citizenship apart from Australia has a mechanism by which you can renounce that citizenship then you ought to pursue that mechanism in order to satisfy the requirements of the constitution?

Prof Hughes: No Sir. I can see that the commission could get into trouble quoting the High Court. The danger is that the more prolix the text becomes, the less likely it is that candidates will read it....(*Hansard, 17 April 1997, LCA 167*)

4. The Nomination Form and Checklist

4.1 With respect to the Nomination Form, the concerns of Professor Hughes on whether the amendments to the Nomination Form which were made to include warnings about penalties and other matters actually constitute "substantial compliance" with the Form in Schedule 1 of the *Commonwealth Electoral Act 1918*, are noted by the AEC and will be followed up with the

Attorney-General's Department and, as necessary, with the JSCEM at a later date.

4.2 However, any further amendments recommended by this Committee to the Nomination Form should take note of the "substantial compliance" issue, and consideration should be given to whether legislative amendment might be required.

4.3 In relation to the Checklist on the back of the Nomination Form, in submission No 23 of 18 March 1997, Mr Andrew Robb, the Federal Director of the Liberal Party, said the following:

The AEC should work to increase awareness and understanding of the application of section 44(i) to those intending to nominate for election. This would involve amending the "checklist" and "candidate handbook" to clearly explain to possible nominees the implications of section 44(i). The present explanation in the "checklist" and "candidate handbook" are very poor explanations of the operation of section 44(i). (*Submission No 23 of 18 March 1997 from Mr Andrew Robb*)

4.4 During his oral evidence to the Committee on 12 May 1997, the following interchange between Mr Gary Gray, the National Secretary of the ALP, and the Committee members took place:

Mr Gray: ... We provide advice and counsel to our candidates on how they should deal with section 44(iv). We also provide counselling on how they should deal with section 44(i). We circulate several times, in the run up to an election campaign, a checklist. The one for the last election went our, from memory, on about 15 January to candidates to make sure that they had attended to the detail. I believe that other parties do the same.

I think that procedure is good. It means that parties are fulfilling their obligations to their candidates. But frankly, the area is clouded in confusion and a more proactive stance from the AEC would certainly help us in terms of the nationality issue.

Chair: The argument they have put to us, fairly strongly, is that it is not their role to do that, that it is fraught with danger because they are not necessarily qualified to give legal advice. At the end of the day, even if they do give that advice, the court could decide otherwise. They envisage that they are then left in the worst of all possible situations, of having tried to do the right thing by a candidate and then finding that the court effectively overrules them.

Mr Gray: I am aware of that argument - in fact, I am very familiar with that argument. Frankly, I think it is wrong. I think it is wrong firstly on the grounds that it is possible for the parliament to legislate and therefore require of the AEC a more proactive position. They are correct to say that currently that requirement does not exist. We can fix that. Secondly, I think they are wrong in terms of the legal effect of such interpretation since what we ask for is a simple checklist

against which candidates can measure themselves. I point to a potential difficulty with that. But, certainly in the cases that have been brought to light in recent years, the situation would have been enhanced significantly had the AEC had a simple step-by-step procedure to follow. Perhaps we should also advocate a booklet for candidates for public office and some other kind of publicity material. It is a matter which can be addressed in a relatively efficient way. Currently, the AEC is correct in saying that there is no requirement for them to do so. Therefore they cannot and they will not.

Chair: You can also put a disclaimer on it to say that, whilst it is only a checklist, it is not exhaustive. So it does not leave them open to the accusation that what they are putting in is totally definitive. It is the best possible guide they can provide.

Mr Gray: Perhaps it could also be a requirement of the actual nomination form. Perhaps the checklist could appear on the nomination form so that a candidate for public office is then forced to read the content of what they are being asked to sign up to..... (*Hansard, 12 May 1997, LCA 207-208*)

4.5 The AEC would welcome any suggestions from the Committee, in the light of the evidence provided to the Committee by other witnesses, on how the current Nomination Form checklist could be improved, within the space and layout limitations that currently prevail.

5. Section 44(i) of the Constitution

5.1 It has been suggested in some written submissions and oral evidence that the AEC should take primary responsibility for the preparation and publication of information to intending candidates on whether they have any foreign allegiance that might be contrary to section 44(i) of the Constitution. The most elaborate scenario would have officers of the AEC making direct contact with the governments of all foreign nations to establish a comprehensive and current list of all necessary procedures and timeframes for the renunciation of foreign allegiance and any relevant personal rights and privileges.

5.2 For example, in their oral evidence before the Committee on 25 March 1997, Mr Crosby and Mr Smith, of the Liberal Party Secretariat, said the following:

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 on file, the latest information so far as they are aware of renunciation procedures for every country it is possible to obtain 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 obligation basis, the AEC should be in a position to prepare and provide that information. (*Hansard, 25 March 1997, LCA 13-14*)

5.3 The AEC expressed its concern with the practical implications of this scenario to the Committee in oral evidence on 26 March 1997 (*see Hansard, 26 March 1997, LCA 56*).

5.4 For reasons that became apparent during the course of Professor Blackshield's oral evidence to the Committee on 15 May 1997, the AEC would also be very concerned if the following possible scenario, outlined by the Rt Hon Mr Sinclair and expanded on by Mr Mutch, were to be recommended by the Committee:

Mr Sinclair: If the electoral law were to be changed so that a person on nomination is required to give a little more background than they are now required to provide - in particular, where they were born and any other citizenship of which they are aware - and to give specifically - by some form perhaps, of an attested statement, an authority to the electoral officer to take what steps they could to ensure that there was not citizenship other than Australian, would that remove the personal obligation that the courts have now said exists?

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

Prof Blackshield: I do not know whether the Electoral Commission would like that proposal, but I would like it very much indeed. There are proposals that suggest that the candidate, at the time of nomination, should make a declaration disclosing any alternative nationality and declaring that they have taken all possible steps to divest themselves of it. Shifting it into an authoritative or an official bureaucratic way of solving the process would seem to me to be both more reliable - a better assurance that all reasonable steps had been taken - and a way of alleviating the burden on individual candidates. So I would be very attracted by that. You are right I like this solution very much indeed. (*Hansard, 15 May 1997, LCA 266-167*)

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

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

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

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

Mr Mutch: They have got no choice.

Mr Melham: But then it creates other problems, doesn't it?

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

Mr Mutch: That is the question. Would the High Court -

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

Mr Melham: And if they nominated five minutes to midday? (*Hansard, 15 May 1997, LCA 272-273*)

5.5 Even despite the legal and practical problems in relation to the fair and efficient conduct of elections that are inherent in these scenarios, the AEC would be very concerned if its role were to be expanded so as to assume responsibility for intervening in and regulating the personal relationships of intending candidates with foreign nations. This would appear to go way beyond the normal functions of any agency for electoral administration.

5.6 Nevertheless, the AEC does see merit in the suggestion put forward by Dr Jupp in his oral evidence to the Committee on 12 May 1997:

Dr Jupp: ... That is why some department of government needs a database which could be used as a reference point and someone with concerns could go to DFAT or DIMA, or whoever it is, and ask, "What does your database say about Mongolian citizenship? - or whatever it may be. I do not think it would stretch the resources of those departments to keep updated information. There is no need to publish it, but it is something that could be referred to. (*Hansard, 12 May 1997, LCA 236*)

5.7 The Committee could consider recommending the establishment of an electronic database (to allow continuous updating) listing all the information that can be obtained on renunciation of foreign allegiance and rights and privileges.

5.8 Such a database could be established as a joint project between the Attorney-General's Department (responsible for the Constitution), the Department of Foreign Affairs (responsible for foreign liaison), and the Department of Immigration and Multicultural Affairs (with special expertise in

citizenship). If the AEC is provided with a single contact desk in one of these Departments, then referrals could be made for information in individual cases. It might also be possible for a printout of current information to be made at the announcement of a federal election, and provided to the AEC for dissemination as required.

The AEC recommends the establishment of an electronic database on foreign allegiance as a joint project between the Attorney-General's Department, the Department of Foreign Affairs, and the Department of Immigration and Multicultural Affairs, with contact details provided to the AEC so that intending candidates can be referred for information on "reasonable steps" for renunciation of foreign allegiance and other rights and privileges.

6. Section 44(iv) of the Constitution

6.1 The AEC has little to add on this issue to that which was presented in the AEC Submission No 5 of 4 March 1997. Any attempt to "define" various offices of profit in the *Commonwealth Electoral Act 1918*, or any other Commonwealth legislation, would not avoid the authority of the Constitution as interpreted by the High Court.

7. Minor Amendment to Previous Submission

7.1 Paragraph 12.1 of the AEC submission No 5 of 4 March 1997 should be replaced with the following amended paragraph:

The High Court sitting as the Court of Disputed Returns has found in two instances in the last decade that Members of Parliament returned at federal elections were disqualified under section 44 of the Constitution. In the 1992 Cleary case and the 1996 Kelly case, fresh elections for the relevant Divisions were required. (The 1988 Wood case was first brought before the Court by a defective petition on section 44 grounds, but his disqualification was eventually decided on the basis of section 163 of the Commonwealth Electoral Act.)

7.2 The fifth paragraph of the quotation in paragraph 10.2 of the AEC submission No 5 of 4 March 1997 should be replaced with the following amended paragraph (which has already been advised to the JSCEM):

It may be recalled that in 1988 the High Court, sitting as the Court of Disputed Returns, also held that Senator Wood was disqualified from standing as a candidate for Parliament under section 163 of the CEA because he was at the time of his election a British subject, although the matter was first raised in a defective petition as contrary to section 44(i) of the Constitution (Re Wood (1988) 62 ALJR 328).

8. Summary of Recommendations

Recommendation No 1:

The AEC recommends that the role of AEC officers in the conduct of elections not be expanded to include the provision of legal advice to political parties or candidates on the section 44 disqualifications, or to inquire into the validity of nomination declarations prior to an election.

Recommendation No 2:

The AEC recommends that permission be provided by the Parliamentary Library for the AEC to reproduce “Section 44 of the Constitution” as Volume 2 of the Candidates Handbook.

Recommendation No 3:

The AEC recommends the establishment of an electronic database on foreign allegiance as a joint project between the Attorney-General’s Department, the Department of Foreign Affairs, and the Department of Immigration and Multicultural Affairs, with contact details provided to the AEC so that intending candidates can be referred for information on “reasonable steps” for renunciation of foreign allegiance and other rights and privileges.