ACT Electoral Commission Report on the ACT Legislative Assembly Election 2008 and Electoral Act amendment Bills 2011

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

OCTOBER 2011

Report No.8

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Resolution of appointment

On 9 December 2008 the Legislative Assembly appointed a Standing Committee on Justice and Community Safety to perform the duties of a scrutiny of bills and subordinate legislation committee and to examine matters related to: community and individual rights; consumer rights; courts; police and emergency services; corrections including a prison; governance and industrial relations; administrative law; civil liberties and human rights; censorship; company law; law and order; criminal law; consumer affairs; and regulatory services.[1]

Terms of reference

At its meeting of 7 April 2011, the Assembly resolved:

> That the ACT Electoral Commission's report, entitled *Report on the ACT Legislative Assembly Election 2008*, the Electoral Legislation Amendment Bill 2011 and the Electoral (Casual Vacancies) Amendment Bill 2011 be referred to the Standing Committee on Justice and Community Safety for inquiry and report to the Assembly by 22 September 2011.
>
> In conducting this review the Committee should have regard to a range of issues including but not limited to:
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> > 1) the ACT Electoral Commission's *Report on the ACT Legislative Assembly Election 2008*;
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> > 2) the amendments proposed to be made by the Electoral Legislation Amendment Bill 2011;
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> > 3) the amendments proposed to be made by the Electoral (Casual Vacancies) Amendment Bill 2011;
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> > 4) the application of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* to the Electoral (Casual Vacancies) Amendment Bill 2011; and
> >
> > 5) any other relevant matter.

[1] Legislative Assembly for the ACT, *Minutes of Proceedings No 101*, 7 April 2011, p.1266.

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2.42 A majority of the Committee recommends that the Electoral (Casual Vacancies) Bill 2011 be supported.

RECOMMENDATION 2

3.34 The Committee recommends that all clauses of the Electoral Legislation Amendment Bill 2011 be supported with the exception of clauses 7 and 8.

RECOMMENDATION 3

3.36 The Committee recommends that pre-poll voting be restricted to a period commencing two weeks before polling day.

INTRODUCTION

The inquiry

1.1 The Committee has taken the view that this inquiry is concerned with the Electoral Commission's review of the 2008 election in so far as its recommendations have been implemented in the Electoral Legislation Amendment Bill 2011 and the Electoral (Casual Vacancies) Bill 2011.

1.2 The Committee wishes to note at the outset that, broadly speaking, the Electoral Legislation Amendment Bill 2011 attracted a higher degree of assent from contributors to the inquiry. The Electoral (Casual Vacancies) Bill 2011 has been the subject of greater debate, and some submissions to the inquiry concern only that Bill.

1.3 The exception to this is the component of the Electoral Legislation Amendment Bill 2011 which seeks to limit the number of candidates fielded by a party to the number of vacancies in an electorate, which is cognate to the Electoral (Casual Vacancies) Bill 2011.

1.4 The Chair of the Committee wishes to place on record her involvement in the campaign to put the Hare-Clarke electoral system in place in the ACT.

Events leading to the inquiry

1.5 In 2009 the ACT Electoral Commission published its *Report on the ACT Legislative Assembly Election 2008*. In March 2011 the ACT Government responded by introducing Assembly two Bills to amend the *Electoral Act 1992*: the Electoral Legislation Amendment Bill 2011 and the Electoral (Casual Vacancies) Amendment Bill 2011.[2]

[2] *Debates*, Legislative Assembly for the ACT, 31 March 2011, pp.1161, 1159.

Conduct of the inquiry

1.6 The Assembly referred an inquiry into the report and amending Bills to the Committee on 7 April 2011, to report by 22 September 2011. On 22 September 2011 the Chair of the Committee successfully moved an amending motion in the Chamber which set a new reporting date, the end of parliamentary sittings in October 2011.

1.7 The Committee wrote to stakeholders, seeking submissions, in May 2011. It also invited the Attorney-General and the ACT Electoral Commission to brief the Committee on the report and amending Bills. They appeared before the Committee on 10 August 2011.

1.8 The inquiry received six submissions, held one public hearing, and deliberated at nine private meetings. Submissions received and witnesses appearing before the Committee are listed in Attachments B and C of this report.

Structure of the report

1.9 The structure of the report follows the Terms of Reference for the inquiry as follows:

- This introduction, Chapter 1, provides background to the inquiry and considers the report by the ACT Electoral Commission into the 2008 ACT Election;
- Chapter 2 considers the amendments proposed in the Electoral (Casual Vacancies) Amendment Bill 2011 and considers the implications of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* for the Bill;
- Chapter 3 considers the amendments proposed in the Electoral Legislation Amendment Bill 2011; and
- Chapter 4 considers other relevant matters and provides a concluding Committee comment.

The report on the 2008 election

1.10 The ACT Electoral Commission's report makes a number of findings and recommendations arising from the Commission's consideration of the 2008 ACT Election.

Notable features

1.11 The report lists a number of features arising from the election, which are quoted verbatim below.

1.12 These include the highest recorded figures for:

- the highest number of votes in an ACT election - 220,019 (compared to 209,749 in 2004), representing a turnout of 90.4% of enrolled voters (down from 92.8% in 2004); and
- payment of a record amount in public funding to parties and candidates: $295,453 (compared to $246,931 in 2004).[3]

1.13 The report includes a number of measures, adopted by the Commission, which seek efficiencies through the expanded use of electronic tools, including:

- replacing printed electoral rolls in polling places with electronic rolls, resulting in efficiencies and environmental savings;
- expansion of electronic voting facilities to 43,525 voters - almost 20% of all voters (compared to 28,169 in 2004); and
- using an intelligent character recognition scanning system for capturing and counting preferences marked on paper ballots.[4]

1.14 The Commission reported introducing a number of changes for voters unable to attend conventional polling booths on Election Day, including:

- simplified processes for applying for a postal vote, including on-line and phone applications, contributing to a record number of postal votes counted: 9,599 (compared to 6,532 in 2004);

[3] ACT Electoral Commission, Submission No.4, p.2.

[4] ACT Electoral Commission, Submission No.4, p.2.

- extending the number of pre-poll voting centres to 5 (from 4 in 2004), contributing to a record number of voters using pre-poll voting: 44,635 (compared to 30,734 in 2004); and
- extending the right to enrol and vote to all prisoners entitled to enrol for an ACT address, regardless of their length of sentence. [5]

1.15 The Commission also reported introducing procedural changes which affect the administrative arrangements for parties and candidates, and their representation on ballot papers:

- simplified rules for authorisation of electoral material; and
- new rules for grouping candidates on ballot papers.[6]

Recommendations

1.16 There were 16 recommendations put forward in the Commission's report, as follows:

- Recommendations 1 to 3 deal with electors' year of birth and gender being placed on the certified list of electors; that these details should be excluded from lists of electors provided to candidates; and that candidates be provided with electronic copies of the lists;
- Recommendation 4 suggests a mechanism for nomination deposits to be returned to the candidate, the authorised person who paid it or where a candidate is deceased, a person authorised in writing or a personal representative;
- Recommendations 5 and 7 concern layout of ballot papers, proposing the formalisation of the process to create two columns on a ballot paper where a party fields too many candidates to be displayed in a single column, and that the word 'declaration' be printed adjacent to the words 'ballot paper';
- Recommendation 6 proposes that if the casual vacancy provisions are altered as per recommendation 15, then the Electoral Act 1992 should be altered to prevent political parties from fielding more candidates than there are seats in an electorate;

[5] ACT Electoral Commission, Submission No.4, p.2.

[6] ACT Electoral Commission, Submission No.4, p.2.

- Recommendations 8 and 9 seek to remove the requirement for a witness a postal vote certificate, or, if that recommendation is not implemented, provide that a witness be required only for the signing of the postal vote declaration by the voter rather than the whole postal voting process;
- Recommendation 10 asks the Assembly to consider whether voters may be given the option of pre-poll voting without declaring that they are unable to attend a polling place on polling day;
- Recommendation 11 concerns double-sided stickers, and whether the Electoral Act should be amended to regulate in this area;
- Recommendation 12 recommends that the offence of defamation in s 300 of the Electoral Act be repealed;
- Recommendation 13 concerns time-lines for donation disclosures;
- Recommendation 14 recommends an increase in the penalty for failing to vote;
- Recommendation 15 concerns the filling of casual vacancies in the Assembly; and
- Recommendation 16 recommends that 'if the size of the Assembly is to be changed prior to the 2012 election, all necessary legislative changes should be made by October 2010'.

1.17 These recommendations are presented in full in Appendix A of this report.

Recommendations adopted in Bills

1.18 Selected recommendations from the report are expressed in the Bills.

1.19 In its submission to the inquiry, the Electoral Commission noted that the 'Electoral Legislation Amendment Bill 2011 gives effect to recommendations 1, 2, 3, 4, 6, 7 and 8', and that 'Recommendations 5 and 9 are contingent recommendations that would only come into play if recommendations 6 and 8 respectively were not adopted'.[7]

1.20 The Commission also noted that the Electoral (Casual Vacancies) Amendment Bill 2011 would, if enacted, give effect to recommendation 15 of the report.[8]

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[7] ACT Electoral Commission, Submission No.4, p.14.

[8] ACT Electoral Commission, Submission No.4, p.14.

Recommendations not adopted

1.21 For recommendations not adopted, the Commission noted that:

> Recommendations 10, 11, 12 and 14 were not adopted by the Government. These dealt with, respectively, extending access to pre-poll voting, amending authorisation provisions to cover double-sided stickers, repealing the offence of defamation of candidates, and increasing the penalty for failure to vote.[9]

1.22 It also noted that Recommendation 13, regarding time-lines for disclosure of political donations, and Recommendation 16, regarding time-lines for any proposed change in the size of the Assembly, had not been adopted in the Bills.[10]

1.23 In a speech to the Assembly on 31 March 2011, the Attorney-General gave the Government's reasons for not supporting Recommendations 10-14.[11] The ACT Greens' submission to the inquiry commented on the Government's decision to not support Recommendations 10-13, and suggested that a request should be made to the Government to 'provide more detailed reasoning'.[12]

Committee comment

1.24 The Committee wishes to note that time-lines for disclosure have been addressed in its seventh report in the Seventh Assembly, on Campaign Financing Laws in the ACT.[13]

1.25 It also notes that the Electoral Commission's Recommendation 16 may be considered redundant in that no formal proposals were put forward for a change in the number of members in the Assembly before the recommended date of October 2010.

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[9] ACT Electoral Commission, Submission No.4, p.14.

[10] ACT Electoral Commission, Submission No.4, p.14.

[11] *Debates*, Legislative Assembly of the ACT, 31 March 2011, p.1162.

[12] ACT Greens, Submission No.5, pp.6-7.

[13] Standing Committee on Justice and Community Safety, *A Review of Campaign Financing Laws in the ACT*, 2011, Recommendation 14, http://www.legassembly.act.gov.au/downloads/reports/Campaign%20Financing%20Report%202011.pdf.

2 CASUAL VACANCIES AMENDMENT BILL 2011

2.1 In its submission to the inquiry, the Commission provided a synopsis of the Electoral (Casual Vacancies) Bill 2011:

> This Bill provides that where a casual vacancy arises and the vacating member was elected as a party candidate, and no unsuccessful candidates from that party apply to contest the vacancy, the vacancy would be filled by the Assembly appointing a person to fill the vacancy who has been nominated by the vacating member's party.[14]

2.2 The Bill attracted the majority of comment from contributors to the inquiry. Speaking in favour of the Bill were the ACT Electoral Commission, the ACT Government, and the ACT Greens. Speaking against the Bill were Mr Malcolm Mackerras, and the Proportional Representation Society of Australia (ACT Branch). These are considered below.

Arguments in favour of the Bill

ACT Electoral Commission

2.3 As noted, this Bill arises from Recommendation 15 of the ACT Electoral Commission's report on the 2008 Election. In its submission to the inquiry, the Commission provided a further description of the rationale behind the proposal.

2.4 First, the Commission raised concerns over whether the process presently provided for under the Act would, if there were no party candidate of the same party available, deliver a 'representative' result:

> the Commission has noted that the count-back method will only operate as intended to preserve the proportional outcome of the original general election where there is at least one candidate of the vacating member's party available to contest the vacancy. Should a party member resign,

[14] ACT Electoral Commission, Submission No.4, p.18.

> and at least one unsuccessful candidate from that same party is not available to contest the vacancy, under the current law that vacancy would be filled by a candidate from a different party, or by an independent candidate. Arguably, such an outcome would not deliver a representative result, and might serve to alter the balance of power in the Legislative Assembly.[15]

2.5 Second, the Commission noted that the Act already provided for instances where the casual vacancy process failed:

> Section 195 of the Electoral Act currently provides for the situation where a casual vacancy occurs and it is not practicable to fill the vacancy by count-back at all. Such a situation could arise either because of a technical difficulty (such as, in the days before electronic counting, where some or all of the ballot papers were destroyed by accident) or because no candidates applied to contest the vacancy.
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> Under section 195, if a vacancy cannot be filled by count-back, there is a mechanism for the Assembly to appoint a replacement member from the same party of the vacating member, where the vacating member belonged to a party, or to appoint a candidate with no party affiliation where the vacating member was not elected as a party candidate. [16]

2.6 Third, the Commission argued that a reasonable response to this potential outcome was that the Electoral Act be amended to provide that:

> where a casual vacancy arises and the vacating member was elected as a party candidate, and no unsuccessful candidates from that party apply to contest the vacancy, then the vacancy would be filled by the appointment method set out in section 195 of the Electoral Act.[17]

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[15] ACT Electoral Commission, Submission No.4, p.18.

[16] ACT Electoral Commission, Submission No.4, p.18.

[17] ACT Electoral Commission, Submission No.4, p.18.

2.7 In support of this proposal, the Commission noted precedents in other parliaments:

> This method is similar to the Senate casual vacancy rules which, like the ACT's count-back rules, are designed to preserve the proportionality of multi-member election outcomes. [18]

ACT Government

2.8 The ACT Government, in its submission to the inquiry, stated that under normal circumstances the current arrangement for count-back 'serves to preserve the integrity of the proportional representation aspect of the ACT's Hare-Clark system, as it enables the voters who elected the vacating member to choose that member's replacement'.[19] In practice, this had 'always meant that a vacating member of a particular political party has been replaced by a member of the same party, thereby retaining the party balance in the Assembly, which in turn reflects the will of the electorate at the relevant general election'. [20]

2.9 The ACT Government noted the view of the Electoral Commission that: 'the count-back method will only operate as intended to preserve the proportional outcome of the original general election where there is at least one candidate of the vacating member's party available to contest the vacancy'.[23] In light of this, it expressed concern that:

> Should a party member resign, and at least one unsuccessful candidate from that same party is not available to contest the vacancy, under the current law, that vacancy would be filled by a candidate from a different party or, indeed, potentially by an independent candidate. Arguably, such an outcome would not deliver a representative result, and might serve to alter the balance of power in the Legislative Assembly.[24]

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[18] ACT Electoral Commission, Submission No.4, p.18.

[19] ACT Government, Submission No.2, p.5.

[20] ACT Government, Submission No.2, p.5.

[23] ACT Government, Submission No.2, p.6.

[24] ACT Government, Submission No.2, p.6.

2.10 As a result, the ACT Government proposed, by means of the Bill:

> to maintain the balance of party representation in the Assembly as determined by the ACT community at the most recent election. It would apply to any case where a member of a party can no longer fill their position, not just the Labor party. The bill also prevents the thwarting of the intention of the people of the ACT, which might occur under a count-back. [25]

ACT Greens

2.11 In discussing the proposed amendments to the Electoral Act, the ACT Greens described two main philosophical approaches to count-back. These were that:

> 1. Democracy is served by recounting the votes cast at the past election. That is, the will of the people is best measured through votes cast ("votes cast" model)
>
> 2. Democracy is served by ensuring the numbers in the Assembly delivered by the last election are preserved. That is, the will of the people is best measured through the overall result delivered in terms of party representation ("result delivered" model) [26]

2.12 Regarding the current process, the Greens suggested that the current approach 'balances both competing models', and that this had been borne out in practice:

> Since the adoption of the Hare Clark system in the ACT there have been seven casual vacancies. In each case, a recount of the ballot papers received by the vacating Member took place and in each case a member of the same political party was the successful candidate. That is, both aspects of democracy are reflected in the outcome.[27]

[25] ACT Government, Submission No.2, p.7.

[26] ACT Greens, Submission No.5, p.2.

[27] ACT Greens, Submission No.5, p.3.

2.13 However, the Greens expressed concern that 'the current process does create the potential scenario where the second objective, the "result delivered" model, is ignored and given no weight':[28]

> This scenario arises where a member of the same political party is unable to participate in the recount. Such a case has not arisen in the history of the Assembly but, if it were ever to arise, it would result in the relevant party not participating in the recount process. This would predetermine the result and would automatically result in a member of a different political party claiming the seat of the vacating member.[29]

2.14 In the Greens' view, the Bill would remedy this:

> by allowing the Assembly to appoint the replacement member where a member of the relevant political party is unable to participate in the recount process. This amendment would ensure that party representation is reflected in the outcome. [30]

2.15 The Greens envisaged a practical implementation of such a procedure, based on that of the Senate, in which such an appointment would be subject to the vote of the Chamber:

> The ACT Greens Party understand that, in practice, this Assembly process would be satisfied by the parliamentary leader of the party [bringing] a motion to the Assembly to appoint someone to become the replacement Member. The Assembly would then be required to vote on the proposal. [31]

2.16 In summary, the Greens stated that they supported the Bill for two reasons. First, because it maintained 'party representation', consistent from outcomes of previous elections:

> the Bill would create a system that still caters for both a recount and maintenance of party representation. This is the case because in the majority of foreseeable cases a member of the relevant political party will be able to contest the recount. However, the ACT Greens Party believe

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[28] ACT Greens, Submission No.5, p.3.
[29] ACT Greens, Submission No.5, p.3.
[30] ACT Greens, Submission No.5, p.3.
[31] ACT Greens, Submission No.5, p.3.

> that the proposal is a responsible one because it ensures party representation is maintained. This has been the outcome from the seven previous casual vacancies and it is appropriate to maintain this as a consistent outcome. [32]

2.17 Second, because in the Green's view the Bill followed precedent from Senate practice and provided the legislature with a means to approve candidates put forward:

> the proposal adopts the process used by the Senate to fill casual vacancies which leaves the ultimate check and balance with the Parliament. The parliamentary leader brings a motion to the Assembly to make the appointment which is then voted on by the Assembly. Arguments against the Bill have been made on the basis it allows for Members to be appointed without first being put before the electorate for their assessment. In lieu of that assessment by the electorate, the Assembly process is seen as an appropriate check against inappropriate names being proposed. While it has become convention in the Senate process for Parliaments to be extremely reluctant to vote against a proposal, it can be regarded as having a cooling effect against political parties proposing inappropriate names in the first place.[33]

Arguments against the Bill

Mr Malcolm Mackerras

2.18 Mr Mackerras is a Visiting Fellow in Political Science, School of Humanities and Social Sciences, at the Australian Defence Force Academy in Canberra. In his submission to the inquiry, Mr Mackerras noted that while 'the Hare-Clark system operates under that name only in Tasmania and the ACT', it also operates in the House of Representatives of Malta and the Da'il in Ireland, and in 'Northern Ireland for its assembly as well as operating for European Union elections for the whole of Ireland'.[34] He noted that in these jurisdictions, the

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[32] ACT Greens, Submission No.5, p.3.

[33] ACT Greens, Submission No.5, p.3.

[34] Mr Malcolm Mackerras, Submission No.1, p.1.

system operates under the generic name of 'Proportional Representation by means of the Single Transferable Vote' or 'PR- STV'. [35]

2.19 In his submission Mr Mackerras stated that these PR-STV systems, including the Hare-Clark system employed in the ACT, combine 'two elements of democratic principle [one of which] is direct election, the other … proportional representation'. [36] Concerning the Electoral (Casual Vacancies) Bill 2011, Mr Mackerras posed the question: 'if one of these principles must give way, which should it be?' [37] In his view, reference to other comparable jurisdictions (Ireland, Malta and Tasmania) provides 'an unequivocal answer', that is: that 'direct election must prevail over proportional representation'.[38] He also noted that since the adoption of the Hare-Clark system in the ACT 'every member has been directly elected by the people of the ACT'.[39]

2.20 Mr Mackerras stated that his primary objection to the Bill was that he did not 'believe there should ever be party machine appointments in Australian lower houses'. [40] In addition to this argument, Mr Mackerras put the view that it was important for political parties contesting elections to field sufficient numbers of candidates in order to create 'the competition between candidates of the same party which is deliberately encouraged by the system'. [41] His chief additional objection to the Bill was that it would reduce incentives for parties to provide candidates to that extent. [42]

2.21 Considering alternatives for when there are no candidates for the party successful at the previous election, Mr Mackerras noted that:

> Tasmania has faced up to a problem which has not yet arisen in the ACT. It is possible to imagine a party running out of candidates to fill casual vacancies. Therefore it is possible to imagine a countback of votes robbing a party of a seat purely by virtue of that party running out of candidates able and willing to fill a vacancy. In that case, in Tasmania the

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[35] Mr Malcolm Mackerras, Submission No.1, p.2.
[36] Mr Malcolm Mackerras, Submission No.1, p.2.
[37] Mr Malcolm Mackerras, Submission No.1, p.2.
[38] Mr Malcolm Mackerras, Submission No.1, p.2.
[39] Mr Malcolm Mackerras, Submission No.1, p.2.
[40] Mr Malcolm Mackerras, Submission No.1, p.4.
[41] Mr Malcolm Mackerras, Submission No.1, p.4.
[42] Mr Malcolm Mackerras, Submission No.1, pp.4-5.

> party of the departed member may request (and be granted) a by-election. [50]

2.22 In concluding, Mr Mackerras stated that while he did not expect it to be adopted, his preferred option was that 'the ACT should adopt the Tasmanian provision'. [51]

Proportional Representation Society (ACT)

2.23 In expressing its opposition to the Bill, the Proportional Representation Society of Australia (ACT Branch) made several references to the character of the ACT's electoral system, in particular that it provided 'voter empowerment and fairness to all candidates and parties'. It also suggested that when the system had been implemented 'voters' interests' had been 'consistently put first'.[52]

2.24 In relation to count-back specifically, the Society suggested that from the outset 'Hare-Clark supporters have been clear about the benefit to voters of additional choice of candidates that countback brings'.[53] Under the Hare-Clark system, 'those who have lost their representative get to choose the replacement through a re-examination of the vacating candidate's (or ultimate predecessor's) quota', [54] and:

> If there are no consenting candidates from the party of the vacating candidate, under the ACT approach the baton passes to the consenting candidate whom the voters losing their representative indicated was next best in such circumstances. [55]

2.25 In the Society's view, this provided 'quite an acceptable outcome for the voters directly involved as they are choosing from the remaining available candidates that are still eligible', and this is 'what matters under our Hare-Clark system'.[56]

> As matters currently stand, voters get to make judgements about individual candidates after decisions are made about whom parties will

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[50] Mr Malcolm Mackerras, Submission No.1, p.2.
[51] Mr Malcolm Mackerras, Submission No.1, p.5.
[52] Proportional Representation Society, Submission No.3, p.1.
[53] Proportional Representation Society, Submission No.3, p.5.
[54] Proportional Representation Society, Submission No.3, p.6.
[55] Proportional Representation Society, Submission No.3, p.6.
[56] Proportional Representation Society, Submission No.3, p.6.

> endorse, nominations are accepted and announced and a formal campaign period ensues. There is also very limited scope for intervention by outside forces as it is up to individual unsuccessful candidates to indicate their continuing eligibility and consent to stand in the event of a casual vacancy arising.[57]

2.26 The Society contrasted its position with that of the Electoral Commission, which in its view consisted of a 'party-entitlement view of elections rather than a voter-oriented approach to implementing the people's wishes as expressed on election day.' In the Society's view the Commission's approach was 'based on theoretical party-oriented beliefs'. It contrasted this with spirit of the Hare-Clark system under which, it suggested, 'it is voters' assessments that are supposed to be paramount'.[58]

2.27 In this spirit, the Society suggested that:

> It is … contrary to the Hare-Clark spirit to argue, as the ACT Electoral Commission appears to hold as an article of faith, that the party alignment in the Legislative Assembly should simply become frozen at the point when the declaration of the poll is made. What is actually frozen are the votes that have been cast on or before election day.[59]

2.28 Moreover, the Society suggested that there were insufficient grounds for seeking the remedy that the Bill provided. There had been 'no shortage of consenting candidates each time a casual vacancy has occurred'. Rather, there had been 'multiple party candidates for count-backs, with one exception'.[60] Since Hare-Clark had been established as the electoral system of the ACT in 1995 there had only once been 'just one consenting candidate from the party of a vacating candidate, as opposed to two candidates on two occasions and three four times'.[61]

2.29 On the basis of this record, the Society proposed that:

> There are absolutely no grounds for departing from the fundamental, entrenched Hare-Clark principle that voters always have a prior

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[57] Proportional Representation Society, Submission No.3, p.6.
[58] Proportional Representation Society, Submission No.3, p.4.
[59] Proportional Representation Society, Submission No.3, p.5.
[60] Proportional Representation Society, Submission No.3, p.6.
[61] Proportional Representation Society, Submission No.3, p.6.

> opportunity to reflect upon the merits of any potential MLA. No case has been made of tangible and insurmountable problems arising from the current carefully-chosen and entrenched provisions for filling casual vacancies, and no change to current procedures should be contemplated.[62]

2.30 The Society also stated that the Tasmanian option discussed by other submitters had been considered and rejected by the architects of the ACT system:

> Those who worked on implementation of the finer detail of the Hare-Clark system deliberately eschewed the then (unused) Tasmanian approach of allowing a parliamentary party leader to request in writing a by-election in the event of no consenting candidate from that party being available to contest a countback arising from the departure of one of their number.
>
> The ACT approach was to follow voters' expressed wishes come what may in terms of consents, and only invoke Assembly decisions in the extremely unlikely eventuality of no unsuccessful candidate consenting. This was considered important enough to be reflected in the way that countback was included among the key Hare-Clark principles entrenched in 1995.[63]

2.31 In conclusion, the Society suggested that:

> This ACT approach has worked without controversy to date and it remains in parties' hands for it to continue to do so into the future. There is no need to be jumping at imagined shadows or to start thinking about allowing party machines or the Assembly to intervene regularly and thereby undermine the equal basis on which elections have been conducted, with all potential MLAs being required to submit themselves to voters' collective assessments at the time of a general election. [64]

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[62] Proportional Representation Society, Submission No.3, p.7.

[63] Proportional Representation Society, Submission No.3, p.6.

[64] Proportional Representation Society, Submission No.3, p.6.

Proportional Representation (Hare-Clark) Entrenchment Act 1994

2.32 The *Proportional Representation (Hare-Clark) Entrenchment Act 1994* is an essential part of the ACT electoral system. The Act makes it possible for a Bill to amend key aspects of the ACT's electoral system only if it attracts a special two-thirds' majority in the Assembly.[65] If the Bill fails to attract that level of support, but is passed by a simple (greater than ½) majority in the Assembly, it is put to a referendum.[66]

2.33 Under these arrangements, if the ACT Government were to put the Electoral (Casual Vacancy) Bill 2011 to debate and the Bill were passed by only a simple majority, this would automatically trigger a referendum on the Bill, without further discretion on the part of any participant. As a result, the Electoral Commission in its submission to the inquiry recommended that:

> the Assembly notes that, if the Electoral (Casual Vacancies) Amendment Bill 2011 is passed by a simple majority but not a 2/3 majority of MLAs, the operation of the Proportional Representation (Hare-Clark) Entrenchment Act and the Referendum (Machinery Provisions) Act would automatically refer the Bill to a referendum to be held at the next general election of the Assembly, with the inevitable associated costs for holding a referendum, including printing and counting ballot papers and printing and distributing information material.[67]

2.34 With this in view, the Commission's Recommendation 3 proposed that:

> If the Electoral (Casual Vacancies) Amendment Bill 2011 appears to have the support of a simple but not a 2/3 majority of MLAs, the Commission recommends that the Assembly carefully consider whether it is prepared

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[65] These key aspects of the electoral system are created in the *Electoral Act 1992* and are listed in s 4 of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*. The count-back process is entrenched by s 4(1)(l) of the Act.

[66] The referendum is provided for under s 5 of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*. Such referenda are conducted under the *Referendum (Machinery Provisions) Act 1994* (ACT)

[67] ACT Electoral Commission, Submission No.4, p.4. Recommendation 2.

> to put the Bill to a vote given that a referendum would be a statutorily inevitable consequence of passage with less than a 2/3 majority. [68]

2.35 In its submission to the inquiry, the ACT Government noted the referendum trigger contained in the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*, and in view of this suggested that:

> The purpose of the special majority requirements of the entrenchment act is to ensure that significant changes to our electoral system have multi-party support. In this case, given the compelling arguments for making the proposed changes, aimed at preserving the representative nature of the Assembly, the Government hopes that this bill will receive the support of all Assembly members.[69]

2.36 The Attorney-General commented on this at a public hearing of 10 August 2011, where he told the Committee that it was 'not the government's intention to pursue a referendum on this question', and that it would 'depend on what the views of the parties are in the Assembly as to whether or not this bill comes on for debate'.[70]

Committee comment

2.37 In the Committee's view, there are clear choices between the imperatives raised by proponents and opponents of the Electoral (Casual Vacancies) Bill 2011.

2.38 Those who support the Bill do so on the basis that votes have a collective character in that they are generally made for parties. A measure, such as that contained in the Bill, to replace a party member with a nominee from the same party, in the event that there was a 'failure' of count-back, respects the collective nature of voting (and indeed of government) and supports the stability of the complexion of the Assembly.

2.39 Those who oppose the Bill characterise the ACT's present Hare-Clark system as one which maximises choice on the part of individual voters (albeit voting collectively), and see an unadulterated count-back process as the purest

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[68] ACT Electoral Commission, Submission No.4, p.4. Recommendation 2.

[69] ACT Government, Submission No.2, p.6.

[70] Mr Simon Corbell MLA, *Transcript of Evidence*, 10 August 2011, p.11.

expression of this imperative. Contributors to the inquiry who take this view point to the various mechanisms that have been adopted in the ACT, such as enhanced Robson Rotation of candidates' names on ballot papers, as evidence of the spirit of the ACT electoral system, in terms of maximising choice.

2.40 The majority view of the Committee is to support the Bill. The Committee takes the view that voters cast their votes for a party 'brand' in addition to individual candidates, and that amending the *Electoral Act 1992* in this way will help protect the fortunes of parties which are unable to field a full list of candidates in a given election. It also considers that ensuring the maintenance of party representation in the Assembly is a more responsible approach, and that the proposed amendment has the further advantage of making such decisions subject to the will of the Assembly, thus providing checks and balances on the selection of new Members.

2.41 The Committee considers that the Bill should be put to debate in the Assembly if the Government has a reasonable expectation that the Bill will attract a special (two-thirds) majority.

RECOMMENDATION 1

2.42 **A majority of the Committee recommends that the Electoral (Casual Vacancies) Bill 2011 be supported.**

Dissenting comments by Vicki Dunne MLA

2.43 I dissent from the recommendation of the majority of the Committee that the Electoral (Casual Vacancies) Bill 2011 be supported. On the contrary I believe that the adoption of the proposed changes to the filling of casual vacancies is contrary to the spirit and intent of the introduction of the Proportional Representation (Hare-Clark) electoral system in the ACT. Unlike any other member of the ACT Legislative Assembly, I have direct and extensive experience of the campaign to introduce the Hare-Clark electoral system in the ACT, and my comments are drawn from that experience.

2.44 By way of background, in 1992 a referendum was held to decide which electoral system should be implemented in the ACT. A majority of 65% of all electors voted for Hare-Clark over the alternative proposal, single member electorates. In 1995, 57% of ACT electors voted to entrench certain aspects of

the Hare-Clark system including the method of filling a casual vacancy. The move to entrench the key elements of Hare-Clark was prompted by attempts by the then minority Labor government to circumvent some of the key provisions of the electoral system that were supported in the 1992 referendum.

2.45 The 1992 referendum campaign characterised Hare-Clark as an electoral system that provided 'people power',[71] and promised to '…prevent party-machine domination',[72] and to minimise '...the influence of party machines'.[73]

2.46 In 1995 the proposal to entrench the key provisions of Hare-Clark championed in 1992, including the filling of casual vacancies, was put forward because:

> Each of the principles [to be entrenched] makes an important contribution to the ACT electoral system and deserves substantial consensus or direct community consultation before any fundamental change is made.[74]

2.47 The provisions of the proposed Bill that in certain, admittedly limited, circumstances, would allow political parties to appoint members directly to the Legislative Assembly, contradicts the spirit and practice of the Hare-Clark system as it was proposed for and ultimately entrenched in the ACT. By departing from the established method of filling casual vacancies—re-examining the ballot papers used to elect the vacating member—and allowing political parties to nominate a successor, the 'influence of party machines' would be enhanced, at the expense of electors.

2.48 As noted by some contributors to the inquiry, the present ACT system has a number of mechanisms which represent a deliberate attempt to achieve fairness, equity, and voter choice. Modifying the system, in the way proposed in the Bill, would undermine voter choice in particular.

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[71] 'Hare-Clark: people power for Canberra' was one of the slogans used widely during the 1992 referendum.

[72] ACT Electoral Commission, *A Referendum for a new electoral system for the ACT Legislative Assembly,*(15 Feb 1992), http://www.elections.act.gov.au/resources/uploads/pdfs/referendumelectsys.pdf, p2.

[73] ACT Electoral Commission, *A Referendum for a new electoral system for the ACT Legislative Assembly*, p.9.

[74] ACT Electoral Commission, *A Referendum to Entrench the ACT's Proportional Representation (Hare-Clark) Electoral System*, (18 Feb 1995), http://www.elections.act.gov.au/resources/uploads/pdfs/hareentrenchment.pdf, p.18.

2.49 Specifically, the proposal assumes that voters regard candidates simply as representatives of political parties. The philosophy of Hare-Clark, however, is based on allowing voters to exercise choices within as well as between parties, and to express an order of preference across party lines based on the views and voting records of individuals. It thus creates an incentive for voters to follow the political process closely, in the knowledge that they can exercise far more than a simple choice between parties.

2.50 Further, this change would create an opportunity for political parties to manipulative the system cynically by pressuring candidates to declare themselves 'unavailable' to fill casual vacancies so as to be able to impose on the citizens of the ACT party officials for whom *no-one* had ever voted in an election.

2.51 The present system offers a consistent and workable method of filling casual vacancies without offering a taint to the present system as it has developed.

2.52 I also endorse the views of the Proportional Representation Society that the provisions of the *Electoral Legislation Amendment Act 2011* to limit the number of candidates that can be fielded by a party in an electorate is inconsistent with the spirit and practice of the electoral system in the ACT. My opposition to this amendment is closely connected with my objection to the proposed changes to filling casual vacancies. Providing an alternative to countback would create a disincentive for parties to ensure that they have enough candidates to fill any casual vacancy, which would further limit voter choice at the election.

2.53 The proposal for changes to the countback system meets neither aspect of the test of '…substantial consensus or direct community consultation…'.[75] There has been no community call for the changes, and there is no consensus in the community about the changes. In addition, the Attorney-General told the committee that the government was not willing to trigger a referendum on the issue, presumably because there would be so little support for the proposition.

2.54 The history of electoral reform in the ACT has also been a history of the Labor Party's opposition to Hare-Clark. Only the ALP opposed the proposal for

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[75] ACT Electoral Commission, *A Referendum to Entrench the ACT's Proportional Representation (Hare-Clark) Electoral System*, p.18.

Hare-Clark in 1992 and, again in 1995, only the ALP opposed the entrenchment referendum. This proposal would weaken Hare-Clark.

3 ELECTORAL LEGISLATION AMENDMENT BILL 2011

Explanatory Statement

3.1 The Explanatory Statement for the Electoral Legislation Amendment Bill 2011 states that the Bill:

- Lowers the age of entitlement to provisionally enrol to vote from 17 years old to 16 years old, to bring the ACT into line with recent changes to Commonwealth entitlements (the requirement that an elector be 18 years old before they can vote is not affected);
- Limits the number of candidates that may be nominated for an election in an electorate to no more than the number of members of the Legislative Assembly to be elected for the electorate;
- Provides for the return of a candidate's deposit to the person who paid it, or to a person authorised in writing by the person who paid it;
- Provides that the certified list of electors used in polling places contain the year of birth and gender of each elector, to assist in correctly identifying electors as they vote, and provides that the extract of the certified list of electors provided to candidates will not contain the year of birth and gender of electors in order to protect their privacy;
- Allows the Electoral Commissioner to provide the extract of the certified list of electors to candidates in electronic form on request (currently only printed copies are provided);
- Removes the requirement for a person to sign as witness when a voter is casting a postal vote; and
- Provides flexibility to the Electoral Commissioner as to where the word 'declaration' is to be printed in relation to the words 'ballot paper' on declaration ballot papers.[76] These are considered below.

[76] Explanatory Statement, Electoral Legislation Amendment Bill 2011, p.2.

3.2 The Statement also states that the 'Bill also makes consequential amendments to the Aboriginal and Torres Strait Islander Elected Body Act 2008, which applies various provisions of the Electoral Act to the conduct of elections for the Elected Body'. [77]

Views of contributors

3.3 Contributors to the inquiry voiced opinions on selected provisions of the Electoral Legislation Bill 2011.

3.4 The ACT Electoral Commission noted that the amendment in the Bill that would 'lower the age of entitlement to provisionally enrol to vote from 17 years old to 16 years old' arose not from its report into the 2008 election, but from changes made to the Commonwealth Electoral Act in 2010. [78] It suggested that this would mean that 'more young people can be encouraged to enrol during electoral education programs at schools and other electoral enrolment initiatives aimed at school students', [79] and that:

> This change to the ACT's Electoral Act will not make a material difference to the current enrolment regime, as anyone who is enrolled on the Commonwealth electoral roll is automatically taken to be enrolled for ACT purposes. However, making this amendment will remove an apparent inconsistency between the ACT's Electoral Act and the Commonwealth Electoral Act.[80]

3.5 The Proportional Representation Society supported the Bill's amendments regarding removing requirement for witness signature on postal vote; layout of ballot papers; return of deposits; measures on certified extracts and lists; and 'rendering of assistance to voters'.[81]

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[77] Explanatory Statement, Electoral Legislation Amendment Bill 2011, p.2.

[78] Electoral Commission, Submission No.4, p.15.

[79] Electoral Commission, Submission No.4, p.15.

[80] Electoral Commission, Submission No.4, p.15.

[81] Proportional Representation Society, Submission No.3, pp.1-2. 'Rendering assistance to voters' refers to clause 16 of the Bill which 'amends section 156(2)(a) of the Electoral Act to remove a reference to an authorised witness to a postal vote certificate … consequential to the amendment made by clause 15', Explanatory Statement, Electoral Legislation Amendment Bill 2011, p.6.

3.6 Two aspects of the Bill in particular attracted comment: pre-poll voting, and proposed limits to the number of candidates that can contest in an electorate.

Pre-poll voting

3.7 The Proportional Representation Society was particularly in favour of more liberal arrangements for pre-poll voting:

> We believe that the ACT Electoral Commission was correct in recommending that the Assembly consider the arguments for and against amending the Electoral Act 1992 to provide that any elector may vote at a pre-poll voting centre, without the need to declare that they are unable to attend a polling place on polling day. There are many situations in which voters can conveniently attend such a centre before polling day but will face major disruption to their plans on polling day if the opportunity is denied them. They should not be forced to make a false declaration in order to exercise their franchise in the circumstances they judge best.[82]

3.8 The ACT Greens were in favour of an approach in which there was a tighter limit on the window for pre-poll voting. The Greens noted the remarks of the Electoral Commission in its report, that pre-poll voting had increased significantly and that this was the result of the 'expectations of the electorate'.

3.9 In view of this the Greens suggested that they had 'reservations about this growing trend for voters to make their decision and cast their vote in advance of all relevant material being made available during the election campaign'. The Greens expressed concern about the interaction between pre-poll voting and the disclosure of political donations, in particular that early voters would not be in a position to be informed about donations for that election. In view of this, the Greens suggested that:

> the Committee consider the growing trend for people to vote before election day and whether it is a trend that should be addressed. If the Committee is of the view that growing trend is something that should be addressed, the ACT Greens Party would offer the suggestion of

[82] Proportional Representation Society, Submission .No.3, p.2.

> restricting the pre polling period from the existing three week period to two weeks.[83]

Limits on the number of candidates

3.10 The second dot-point of the Explanatory Statement for the Bill describes a provision that would limit:

> the number of candidates that may be nominated for an election in an electorate to no more than the number of members of the Legislative Assembly to be elected for the electorate. [84]

3.11 These amendments are contained in clauses 7 and 8 of the Bill, 'Candidates to be nominated', and 'Invalid candidate nominations'.

3.12 As noted in Recommendation 6 of the Electoral Commission's Report on the 2008 Election, these are proposed consequential amendments in relation to the Electoral (Casual Vacancies) Bill 2011. At present, political parties have the option to field more candidates in order to provide a greater number of unsuccessful candidates in the event that there should be a count-back. The Commission suggests that if its Recommendation 15 is adopted (to provide the alternative casual vacancies process outlined in the Electoral (Casual Vacancies) Bill 2011), that this avenue should no longer be available.

3.13 There were two concerns raised with this aspect of the Bill. One, raised by the Proportional Representation Society, concerned the degree to which the proposed changes could be considered consistent with the ACT's Hare-Clarke electoral system. The second, raised by the ACT Electoral Commission, concerned a possible undue burden on the right to 'take part in public life' under s 17(a) of the Human Rights Act 2004. The Commission noted that this had been identified by the Assembly's Scrutiny of Bills Committee, in connection with interactions between clauses 7 and 8 of the Bill. These are considered below.

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[83] ACT Greens, Submission No.5, p.5.

[84] Explanatory Statement, Electoral Legislation Amendment Bill 2011, p.2.

Consistency with ACT electoral system

3.14 The Proportional Representation Society expressed concern at this proposal, suggesting that there was 'no cogent voter-oriented argument for restricting nominations to the number of vacancies to be filled'. Rather, if parties add more candidates to the field, voters can decide on this on the basis of merit. In particular this would depend on whether voters 'perceive an enhancement in the quality of the choice being offered to them'; or whether they see it as 'some publicity stunt or related gimmick without merit is being attempted and act accordingly when marking their ballot-paper'.[85]

3.15 The Society argued that this should be part of the deliberations of both voters and political parties:

> Under clear voter-oriented thinking in the spirit of the Hare-Clark system, such a risk is for parties to weigh up. If they believe that they have a larger group of first-rate candidates or wish to have extra cover in the event of a casual vacancy arising, they will feel confident about proceeding. Otherwise there will undoubtedly at least be some form of internal weighing of the possible advantages and disadvantages before a final decision about nominations is made. [86]

3.16 It was best that voters and political parties were able to consider the case on merit, the Society argued:

> If a party's assessment doesn't align with voters' thinking in a particular instance, potential support may be frittered away by nominating more candidates than there are vacancies. However, if voters are impressed by the quality of their additional choice, more voters will undoubtedly be attracted to the party column and such increased support will be retained.[87]

3.17 There was a risk, the Society admitted, that with an increase in the number of candidates there could be 'some additional votes leaking away from a party column or exhausting' because 'not all voters will mark squares beyond the

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[85] Proportional Representation Society, Submission.No.3, p.3.

[86] Proportional Representation Society, Submission No.3, pp.3-4.

[87] Proportional Representation Society, Submission No.3, pp.3-4.

number of vacancies as asked at a minimum on the ballot-paper'. [88] However, the Society suggested, the most constructive response was not to limit the number of candidates, but to educate voters more thoroughly on exercising their voting preferences under the Hare-Clark system:

> A far more rational and creative approach on the part of the ACT Electoral Commission would have been to recommend additional effort and expenditure in relation to the desirability of more voters being aware of the benefits of marking at least as many preferences as they actually hold.[89]

3.18 In the Society's view, current data on voting in the ACT supported this analysis:

> Among informal votes that are not deliberate, the high proportion arising from use of ticks or crosses or electors numbering each column separately to indicate some order of preference suggests that more work can usefully be done to explain the basics of voting. [90]

3.19 In addition, from the Society's point of view there were further benefits from this approach:

> Once more voters understand that the marking of preferences is an instruction about the order in which candidates may have access to (the value remaining of) their single transferable vote, they will:
>
> • recognise that marking additional preferences cannot harm the prospects of those whom they support the most strongly; and
>
> • be far more likely to make the most of their vote in particular circumstances. [91]

3.20 In view of these proposed benefits, the Society found it 'disappointing':

> to find the ACT Electoral Commission completely overlooking this voter-oriented response to the uncertainties and risks that had been identified and failing to advocate a better allocation of election resources by recommending more expenditure on information promoting or

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[88] Proportional Representation Society, Submission No.3, p.4.
[89] Proportional Representation Society, Submission No.3, p.4.
[90] Proportional Representation Society, Submission No.3, p.4.
[91] Proportional Representation Society, Submission No.3, p.5

> encouraging the marking of preferences that are actually held by individuals.[92]

3.21 In summary, the Society suggested that the 'proposal to limit the number of allowed nominations to the number of vacancies is foreign to the Hare-Clark spirit and should be abandoned'.[93] It also proposed, in an allusion to the Electoral (Casual Vacancies) Bill 2011, that 'if there are no artificial restrictions on the number of candidates a party may nominate, there are fewer reasons to expect a shortage of consenting candidates when a casual vacancy arises'.[94]

3.22 Further, the Society suggested that:

> a sensible discussion [could] be had about imposing a somewhat higher ceiling on the number of candidates that can be nominated by a party (and preferably also a non-party group again in future) in order to guard against a future concerted attempt to bring an election process into disrepute by presenting avalanches of candidates.[95]

Undue burden on 'taking part in public life'

3.23 In its submission to the inquiry, the ACT Electoral Commission noted that in commenting on the Electoral Legislation Amendment Bill 2011, the Assembly's Scrutiny of Bills and Subordinate Legislation Committee had noted clause 7 of the Bill, which:

> proposes to insert new subsection 105(2A) of the Electoral Act, stating that the registered officer of a registered party must not nominate more people to be candidates for election in an electorate than the number of members of the Assembly to be elected for the electorate. [96]

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[92] Proportional Representation Society, Submission No.3, p.5.

[93] Proportional Representation Society, Submission No.3, p.5.

[94] Proportional Representation Society, Submission No.3, p.5.

[95] Proportional Representation Society, Submission No.3, p.5.

[96] ACT Electoral Commission, Submission No.4, p.16, referring to Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee), Scrutiny Report No. 36—29 April 2011, pp.8-9. The Scrutiny Report also considered the Electoral (Casual Vacancies) Amendment Bill 2011.

3.24 The Scrutiny Committee had raised concerns about the interaction of this with clause 8 of the Bill:

> which would substitute a new section 106 of the Electoral Act, then provides that where the above situation occurs, the nomination of all candidates by that party for the electorate will be invalid if, at the hour of nomination for the election, the registered party officer has nominated more candidates in an electorate than the number of vacancies in the electorate. [97]

3.25 The Scrutiny Committee commented that this clause could produce:

> an unduly harsh result, and could be incompatible with the right stated in paragraph 17(a) of the Human Rights Act, which deals with "taking part in public life". The Committee indicated that the relevant party should be afforded the opportunity to rectify a breach under the proposed section 105(2A) within some period of time after the hour of nomination. [98]

3.26 The Electoral Commission considered the risks of this arrangement in this way:

> In practice, if a nomination was to be submitted that was invalid under the new provision, there would generally be time for the nominating party to correct the nomination and submit a revised nomination before the period for nominations closed. However, if a party was to leave its nomination until the last day, it is conceivable that a party may run out of time to submit a compliant nomination. [99]

3.27 To guard against this possibility, the Commission suggested that:

> the Bill could be amended to make use of the 24 hour period between the close of nominations and the "the hour of nomination" to give a party time to remove one or more candidates from its list of nominated candidates in order to ensure that it submits a compliant nomination. At present, section 107 of the Electoral Act allows the registered officer to

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[97] ACT Electoral Commission, Submission No.4, p.16, referring to Scrutiny Report No. 36—29 April 2011, pp.8-9.

[98] ACT Electoral Commission, Submission No.4, p.16, referring to Scrutiny Report No. 36—29 April 2011, pp.8-9.

[99] ACT Electoral Commission, Submission No.4, p.16.

cancel a nomination of a candidate for any reason up to 24 hours before the hour of nomination, when the period for making nominations closes. This deadline could be extended until the hour of nomination in this special case of a party nomination that would otherwise have to be rejected in its entirety. [100]

Committee comment

3.28 The Committee notes the comments of the ACT Greens and the Proportional Representation Society on the Electoral Legislation Amendment Bill 2011.

3.29 In relation to comments on restrictions on numbers of candidates fielded by parties in electorates, the Committee finds the comments of the Proportional Representation Society useful in defining key arguments regarding what is or is not consistent with the principles of the Hare-Clark electoral system as it is implemented in the ACT.

3.30 In the Committee's view, while the other amendments contained in the Bill have merit, clauses 7 and 8 should not be supported. The Committee considers it highly problematic to prevent persons from seeking to represent the electorate. This would appear to contravene the right to 'take part in public life' under s 17 of the *Human Rights Act 2004* (ACT), and may leave the amendment open to challenge. This view is also consistent with the concerns raised by the Scrutiny of Bills Committee in its consideration of the clauses 7 and 8.

3.31 The Committee believes that if the Electoral (Casual Vacancies) Bill 2011 is passed into law, then there will be no benefit for political parties for fielding more candidates with respect to count-back. Parties should, in the Committee's view, be able to make their own decisions on how many candidates to field in an election according to the merits as they see them. It is to be noted that dispensing with these amendments also removes risks that nominations of candidates will be considered invalid on the grounds that too many have been selected.

3.32 With regard to pre-poll voting, the Committee disagrees with the position adopted by the Electoral Commission. Rather, it believes that Election Day has

[100] ACT Electoral Commission, Submission.No.4, p.16.

a particular significance in the electoral process, and that pre-poll voting should be held in check, and should be the exception rather than the rule. This allows voters to cast their vote in full possession of information made available to them, through various channels, up until Election Day.

3.33 Consistent with this, the Committee takes the view that the requirement should be maintained, for voters who lodge a pre-poll ballot paper, to declare that they are unable to cast a vote on Election Day.

RECOMMENDATION 2

3.34 **The Committee recommends that all clauses of the Electoral Legislation Amendment Bill 2011 be supported with the exception of clauses 7 and 8.**

3.35 In relation to comment on the allowable pre-poll voting period, the Committee finds that the Greens' proposal to limit the period to two weeks is a reasonable measure to ensure that the election takes place within a defined period. This ensures that measures designed to assist in free and fair elections, such as donation disclosures, do not have their efficacy reduced by pre-poll voting.

RECOMMENDATION 3

3.36 **The Committee recommends that pre-poll voting be restricted to a period commencing two weeks before polling day.**

4 OTHER MATTERS AND CONCLUSION

Other matters

4.1 Some other matters were raised by contributors to the inquiry, which are cognate to the areas addressed by the Bills but which do not touch directly on their provisions.

Further recommendations by the Electoral Commission

4.2 The ACT Electoral Commission's submission to the inquiry contained 14 Recommendations, four of which correspond to Recommendations 10, 11, 12 and 14 of the 2008 Election Report.

4.3 Of the other 10 recommendations, four have already been discussed in this report, recommending that a registered officer be empowered to cancel a nomination up until the hour of nomination; noting the referendum requirement if the Electoral (Casual Vacancies) Bill 2011 does not attract a special majority in the Assembly; that the Assembly carefully consider whether the Bill should be put to a vote, considering the referendum provisions of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*; and that there be no amendment to limit the number of candidates fielded by a party in an electorate if the Electoral (Casual Vacancies) Bill 2011 is not enacted.

4.4 Of the other six recommendations, Recommendation 9 concerns automatic enrolment of voters and/or enrolment on Election Day; Recommendation 10 concerns cooperative work with the Commonwealth on a national automatic enrolment scheme; Recommendations 11, 12 and 13 concern the independence from Executive Government of the Planning and Lands Authority's nominees to the Redistribution Committee and the Augmented Electoral Commission, and change the reference to the Commission Chairman for the Augmented Electoral Commission; and Recommendation 14 concerns an indicative referendum on the size of the Legislative Assembly.

Other matters raised by the ACT Greens

4.5 The ACT Greens raised two other matters in its submission to the inquiry. These concerned How To Vote (HTV) material in polling booths and amending the voting age to 16 years.

How To Vote material

4.6 Regarding HTV material, the Greens suggested that there should be consideration of:

> the benefits of adopting a system where each party or independent should be permitted to submit a single page outlining material about themselves and how people could vote if they wish to take the advice of their preferred party or independent.[101]

4.7 The Greens put forward three arguments in favour of this proposal. First, that 'a sizable proportion of voters in the ACT experience problems with the lack of easily accessibly HTV information', based on survey information from the ACT Electoral Commission. Second, that the Greens supported a 'general right to information' and that 'for voters who want HTV material, there should be no restriction on its availability':

> Some voters will want to record their votes in accordance with the direction their party of choice wants them to and these people should not be denied orderly access to that information.[102]

4.8 Third, the Greens suggested that more liberal provisions on HTV material were preferable to the alternative of altering the restriction on 'which is to reduce the existing restrictions on handing out HTV material outside polling places (i.e. the 100 meter [sic] rule)'. [103]

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[101] ACT Greens, Submission No.5, p.4.

[102] ACT Greens, Submission No.5, p.4.

[103] ACT Greens, Submission No.5, p.4.

Amending the voting age to 16 years

4.9 The ACT Greens also proposed that 'sixteen and seventeen year olds should be given the option to register and vote in ACT elections'. This was proposed because:

> With the fast changing conditions in the world, the future is extremely important to young people. It is thus an important principle that young people have greater opportunities to participate in decision making that affects their lives. The goal is for young people to be able to express their needs and aspirations at all levels of government, as well as in their own communities. Because of this the ACT Greens encourage the committee to examine this issue.[105]

Other matters raised by the Proportional Representation Society

4.10 The Proportional Representation Society raised concerns with the formatting of ballot papers with regard to the display of candidates in columns. The Society suggested that 'the abandonment in 2008, uniquely in Australian electoral practice, of separate columns for non-party groups' had been a negative development in ACT elections.[106]

4.11 In response to this, the Society stated that it sought:

> the restoration of columns for non-party groups as a feature of the Hare-Clark system clearly outlined to voters in the description of the Hare-Clark system in the official Australian Electoral Commission mail out to electors prior to the 1992 plebiscite on the electoral system … [107]

4.12 The Society further commented that:

> Reasonable deadlines exist for lodgement of applications for party registration that leads to the printing of party particulars on the ballot-paper. However, community or other interest groups may establish only late in the term of an Assembly that none of the registered parties will take up their issues with sufficient vigour and wish to present a team for

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[105] ACT Greens, Submission No.5, p.6.

[106] Proportional Representation Society, Submission No.3, p.1.

[107] Proportional Representation Society, Submission No.3, p.2.

voter consideration. No other jurisdiction denies them the opportunity to have a separate un-named group column in those circumstances. [108]

4.13 In the Society's view, this would ensure that electoral arrangements manage, fairly and effectively, what it termed 'down-the-column advantage', which was otherwise effectively managed by Robson Rotation.[109]

Other matters—ANZSOG School of Governance

4.14 The submission to the inquiry by the ANZSOG School of Governance, University of Canberra, proposed that consideration be given to giving the Electoral Commissioner independent status with respect to Executive Government.

4.15 The School noted the present inquiry by the Standing Committee on Administration and Procedure into creating Officers of Parliament, and suggested that the position of Electoral Commissioner should be considered within such a framework. This would place the Commissioner appropriately within a context of functions which properly lie within the integrity arm of government.[110]

Committee comment

4.16 The Committee notes the material brought forward by the ACT Electoral Commission, the ACT Greens, the Proportional Representation Society and the ANZSOG School of Governance, without further comment.

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[108] Proportional Representation Society, Submission No.3, p.2.

[109] Proportional Representation Society, Submission No.3, p.1.

[110] ANZSOG School of Governance, Submission No.6.

Committee conclusion

4.17 As noted in this report's previous Committee comments, the Committee supports amendments set out in the Electoral Legislation Amendment Bill 2011, with the exception of clause 7, 'Candidates to be nominated', and clause 8, 'Invalid candidate nominations'. These the Committee does not support, for reasons outlined above.

4.18 On the Casual Vacancies Bill, the majority view of the Committee is to support the Bill, but that it should only be brought on for debate in the Assembly if the Government has reasonable ground to anticipate that it will attract a special majority.

4.19 One member of the Committee, Mrs Dunne, disagrees with this view, as reflected in the Dissenting comments provided at paragraphs 2.43-2.54.

[Signature]

Chair

[Date report adopted by Committee]

APPENDIX A: Election report recommendations

Recommendation 1

The Commission recommends that the Electoral Act be amended to provide for the inclusion of an elector's year of birth and gender on the certified list of electors for an election.

Recommendation 2

Should the year of birth and gender be included on the certified list, the Commission recommends that the lists provided to candidates should exclude the year of birth and gender details, on privacy grounds.

Recommendation 3

The Commission recommends that the Legislative Assembly consider whether it is desirable to amend the Electoral Act to provide that candidates may be given electronic copies of the certified lists.

Recommendation 4

The Commission recommends that section 113 of the Electoral Act be amended to provide that where a candidate has qualified for the return of a nomination deposit, then the deposit is to be returned to the person who paid it or a person authorised in writing by the person who paid it, and, in the case of a candidate dying before polling day, to the person who paid it or a person authorised in writing by the person who paid it, or in any other case, the deceased's personal representative.

Recommendation 5

The Commission recommends that it would be prudent to amend the Electoral Act to explicitly provide for the format of the ballot paper where a party's candidates are split into two columns, to put the issue beyond doubt.

Recommendation 6

If the casual vacancy provisions in the Electoral Act are amended to remove any incentive to nominate more candidates than the number of vacancies, the Commission recommends that the Assembly consider amending the Electoral Act to

prevent a party from nominating more candidates in an electorate than the number of vacancies.

Recommendation 7

The Commission recommends that the Electoral Regulation be amended to provide that the word "declaration" be printed adjacent to the words "ballot paper".

Recommendation 8

The Commission recommends that the requirement in the Electoral Act for a witness to sign a postal vote certificate be removed.

Recommendation 9

If the previous recommendation is not accepted, then the Commission recommends that the requirement for the witness to observe the whole of the postal voting process by the voter be removed, and replaced with a requirement that the witness only witness the signing of the postal vote declaration by the voter.

Recommendation 10

The Commission recommends that the Assembly consider the arguments for and against amending the Electoral Act to provide that any elector may vote at a pre-poll voting centre, without the need to declare that they are unable to attend a polling place on polling day.

Recommendation 11

The Commission recommends that the Assembly consider whether an amendment to the Electoral Act is warranted to address the issue of authorisation of double-sided stickers containing electoral matter.

Recommendation 12

The Commission recommends that the offence of defamation of a candidate in section 300 of the Electoral Act be repealed.

Recommendation 13

The Commission recommends that the two disclosure issues (the proposal to require all political donations to be disclosed within 1 month of receipt and, in an election period, on a weekly basis; and proposals that may arise resulting from the Commonwealth Electoral Reform Green Paper on Donations, Funding and

Expenditure) be considered, perhaps by a Legislative Assembly parliamentary committee, once the outcome of the Commonwealth review is known.

Recommendation 14

The Commission recommends that the penalty notice fine for failing to vote at ACT Legislative Assembly elections should be increased to, say, $25.

Recommendation 15

The Commission recommends that consideration be given to whether it would be desirable to amend the Electoral Act to provide that, where a casual vacancy arises and the vacating member was elected as a party candidate, and no unsuccessful candidates from that party apply to contest the vacancy, then the vacancy would be filled by the appointment method set out in section 195 of the Electoral Act.

Recommendation 16

The Commission recommends that, if the size of the Assembly is to be changed prior to the 2012 election, all necessary legislative changes should be made by October 2010.

APPENDIX B: Witnesses to the inquiry

Wednesday 10 August 2011

- The Attorney-General, Mr Simon Corbell MLA
- Ms Julie Field, Executive Director, Legislation and Policy Branch, Justice and Community Safety Directorate
- Mr Phillip Green, Electoral Commissioner, ACT Electoral Commission
- Mr Andrew Moyes, Deputy Electoral Commissioner, ACT Electoral Commission

APPENDIX C: Submissions to the inquiry

- Submission No.1 — Mr Malcolm Mackerras
- Submission No.2 — ACT Government
- Submission No.3 — Proportional Representation Society of Australia (Australian Capital Territory Branch)
- Submission No.4 — Electoral Commission
- Submission No.4 — ACT Greens
- Submission No.6 — ANZSOG School of Governance, University of Canberra