

Mr Mick Gentleman MLA
Chair
Select Committee on Amendments to the Electoral Act 1992
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Gentleman

**Questions on notice put to the ACT Electoral Commission in relation to
the inquiry into Amendments to the *Electoral Act 1992***

I refer to the questions on notice asked of the ACT Electoral Commission on 29 May 2014.

Answers to the questions on notice are attached.

Yours sincerely



Phillip Green
Electoral Commissioner

5 June 2014

Questions on notice put to the ACT Electoral Commission in relation to the inquiry into Amendments to the *Electoral Act 1992*

1. The ACT Electoral Commission's report on the 2012 ACT election recommended an amendment to clause 7(3)(c)(i) and (ii) of Schedule 4 of the Electoral Act 1992 by deleting the word "all", to ensure that the scrutiny rules follow accepted Hare-Clark procedures (Recommendation 2).

The Proportional Representation Society of Australia (Australian Capital Territory Branch) has argued that the proposed amendment does not always constitute the best available improvement when more than two candidates are involved, setting out alternatives (Submission 13, p. 10). They have also suggested other opportunities for minor improvements in scrutiny rules and calculations (pp. 11-20).

Please provide your comments on their suggestions.

Tie-breaking methods during the Hare-Clark scrutiny

Recommendation 2 of the ACT Electoral Commission's report on the 2012 election is aimed at addressing an apparent anomaly in the procedures for dealing with ties during the scrutiny for an ACT Legislative Assembly election. Specifically, the recommendation is aimed at ensuring that a tie occurring when 3 or more candidates achieve the same number of votes at the point where they exceed the quota during the scrutiny is dealt with equitably.

The likelihood of such a tie occurring is very low; nevertheless it is important that the scrutiny procedures deal with such a possibility appropriately.

The principle generally used to break ties in Hare-Clark-style systems is to re-examine the scrutiny sheet by looking at each preceding count of ballots to determine the most recent point at which the tied candidates were not tied, and determine which candidate was in front (if the tied candidates have achieved the quota) or behind (if one of the tied candidates is to be excluded) in order to determine which candidate's votes to deal with first. Only if no such counts exist, and the candidates were tied throughout the scrutiny, would a random draw by lot be used to determine which candidate to deal with first.

Where only two candidates are tied, this is a straightforward unambiguous process. Where three or more candidates are tied, the required calculations become more complex.

Clause 7(3)(c) of Schedule 4 of the Electoral Act currently provides that:

- where two or more candidates with more votes than the quota are tied and a decision is required to determine which surplus is to be transferred first:
 - the scrutiny sheet is to be examined to determine the most recent count at which all of these candidates had an unequal number of votes; and
 - the candidate with the most votes at that count is chosen as the candidate whose surplus is dealt with first.

In its 2012 election report, the Electoral Commission recommended removing the requirement that “all” candidates had to have unequal votes, so that consideration could be given to the situation where one candidate had more votes than the other tied candidates, notwithstanding that two or more of those other candidates were still tied with the same number of votes.

However, as the Proportional Representation Society of Australia (ACT Branch) has demonstrated in its submission, it is arguable that this could give rise to an unfair outcome as set out in the following example (where the quota is 100 votes).

Candidate	Progress total count 1	Progress total count 2	Progress total count 3
Spanos	89	95	105
Muller	88	95	105
Allen	90	92	105

In this example, using the existing provision in the Electoral Act (which requires all tied candidates to have an unequal number of votes at an earlier count before looking to see who is in front), only count 1 can be taken into account. In this case, candidate Allen would be the candidate chosen to have the surplus distributed first, followed by Spanos.

In this example, using the Commission’s recommended change to the Electoral Act (which would take account of the most recent count where one candidate was ahead of the other tied candidates), again only count 1 would be taken into account. Again, candidate Allen would be the candidate chosen to have the surplus distributed first, followed by Spanos.

In this example, using the PR Society’s recommended change to the Electoral Act, the fact that Spanos and Muller were tied at count 2 would be taken into account, and Allen with fewer votes would be removed from contention. By then examining only Spanos and Muller at count 1, Spanos would be chosen to have the surplus distributed first, followed by Muller.

As both Spanos and Muller were in front of Allen at count 2, the PR Society’s method would appear to be a fairer outcome.

However, it should be noted that the likelihood of this situation occurring in practice is remote, and even if it did arise, it would also be very unlikely that the order of distribution of three or more tied surpluses would make a material difference to which remaining candidates were ultimately elected. Nevertheless, for the sake of maximising fairness, the Commission is satisfied that it would be appropriate to adopt the methodology proposed by the PR Society.

The PR Society also points out that this issue is relevant to the process of resolving ties where three or more candidates are tied with the fewest votes and a decision is required as to which candidate is to be excluded from the count.

The Electoral Act has already been amended to remove the concept of “all” candidates being required to have unequal votes when deciding a tie in this situation (see clause 8(2) of Schedule 4).

Again, it is arguable that the existing Electoral Act provision could give rise to an unfair outcome as set out in the following example (where three candidates are tied with the fewest number of votes and one of them must be excluded).

Candidate	Progress total count 1	Progress total count 2	Progress total count 3
Spanos	89	92	105
Muller	88	95	105
Allen	90	92	105

In this example, using the existing provision in the Electoral Act (which would take account of the most recent count where one candidate had fewer votes than the other tied candidates), only count 1 would be taken into account. In this case, candidate Muller would be the candidate chosen to be excluded.

In this example, using the PR Society's recommended change to the Electoral Act, the fact that Spanos and Allen were tied with the least votes at count 2 would be taken into account, and Muller with more votes would be removed from contention. By then examining only Spanos and Allen at count 1, Spanos would be chosen to be excluded. This is arguably a fairer outcome given Muller had more votes than the other candidates at count 2.

This apparent anomaly has the potential to be more significant, as the order of exclusion of candidates has more impact on the flow of preferences in the count than does the decision as to which order a series of simultaneous surpluses will proceed in.

In order to address these issues, the Commission recommends adopting the solution proposed by the PR Society as follows:

The Commission **recommends** that clause 7(3)(c) of Schedule 4 of the Electoral Act be amended to provide that, when two or more candidates are tied with surplus votes (*contemporary candidates*) and a decision is required to identify which tied candidate's surplus is to be next dealt with during the scrutiny:

- the total votes of the tied candidates are to be examined at each preceding count of the scrutiny until one of the following events occurs:
 - if a single contemporary candidate has more votes than any of the other tied candidates, that candidate's surplus shall be dealt with;
 - if two or more contemporary candidates remain tied, but one or more contemporary candidates has fewer votes than the first-mentioned candidates, the last mentioned candidate(s) shall be removed from consideration;
- the above steps are to be repeated until a candidate is identified if possible; or
- if it is not possible to break the tie using the above steps, the Commissioner shall choose a candidate by lot, and that candidate's surplus shall be dealt with.

The Commission **recommends** that clause 8(2) of Schedule 4 of the Electoral Act be amended to provide that, when two or more candidates are tied (*contemporary candidates*) with fewer votes than any other candidates and a decision is required to identify which tied candidate is to be next excluded during the scrutiny:

- the total votes of the tied candidates are to be examined at each preceding count of the scrutiny until one of the following events occurs:
 - if a single contemporary candidate has fewer votes than any of the other tied candidates, that candidate shall be excluded;
 - if two or more contemporary candidates remain tied, but one or more contemporary candidates has more votes than the first-mentioned candidates, the last mentioned candidate(s) shall be removed from consideration;
- the above steps are to be repeated until a candidate is identified if possible; or
- if it is not possible to break the tie using the above steps, the Commissioner shall choose a candidate by lot, and that candidate shall be excluded.

Changes to the ACT's Hare-Clark counting rules

The PR Society makes a range of recommendations for refining the scrutiny system for counting votes for the ACT Legislative Assembly. The recommended changes are highly technical and have been raised in other forums, such as the Commonwealth parliament's Joint Standing Committee on Electoral Matters.

Making some or all of these changes would require significant changes to the systems used to conduct the scrutiny by Elections ACT, particularly the eVACS computerised counting system. Adding complexity to the counting system would also make it more difficult to explain the counting system to students and voters.

Consequently, before making any changes, an assessment needs to be made of the value of making such changes.

An election counting system such as the ACT's implementation of the Hare-Clark system is essentially a method for taking a very large number of preferences expressed by voters on ballot papers and using them to determine a relatively small number of most preferred candidates (in the ACT's case around 220,000 voters elected 17 members in 2012). By the nature of the process, this will always involve making generalised assumptions, as it is arguably impossible to precisely and unambiguously identify the most preferred candidates in all cases.

Where an election result is not "close", in the sense that candidates can be identified that are clearly preferred as they have more preferences in their favour compared to their rivals, with a clear margin between the last candidate elected and their nearest rival, then the changes suggested by the PR Society would be highly unlikely to make a difference to the final result.

Where an election result is "close", in the sense that the final margin between the last candidate elected and their nearest rival is a very small number of votes, then the changes suggested by the PR Society may presumably in some cases make a difference. If the changes were to make no difference at all, then it would appear that there would be no point to making any changes.

Assuming that the suggested changes could make a difference, an assessment needs to be made as to whether one outcome or another is fairer.

Without going into all the technical details that can be found in the PR Society's submission, it is not apparent to the Commission that the suggested changes are intrinsically fairer. For example, the ACT uses the "last parcel" method of transferring surplus votes, while the Western Australian upper house uses the weighted inclusive Gregory transfer method (where every parcel received by an elected candidate is transferred at a transfer value calculated in relation to the value at which the ballot papers were received by that candidate). Neither system is intrinsically fairer than the other, they are simply different. Arguments can be raised in favour of either system.

Where the changes suggested would make very small adjustments, such as altering the treatment of fractional reminders, the likelihood of such changes making a difference in a real life count would only occur where two candidates were very close together in the scrutiny at the point where one candidate or another had to be excluded. It is arguable that, in such cases, making small mathematical adjustments would not lead to a fairer outcome, simply a different outcome in a very small number of cases.

The PR Society has suggested that the fact that ACT Legislative Assembly scrutinies are now conducted using a computerised counting system means that it is practicable to use more complex counting methods. This implies that there is no need to maintain the features built into the ACT system that streamline manual counting of ballots. A good example of this is the last parcel method of distributing surpluses.

However, the Commission notes that the ACT scrutiny system is used for several elections that are still counted by hand, including the Aboriginal and Torres Strait Islander Elected Body election, elections for the ANU Students Association and other fee-for-service elections. If the ACT counting rules are made more complex, this will make it more difficult if not impossible to retain the use of the ACT's rules for these other elections.

While this difficulty could be overcome by using different rules for hand-counted elections compared to computerised counts, there is much to be said for retaining common rules for both types of elections. Use of hand-counted elections serves as a valuable training ground for election officials, and hand-counts are used to test computerised counts to ensure that counting software is operating correctly. Adopting methods that can only be counted by computer introduces the risk that errors in computer counting programs may not be readily identifiable.

The Commission is also concerned that adopting very complex systems, such as the Meek system or a reducing quota system, would make it very difficult to explain how the system works to students and voters. The Commission considers it important that an electoral system should be easy to understand in order for election results to be accepted by the general public. The ACT's notorious modified d'Hondt system is a good example of a complex electoral system contributing to significant dissatisfaction with election outcomes.

The Commission notes that altering the ACT's scrutiny system would require changes to counting procedures, particularly the eVACS computer counting system and the HC-Auto computer counting system used for hand-counted elections. Making these changes would involve considerable cost and time, as programs would need to be changed and extensively tested. Such changes would introduce considerable risks related to the conduct of the 2016 election and future ACT elections. The Commission is not satisfied that a case has been made that the suggested changes would be worth these risks.

Finally, the Commission notes that many of the changes suggested by the PR Society have not been widely accepted by other parliaments. For example, the Meek method is used for some local elections in New Zealand, but has not been adopted for any state or national legislatures. In the absence of any identified significant problem with the ACT electoral system, the Commission cautions against adopting any electoral changes that have not been widely accepted elsewhere.

For the above reasons, the Commission does not support any changes to the ACT's Hare-Clark scrutiny rules other than the tie-break rule changes referred to above.

Expanding the remedies available when something goes wrong during an election

The PR Society submission lists a range of issues to consider in the light of recent challenges to election outcomes in other jurisdictions.

The Commission considers that, if the Committee wishes to broaden its scope to encompass these issues, it would be appropriate to invite additional submissions on these matters. The questions raised are complex and it would be appropriate to seek legal advice, particularly in relation to issues arising from recent court of disputed returns outcomes.

In relation to the suggestion that there be sufficient flexibility to rectify problems or defects, the Commission notes that section 159 of the Electoral Act currently makes provision for the executive to extend the time for holding an election or to meet any difficulty that might otherwise interfere with the due conduct of an election.

In relation to the suggestion that rejection of nominations could be challenged by court action before polling begins, the Commission does not support this suggestion. At present, the only means by which a rejection of a nomination can be challenged is by petition to the court of disputed elections after the poll is declared. This provision is based on sound precedents in other jurisdictions. As ballot papers need to be printed and pre-poll voting has to commence within days of the declaration of nominations, any procedure that allowed nominations to be challenged before polling day could place the entire election process at risk. It would not be a trivial matter to postpone an election by one or two weeks, as suggested.

Given the significant legal questions raised by these matters, the Commission does not at this time support the suggestions raised by the PR Society in relation to these issues. If the Committee wishes to explore these matters in more detail, the Commission can provide a more considered view if requested.

2. The Attorney-General in a public hearing on 16 May 2014 said:

[G]iven the large number of people now who vote before polling day and often a number of weeks before polling day, whether or not that is having an impact on the ability for the campaign period as a whole to properly inform the elector as to all of the issues at play in the election—ie, if you vote early, there may be developments in the campaign that would have changed your vote or would have changed your view on a particular matter, but you have already voted so you cannot redress that.

This is an issue, I think, that should be potentially taken into account because of the very significant trend in the numbers of people voting before polling day. And whilst the government do not have a concluded view on it, we are aware that it is an issue and one that is worthy of some examination at the very least. (*Proof transcript of evidence*, pp. 10-11).

Please provide your views.

Under the Electoral Act, any elector who expects to be unable to attend at a polling place on polling day or who has silent enrolment is entitled to apply for a postal vote or an in-person pre-poll vote at a pre-poll voting centre in the ACT or another Australian capital city. Pre-poll voting generally commences on the Tuesday in the third week before polling day (as the Monday is generally a public holiday).

While the proportion of postal voters has remained generally static, the number and proportion of pre-poll voters has risen significantly in the ACT in recent times. The following table sets out relevant figures.

Election	Postal		Pre-poll	
	votes	%	votes	%
2004	6532	3.1%	30734	14.7%
2008	9599	4.4%	44635	20.3%
2012	9859	4.3%	61660	26.9%

This trend of increasing numbers of pre-poll voters has been experienced by all Australian jurisdictions at recent elections. The submission to the Committee made by Nathaniel Reader discusses this trend and speculates the reason for the increasing numbers is: “In a nutshell ... convenience.” The Commission is inclined to agree with this assessment.

The Commission sees the issue of providing extensive pre-poll voting facilities as one of maximising the franchise. Given that turnout for ACT elections is already lower than for federal elections in the ACT, the Commission would be concerned about any changes that acted to lower turnout in ACT elections.

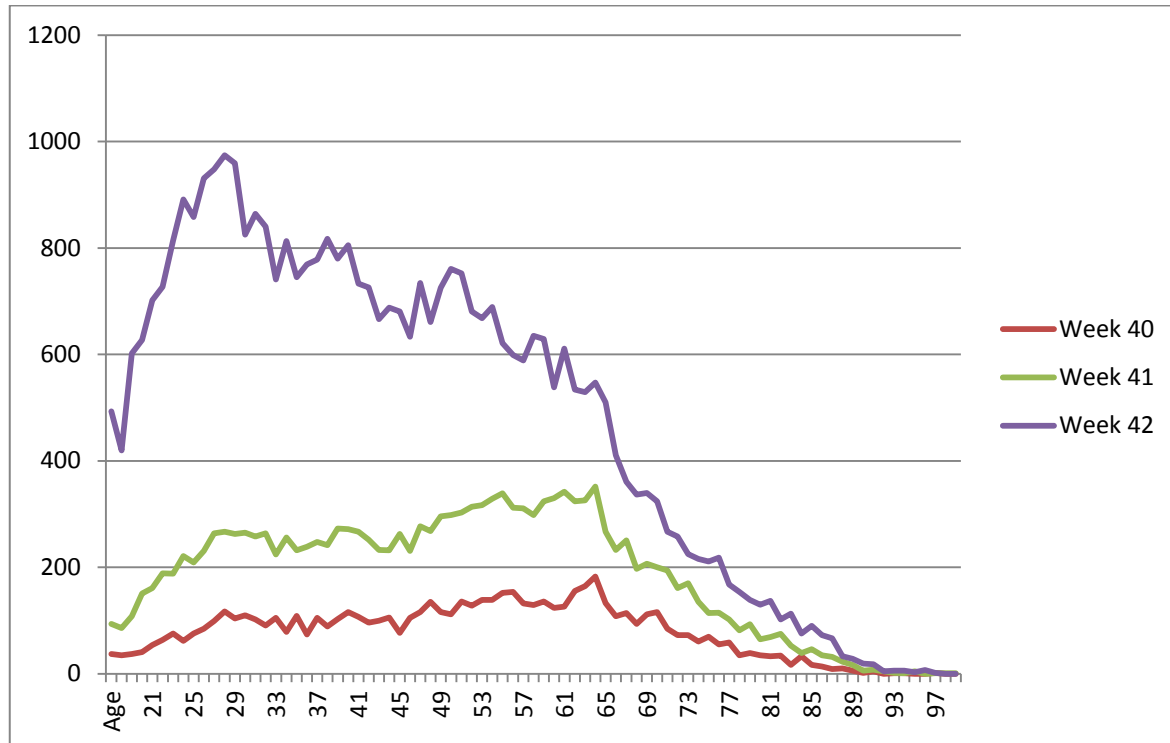
If the postal vote/pre-poll period is reduced from the current 3 week period to, say, a 2 week period, then some electors will be unable to vote. In particular, electors who will be interstate or overseas during the 2 weeks leading up to polling day may not have sufficient time or opportunity to vote if the voting period is reduced. In particular, voters relying on postal arrangements in remote areas or overseas locations might find it more difficult to receive and return postal votes within a 2 week window, compared to a 3 week window.

If the postal vote period is retained at 3 weeks but the pre-poll period is reduced to say 2 weeks, the Commission suggests that this is unlikely to make a substantive difference to early voting patterns, as a substantial number of electors who are keen to cast a pre-poll vote this early could be expected to instead cast a postal vote. This would increase the administrative burden on electors and Elections ACT, as well as increase the risk of a postal vote failing to be included in the count, with little likely benefit to be gained in terms of reducing the numbers of early voters significantly.

Analysis showing the numbers of electors using pre-poll voting throughout the pre-poll period indicates that most pre-poll voters vote in the last week before polling day, with more voters generally attending each day of that last week, with the busiest day being the Friday before polling day. The first week of pre-poll voting is the quietest.

Analysis also indicates that younger-aged pre-poll voters tend to vote in the last week before polling day. It is also apparent that young people make up a large proportion of pre-poll voters, particularly in the last week.

The following graph illustrates these trends.



Note: Week 40 is 3 weeks before polling day; week 41 is 2 weeks before polling day; and week 42 is the last week before polling day.

This analysis indicates that the most significant trend resulting in increasing numbers of pre-poll voters is the tendency for electors to vote in the last week before polling day, right up until the Friday before polling day. This in turn would indicate that reducing the pre-poll period to 2 weeks or even 1 week before polling day would not change the behaviour of most pre-poll voters. However, it can be expected that at least some of those who vote in the earlier weeks would experience difficulty in voting in the last week, assuming that they are voting early as they are travelling or otherwise unable to get to a polling place.

Whether the increase in the number of pre-poll voters is likely to have an impact on voting behaviour is a question that might best be addressed by political scientists. On the one hand, if something emerges or occurs late in an election campaign that might serve to alter someone's voting intention, anyone who has already cast a pre-poll vote will not have the opportunity to take that into account. On the other hand, it is arguable that many voters decide their voting intention long before polling day, and anything that occurs during the election campaign period itself is unlikely to change their opinion.

Taking the above considerations into account, the Commission suggests that the widespread acceptance of pre-poll voting indicates that a very significant proportion of the electorate (more than 30% in 2012) are appreciate of the opportunity to vote before polling day in an ACT election. To actively discourage or prevent electors from pre-poll voting would be at odds with the popularity of this voting method, and could serve to disenfranchise electors who may not be able to vote any other way.

Rather than restrict opportunities for pre-poll voting, it could be argued that the popularity of pre-poll voting indicates that political parties and candidates should be mindful of the fact that many electors vote before polling day and that they should structure their campaign strategies accordingly.