No 3

14 January 2002

Ms Karen Struthers MP
Chair
Legal, Constitutional and Administrative
Review Committee
Legislative Assembly
Parliament House
George Street
Brisbane Qld 4000

Dear Ms Struthers

FRAUDULENT ACTIONS

I enclose herewith my submission to this inquiry.

Yours sincerely

Colin A. Hughes
Emeritus Professor

SUBMISSION

TO

THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE
LEGISLATIVE ASSEMBLY OF QUEENSLAND

INQUIRY INTO THE ELECTORAL (FRAUDULENT ACTIONS) AMENDMENT BILL 2001

COLIN A. HUGHES

Should this legislation be proceeded with now?

It is arguable that this is not the proper time to proceed with legislation on this subject and with its objective because of uncertainties resulting from the passage of the Commonwealth's *Electoral and Referendum Amendment Act (No. 1) 1999* and the subsequent making of the Commonwealth's *Electoral and Referendum Amendment Regulations 2001 (No. 1)*. For the first time since a Common Roll came into effect the requirements for enrolment on the Commonwealth roll and the Queensland roll have diverged, and have diverged substantially. Previously if there were some difference between the two rolls, it could be accomodated by annotation of the relatively few cases, but now there are fundamental differences which might involve substantial numbers of electors and their eligibility to be one roll but not the other.

I do not know whether any negotiations between the Commonwealth and Queensland governments have taken place on this matter since the Committee reported in March 2000, nor have I sought to inquire about what should be confidential discussions between the two governments. Further, this is a problem that involves the other States as well as Queensland, and a common solution would be highly desirable. But I presume that the Queensland government does not intend to alter its enrolment requirements to conform with the recent Commonwealth changes, a decision which would be reinforced by the Committee's Report No. 19, *Implications of the new Commonwealth enrolment requirements* (March 2000), and its recommendations.

However, it is possible to speculate about possible solutions to the emerging problem: for example, there could be separate enrolment application forms to be separately processed by the two electoral authorities thereby reviving the old, expensive and unsatisfactory, position.

Or there could be a single enrolment application form, indicating the more stringent requirements now imposed by the Commonwealth, which would first be processed by the AEC which would subsequently download new and changed enrolments to the ECQ, and pass those application forms which it had rejected for failure to meet the new requirements to the ECQ which would process them according to its own requirements. In the past, as I understood it, when a State electoral event was impending, if received by the AEC first the joint card was passed to the State agency for urgent action and then sent back to the AEC; if, which happened much less often, the card was received by the State first, they processed it and then passed on to the AEC.

Or, third, there could be a single enrolment application, indicating the more stringent requirements now imposed by the Commonwealth, which would be processed solely by the AEC which would subsequently download to the ECQ two separate sets of

data, those transactions which had resulted in changes to the Commonwealth roll and comparable transactions which had been rejected for the Commonwealth roll but met the requirements for the Queensland roll e.g. because documentation had not been produced or had some defect. In effect the AEC would act as the agent of the ECQ in processing the application through to a final roll entry.

Here is one example of possible difficulties. In the first case above, I see no particular problems arising in prosecuting offenders under the proposed Bill now before the Committee. (Though there are other, important defects in the Bill which will be raised below.) Only Queensland's enrolment application form setting out Queensland's requirements would be looked at by Queensland officers. But suppose there is a joint card, and suppose that someone is approached to attest a claim ("an act ... to have a person ... enrolled for an electoral district") and knows that they are not in any prescribed class of Schedule 4 of the Electoral and Referendum Amendment Regulations 2001 but does not know that this is irrelevant to the claim for a change in the Queensland roll. They sign it, wishing to please someone - perhaps in authority or with influence over them - but do so believing the claim will be a nullity and will be rejected because of their ineligibility to attest it - and so no offence will have been committed.

The Bill's formula (s. 16A.(2)(b)) "not entitled to be enrolled" has to be set against the positive definition of "entitled to be enrolled" in *Electoral Act 1992*, s. 64(1):

> (a) either -
>
> (i) is entitled to be enrolled under the Commonwealth Electoral Act for the purposes of that Act in its application in relation to an election within the meaning of that Act; or
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> (ii) is not so entitled, but was entitled to be enrolled under the *Elections Act 1983* on 31 December 1991; ...

Does the formula in the present Bill therefore really mean "complies with the requirements of the enrolment process" in which case the Regulations are effectively imported to Queensland law? A Queensland court, especially one faced with a stiff mandatory minimal sentence and seeking a narrow interpretation of criminal liability, would be better served by greater clarity in the State's legislation. Additionally, the wisdom of continuing to admit the nose of the restrictive Commonwealth Regulations camel into the State electoral tent should be considered carefully as a matter of principle. At the very least s.64.(1) should be replaced, but it would probably be preferable to wait until there was some certainty of how the potential two-rolls problem was to be dealt with by the State.

But if it is thought better to proceed now?

If, however, the Committee considers that public concern about roll integrity requires some appropriate action forthwith, then there are a number of ways in which the present Bill could be made more effective to achieve that end. These involve extending the definition of "election", clarifying the concept of "the outcome of an election" proposed, and varying the penalty provisions.

The definition of "election"

The present definition, *Electoral Act 1992*, s.3, restricts the application of the proposed Bill to "an election of a member or members of the Legislative Assembly" i.e. to what is called a parliamentary election. However the Shepherdson Inquiry found:

> The information gathered during the Inquiry clearly established that the practice of making consensual false enrolments to bolster the chances of specific candidates in preselections was regarded by some Party members as a legitimate campaign tactic. No evidence, however, was revealed indicating that the tactic had been generally used to influence the outcome of public[1] elections. Where it was found to have been used in public elections, the practice appeared to be opportunistic or related to the family circumstances of particular candidates rather than systemic or widespread. (2001: xiv)

A combination of the proposed Bill and the existing definition ignores the principal source of the mischief as it was found by a protracted and recent inquiry. This should be remedied by a more extensive, and very specific, definition that might read:

> "election" means -
> (a) an election of a member or members of the Legislative Assembly; or
> (b) the selection by a political party which has applied for registration or been registered [under section 72] of a person or persons to be nominated as a candidate or candidate for election [under section 84]

It may be that the words in square brackets would be better placed in notes to the Act.

The extension in (b) should cover not only the most likely case of preselection by either rank-and-file party members or a mix of such members and branch representatives or executive members, but also any manipulation of a candidate's residential eligibility under party rules and joint nominations by two or more parties.

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[1] The Shepherdson Inquiry was concerned with both parliamentary and local government elections.

The concept of "influence the outcome of an election"

The proposed Bill speaks of "intent to fraudulently influence the outcome of an election". "Fraudulently" is clear enough; *Butterworth's Australian legal Dictionary* (1997) defines "fraud" as "an intentional dishonest act or omission done with the intention of deceiving". But it supplies no definition of "outcome" whether of an election or otherwise. The *Shorter Oxford English Dictionary* to which one might turn next provides "visible or practical result, effect or product" and that suggests where the problem is. Is "the result" of an election who wins and takes a place in the legislature? The heading of the *Electoral Act 1992*, s.122 speaks of "Notifying the results of an election" when the section itself speaks of "notifying ... the name of the candidate elected" which would point a court in that direction.

If so, then a half dozen shonky votes in a safe seat, which was the norm for the Shepherdson Inquiry, may not constitute the offence. If the intention is to stop improper interference with the rolls, then it is necessary to cover safe seats as well as the marginal, and in the context of the previous subsection's proposal to cover runaway preselections as well as the close ones. A solution, and there may be others, would be to add a new definition to s.3, which might read:

> "result of an election" means -
>
> (a) the name of the candidate elected; or
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> (b) the number of votes recorded for each and every candidate at the election.

Penalties

At the very least, if the Bill is proceeded with it will be advisable to amend s.176 to include the new section 154A as incurring the further penalty of disqualification from membership of and candidacy for the Legislative Assembly. However I believe there is now sufficient evidence known of the purposes to which fraudulent enrolments may be put to extend the effect of s.176 beyond parliamentary elections. Fraudulent enrolments may be used in an attempt to secure party office which is equally or more attractive to the offender.

Accordingly s.176 might be amended by adding (in terms equivalent to its present provisions):

> (c) in any case - the person is not entitled to be elected to or hold any office or committee membership constituted under the constitution or rules of a registered political party for 3 years after the conviction.

However making the election or choice of a convicted person a nullity may not sufficiently deter a registered political party from proceeding with or continuing that person holding an office or committee membership, and it may be necessary to

consider creating an offence with an appropriate penalty to discourage the party from such behaviour. This would be breaking new ground. Presently the offences (s.315) relating to unlawful conduct by a registered party in respect of funding and disclosure returns are committed by the registered agent or the person required by the Act to give a record. It might be appropriate to place liability upon the registered agent, who is readily identifiable, with a proviso that the designated person may not discharge the duties and powers of a registered agent whilst the convicted person continues to hold the office or committee membership with a reasonable period, say 30 days, in which the registered party may act to remove the convicted person if they will not resign voluntarily. This would disable the party from deriving a number of benefits under the Act.

In this regard, I would suggest that the 3 year disqualification period presently contained in s.176 and proposed above for its extension is inadequate for, whilst it ensures that the a convicted person cannot stand at the next general election, it might be possible for them to re-enter the Legislative Assembly at a subsequent by-election during the life of the next Legislative Assembly. If the period were extended to 5 years it would ensure that the person could not serve for two successive Legislative Assemblies.

Finally, whilst advocating the extension and stiffening of sanctions to discourage enrolment fraud, I would strongly oppose bringing mandatory minimum sentences into the Act. The case against them is well known: they frequently cause grievous injustice, they may well discourage convictions, they are a bad precedent that can spread into other areas of the law, they fail to recognise other consequences of conviction which may be severe - as in the recently reported instance of someone disbarred for what must be about as mild a version of the offence as one can get. This is essentially a political offence, committed for political purposes, and the best weapon to discourage it is to blight the political career of the perpetrator(s). The punishment should fit the crime.