

Submission No 25

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LEGAL, CONSTITUTIONAL AND  
ADMINISTRATIVE REVIEW  
COMMITTEE

Dr. M.J.Macklin

28 October, 1998

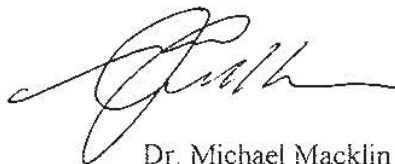
Gary Fenlon MLA  
Chair,  
Legal, Constitutional and Administrative Review Committee  
Legislative Assembly of Queensland,  
Parliament House  
Brisbane QLD 4000

Dear Chair

Please find enclosed a submission with regard to your Committee's inquiry into Mr. Justice Mackenzie's comments on the operation of the Electoral Act.

I would be happy to appear before the Committee to elaborate on my submission if the Committee so requires.

Yours sincerely



Dr. Michael Macklin

## **Introduction**

Mr. Justice Mackenzie has proposed that the law be changed to require How-to-Vote cards to conform to an additional requirement.

While this may seem to be a simple proposal, it has far wider ramifications than first appears to those not familiar with the area. For example, Mr Justice Mackenzie's suggestion that if a person is not a member of a political party than the fact that he or she is an independent should be stated.

The problem with this is that it may open up the opportunity for someone to register an group called "Independent" and co-opt all other independents or exclude them since to put Independent on one's card in those circumstances would be to mislead voters. Of course, this could be overcome by further amendments to insert provisions similar to those in the federal electoral legislation preventing the registration of a group with such a name. But nevertheless, this illustrates that the issue is not a simple one.

This suggests that if any changes are contemplated that they ought take place only by consideration of the broader context of the place of How-to-Vote cards within the Queensland electoral system.

## **How-to-Vote Cards**

Essentially How-to-Vote card are the last attempt both to influence and assist voters in the casting of their vote. This dual purpose has over time seen various conventions arise with regard to the printing and distribution of these cards.

The question to ask is whether regulation will improve these conventions and the overall electoral system or merely introduce an unnecessary impediment to further development. It should not be assumed that regulation per se will necessarily provide improvement. On the other hand, the electoral process is so central to the health of a democracy that the onus of proof normally needed prior to regulation is considerably lessened by the gravity of the issue.

There would be a number of way of dealing with this issue:

**1. How-to-vote cards could be banned completely in so far as the last minute attempt to influence could be argued to be counterproductive to a deliberative vote.**

If, in general, it was understood that no additional information would be provided at the booths then voters would have to utilise other methods of ensuring that they cast their vote for their favoured candidate. If such cards were banned, then it is highly likely that parties would print them in newspapers with the exhortation to voters to cut them out and take them with them to the polls. I would argue that this would be preferable to the current context provided that canvassing for votes were made illegal within several hundred metres of polling booths to ensure that attempts to pass such cards in the surrounding streets was rendered useless.

It should be noted that this method would not avoid the need to look at the issue of misrepresentation since this would now be transferred from the how-to-vote card to be handed out on the day to the how-to-vote card in the newspapers. At a minimum, a specific regulation

with regard to this type of political advertising would still be needed. Alternatively, a more general regulation in relation to truth in political advertising could address not only this issue but all forms of printed attempts to misled the voter in relation to the casting of their vote.

**2. How-to-vote cards could be made into posters by the Electoral Commission and placed in the voting compartments.**

These posters would come in a number of formats to ensure a fair and equal distribution of favoured spots such as at the top and bottom. Under this arrangement, the Electoral Commission would need to receive the cards some time prior to polling day. The Commission would need to specify the size and shape of the card to ensure some uniformity and would necessarily need to be given specific powers to ensure that cards to which objection could be taken were not displayed. This would involve some injunction power that unlike the current cumbersome process would be extremely powerful in eliminating any card to which a court-sustained objection could be taken.

This system could only be effective providing How-to-vote cards were not allowed to be distributed anywhere near the polling booths.

This approach is likely to be objected to on the basis that it provides equal access to voters for those candidates who normally would be unable to staff all of the polling booths. This objection highlights the tension between the two functions of these cards - the last chance to influence and the provision of information to assist in casting a vote

of choice. Provided one accepts that the latter is vastly more important than the former then this objection can be dismissed.

**3. A third position would be to require all political parties intending to distribute How-to-vote cards on election day to register such cards with the Electoral Commission prior to election day.**

Only those cards which have been duly registered and accepted as valid would be permitted to be distributed. This approach would also require the granting to the Commission a range of discretionary powers to ensure fair play. The courts would maintain their role but before the event rather than after it as at present.

**4. A fourth possibility would be to leave the current situation unchanged.**

This approach would draw upon the argument that the number of times that these problems have arisen is not such as to suggest that there is a major problem that need rectification.

The difficulty with this argument is that there is a general agreement that it is wrong if voters are misled to vote for one's political opponent. As a consequence, it is likely that future occurrences will take a variety of forms and it cannot be predicted that the outcome will be the same. It is therefore advisable in the interest of protection of the integrity of the system that some action be taken to rectify the situation.

## **Recommendation**

I believe that democracy is assisted more by the second approach outline above than both any of the others. However, if it is felt that such a change is too radical then the third approach would be the next logical step.

## **Appeals**

I do not have a firm view with regard to the introduction of an appeal mechanism to the Court of Appeal. While the issue of appeals is an important principle in most areas of administrative law, I do not see a compelling reason as to why it need be included in this area. The close votes that characterise the current political climate suggest that the introduction of further delays into the system will almost inevitably be used by political opponents to delay the formation of a government.

I accept, however, that certainty is necessary with regard to any decision in this area and hence the introduction of such an appeal mechanism may be warranted.

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