LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

The Electoral Amendment Bill 1996

February 1997

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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

48TH PARLIAMENT

SECOND SESSION

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CHAIRMAN'S FOREWORD

The Electoral Amendment Bill 1996 contains amendments to the *Electoral Act 1992* (Qld) which were called for by the Electoral Commission of Queensland in light of its conduct of the 1995 general election and the two resulting petitions heard by the Court of Disputed Returns for the electoral districts of Greenslopes and Mundingburra.

The most imperative amendments to the *Electoral Act* were sought by the Electoral Commission as a result of the Mundingburra decision. They involved the definition of 'special postal voters' under the Act. The amendments have already been implemented as a result of the passage of the *Justice Legislation (Miscellaneous Provisions) Act 1996* (Qld).

The amendments contained in the current Bill comprise a range of essentially technical changes to the Act which are uncontroversial. The Committee finds the Bill unobjectionable and believes the amendments the Bill contains will enhance the capacity of the Electoral Commission to conduct future Parliamentary elections in Queensland.

On behalf of the Committee, I thank the Attorney-General for this opportunity to report on the Bill.

Judy Gamin
Chairman
6 February 1997

1. INTRODUCTION - THE COMMITTEE'S REVIEW

The Legal, Constitutional and Administrative Review Committee (LCARC) is an all-party committee of the Legislative Assembly with a broad range of responsibilities. The *Parliamentary Committees Act 1995* (Qld) provides that electoral reform is one of the Committee's major areas of responsibility. Section 12 of the *Parliamentary Committees Act* provides that the Committee's responsibility about electoral reform includes monitoring generally the conduct of elections under the *Electoral Act 1992* (Qld) ('the Act') and the capacity of the Electoral Commission of Queensland to conduct elections.

On 3 December 1996, the Attorney-General, the Honourable D E Beanland MLA, wrote to the Committee notifying it that the Electoral Amendment Bill 1996 ('the current Bill') had been tabled on that day and invited the Committee to review the Bill if the Committee so wished. The Attorney-General's letter is attached as **Appendix 1**.

At a meeting held on 5 December 1996, the Committee resolved:

> *That the Committee, pursuant to its responsibility in relation to electoral reform, conduct a review of the Electoral Amendment Bill 1996 and report thereon to the Legislative Assembly.*

The Committee has now concluded its deliberations on the current Bill and presents this report to the Legislative Assembly.

2. BACKGROUND TO AND PURPOSE OF THE BILL

The 1995 State general election resulted in two significant decisions by Mr Justice Ambrose sitting as the Court of Disputed Returns. The first decision concerned a petition disputing the election result in the Greenslopes electorate: *Fenlon v Radke*, unreported decision of the Supreme Court of Queensland sitting as the Court of Disputed Returns, Petition No. 15 of 1995. The second decision concerned the disputed return for the seat of Mundingburra: *Tanti v Davies*, unreported decision of the Supreme Court of Queensland sitting as the Court of Disputed Returns, Petition No. 16 of 1995. The Mundingburra decision, in particular, presented considerable ramifications for the role of the Electoral Commission in administering the Act and conducting Queensland Parliamentary elections.

As a result of the Greenslopes and Mundingburra decisions, and of the wider experience of the 1995 State election, the Electoral Commission advocated to the Attorney-General various changes to the Act.

At that time, the Electoral Commissioner informed this Committee of the changes which the Commission proposed and the Committee considered the proposals, amongst other things, in its report titled *Matters Pertaining to the Electoral Commission of Queensland* (Report No.2, August 1996). At page 9 of that report, the Committee endorsed all but one of the Commission's proposals. As is discussed below, the proposal which was not endorsed by this Committee has not been included in the current Bill.

The more pressing of the Electoral Commission's proposals, those relating to 'special postal voters', have already been brought into effect through changes to the *Electoral Act* contained in the *Justice Legislation (Miscellaneous Provisions) Act 1996* (Qld). That legislation was introduced into the

Legislative Assembly on 4 September 1996 by the Attorney-General, the Honourable D E Beanland MLA, passed by the Assembly on 5 December 1996 and assented to on 12 December 1996.

The *Justice Legislation (Miscellaneous Provisions) Act* made two important changes to the *Electoral Act* with regards to '*special postal voters*'. Firstly, it gave statutory recognition to the register of special postal voters which the Electoral Commission maintains in practice. Secondly, it changed the statutory definition of '*special postal voter*' in s.105(3)(a) of the *Electoral Act* from:

- an elector whose '***real place of living*** (a term subjected to intense and complex legal argument in the Mundingburra petition, with the Court's interpretation of the term in that case presenting massive logistical problems for the Electoral Commission in administering postal votes to electors temporarily residing outside their electorate*) is not within 15 km of a polling booth*';

to:

- an elector whose name is on the special postal voters register '***because of*** *a written application that satisfies the Commission the person's* ***registered address as shown on the electoral roll*** [therefore necessitating a Queensland address] *is more than 15 km … from a polling booth*'.

The current Bill introduces various other amendments to the Act which were proposed by the Electoral Commission. This Committee notes that the current Bill is listed in the Queensland Scrutiny of Legislation Committee's *Alert Digest No. 1 of 1997* (28 January 1997) as a Bill 'examined but not reported on'.

The current Bill is endorsed by this Committee. The Bill:

- contains amendments all but one (**clause 18**) of which have already been endorsed at proposal stage by the Committee in its report on *Matters Pertaining to the Electoral Commission of Queensland* Report (as mentioned above); and
- effects those changes in an appropriate manner.

The remainder of this report will briefly outline the main amendments to the Act contained in the Bill.

3. MAIN AMENDMENTS CONTAINED IN THE BILL ALREADY ENDORSED BY THE COMMITTEE

3.1. Register of Political Parties - Registered Officer's Deputy

'Registered Officers' of political parties perform various functions with regards to Part 5 of the *Electoral Act* 'Registration of Political Parties'. Importantly, Registered Officers are the only persons who can endorse candidates on behalf of a party. However, under existing provisions, should a Registered Officer position become vacant a new Registered Officer can only be appointed after a thirty-day statutory objection period. This delay would obviously have unfortunate consequences should a position, due to unforeseen circumstances, become vacant when an electoral writ had been issued.

Clause 5 of the current Bill, introduces a new s.72A into the *Electoral Act.* Section 72A allows a Registered Officer of a political party to nominate a Deputy. The Deputy would be able to perform

the Registered Officer's duties should that person become unavailable. The amendment sensibly alleviates any unnecessary problems which might arise in the circumstances just discussed.

3.2. Scrutineers and the Counting of Declaration Votes

Section 99 of the Act provides for the appointment of scrutineers and allows for their presence to observe various procedures during the course of an election, including examining declaration envelopes *after* polling day. It is the Electoral Commission's view that s.99 effectively prevents any examination of declaration votes before the Sunday following polling day.

Clause 6 of the Bill seeks to amend s.99(3) of the Act to allow for the presence of scrutineers at '*the examination of declaration envelopes received* ***before*** *6.00 p.m. the day before polling*'. This amendment will enable an earlier start to the somewhat slow process of counting declaration votes, thereby reducing delays in determining the results of close elections. Very close elections would still entail the ten-day statutory period to assure the receipt and counting of straggling postal votes.

Related to the ten-day statutory limit for the receipt of posted declaration envelopes is an amendment proposed by **clause 12** of the current Bill. The clause amends s.116(2) of the Act by providing a specific cut-off time of 6 p.m. on the tenth day after polling day for the receipt of postal votes, replacing the phrase 'within 10 days after polling day'. The amendment allows for a result to be determined on that tenth day, as opposed to determination needing to lag until the eleventh day as a result of the existing vague wording.

3.3. The Location of Polling Booths

In a communication with this Committee, the Electoral Commissioner, Mr Des O'Shea, has stated:

> '*The appointment of 'Joint Polling booths' can be, if used sensibly, an effective means of dealing with electors residing near borders of electoral districts. However, as was highlighted during the recent Mundingburra election, no provision exists for the Commission to effectively appoint polling booths outside of a district when there is an election for one (1) district only.*
>
> *Section 102(2) currently precludes an elector from lodging an ordinary vote other than by entering "a polling booth <u>in</u> the electoral district for which the elector is enrolled". A minor change replacing the words "in the" with the words "[appointed] for" would resolve this anomaly.*'

Clause 7 of the current Bill addresses the above matter.

Similarly, **Clause 8** amends s.106 of the Act to clarify that electors (especially during by-elections) can cast absentee votes at mobile polling booths and declared institutions located geographically outside their electoral district.

3.4. 'Post' and Alternative Delivery Systems

Section 110 of the Act places statutory duties on the Electoral Commission to ensure certain electors are not disenfranchised. If the Commission receives a timely request for a ballot paper and declaration envelope from an '*ordinary postal voter*' (as defined in s.105(2)) the Commission is under a duty to '*post*' the documents to the elector [s.110(2)]. Section 110(3) states that the Commission must, as soon as practicable after the issue of the writ for an election (and regardless of the receipt

of a request), '*post*' a ballot paper and declaration envelope to each '*special postal voter*' (as defined under s.105(3)).

In the Mundingburra decision, his Honour, Mr Justice Ambrose, held that the word 'post' in s.110(2) of the Act meant to post by ordinary means, namely, to use Australia Post. In relation to the election for the Mundingburra electoral district, the Electoral Commission attempted to contact Australian Defence Force (ADF) personnel situated in Rwanda through official ADF courier. This mode of delivery was held by Ambrose J to be outside the meaning of 'post' in s.110(2). [*Tanti v Davies*, unreported, Petition No.16 of 1995, p.43] The Electoral Commission's use of an alternative delivery system to secure delivery to military personnel in a strife-torn country was indeed commended by Ambrose J but was nevertheless held by His Honour to be a breach of the Act, albeit a technical breach. [*Tanti v Davies*, unreported, Petition No.16 of 1995, pp.43,47]

Clause 9(3) of the current Bill replaces the word '*post*' in s.110(2) of the Act with the phrase '*post, deliver or send*'. This will effectively give a discretion to the Electoral Commission to use the most effective delivery system available in the circumstances to effect delivery to **ordinary postal voters**.

However, the Bill does not likewise replace the word '*post*' with the phrase '*post, deliver or send*' in existing subsection 110(3), dealing with **special postal voters**. This is because of the amendments already made by the *Justice Legislation (Miscellaneous) Provisions Act* to the s.105(3)(a) definition of 'special postal voter'. In essence, the new definition of '*special postal voter*' (provided in Section 2 of this report) necessitates that - for an elector to be defined as a special postal voter - they must, amongst other things, possess a '*registered address which is shown on the electoral roll*'. In effect, this means an address within Queensland and not out outside the State. This (in conjunction with the fact that postage to special postal voters occurs relatively early in the election, that is, '*as soon as practicable after the issue of the writ*') alleviates the need to extend potential means of delivery beyond Australia Post.

Another change to the Act which was initially proposed by the Electoral Commission was an amendment to ensure that an order to hold a fresh election could not arise from the failure of a delivery system (alternative to post) to deliver electoral documents to postal voters. The proposal was advocated to the Attorney-General and was also considered by this Committee in its report on *Matters Pertaining to the Electoral Commission of Queensland*. It was the only proposal initially advocated by the Electoral Commission to *not* have been endorsed by the Committee (see page 9 of that report).

The Department of Justice and Attorney-General concurred. In a Ministerial response to the recommendations contained in the LCARC report on *Matters Pertaining to the Electoral Commission of Queensland*, the Attorney-General informed the Committee that '*the same conclusion had been independently reached by Departmental officials in the course of negotiations with the Electoral Commission*'. Accordingly, the current Bill does not contain the initial proposal.

3.5. Applications for Postal Votes and Electoral Visitor Voting

Clause 9 makes other changes to s.110 'Making a declaration vote using posted voting papers'. As it stands, s.110 limits the means by which an elector may request a postal vote to using either post or facsimile. **Clause 9(1)** will enable an elector, or someone on the elector's behalf, to lodge an application for a postal vote by personally *delivering* the request to a returning officer or the Electoral Commission.

In addition, **Clause 9(2)** will require applicants for an ordinary postal vote to specify an address to which ballot papers are to be sent. This amendment will reduce the possibility of the failure of the elector to receive the postal ballot papers being held to be 'official error' by the Court of Disputed Returns and the election result being accordingly challenged.

Clause 10 similarly amends s.111 'Electoral visitor voting' by:

- enabling an elector to lodge an application for electoral visitor voting by personally delivering the application; and
- requiring that the application specify the address which the electoral visitor is to visit.

Clause 17 is related to the amendments made by **clauses 9** and **10**. **Clause 17** amends s.172 of the Act - dealing with the failure of third persons to post or facsimile documents for someone else - by extending the offence to failure to '*deliver*' (not just post or facsimile) documents on behalf of postal vote or electoral visitor applicants and to failure to '*send*' (not just post) documents on behalf of the Electoral Commission.

3.6. Formal Voting and the Casting of ballots

Subsection 114(1)(c) of the Act states that a ballot paper will only be adjudged to be formal if it, amongst other things, has '*been put into a ballot box as required by this Act*'. Subsection 114(1)(c) was the subject of complex legal argument in the 1995 Greenslopes petition to the Court of Disputed Returns. The petitioner asserted that the arguably mandatory requirement contained in the subsection extended not only to an elector casting their vote, but also to a returning officer receiving a declaration vote for the purpose of counting it. Mr Justice Ambrose did not agree with the assertion.

Nevertheless, the Electoral Commission sought an amendment to make it explicit that s.114(1)(c) *only* relates to *an elector* placing a ballot in a ballot box (and not, for example, throwing the completed ballot on the floor). **Clause 11** of the Bill clarifies that - for the purposes of adjudging a formal vote under s.114(1)(c) - the ballot paper '*must have been put into a ballot box* ***by the elector*** *as required by this Act*'.

3.7. Power of the Court to Inspect Declaration Envelopes

As mentioned in the Attorney-General's Second Reading Speech to the current Bill, electoral officials in Queensland and other jurisdictions have traditionally observed the practice not to open declaration votes where there is doubt as to their validity; '*once the declaration envelope has been opened and the ballot paper admitted to the count the position is irretrievable*'. [Electoral Amendment Bill 1996 (Qld), Queensland Parliamentary Debates, Second Reading Speech, Hon D E Beanland MLA, 3 December 1996, p.4786]

In Queensland in these circumstances, such declaration votes have been left to the Courts to inspect and add to the count where necessary (for example, *Turner v King*, unreported decision of the Supreme Court of Queensland sitting as the Elections Tribunal, Petition No.1 of 1990; *Re: Maryborough Election Petition; Nightingale v Alison* [1984] 2 Qd.R. 214). However, recent decisions by Courts in other jurisdictions has cast doubts as to the Court's power to open declaration votes (for example, *Varty v Ives* [1986] V.R. 1).

Clause 14 assures that past Queensland practice in this regard remains unchallengeable. **Clause 14** inserts a new subsection (3) to s.136 'Powers of the Court' which reads: '*To remove doubt, it is declared that the Court may order the opening of a sealed declaration envelope*'. However, an important proviso accompanies in the form of new s.136(4): '*However the Court must ensure, as far as reasonably practicable, the secrecy of the ballot is maintained*'.

3.8. The Powers of the Court and Trivial Errors

Section 136(2) of the Act provides examples of orders which the Court of Disputed Returns may make when exercising its broad discretion [conferred in s.136(1)] to make any order '*that the Court considers just and equitable*'. Section 137(1) then places certain restrictions on orders made by the Court under s.136(2). Section 137(1)(b) states that one of these restrictions is that the court cannot make an order (for example, an order that a new election be held) because of a trivial error made by a member of the Electoral Commissions' staff, that is, an error which appears unlikely to have affected the election result.

This provision makes sense with regards to most orders listed under s.136(2) such as an order for a new election or an order that the person taken to have been elected has not been elected. However, s.136(2)(d) includes the example of '***an order to dismiss*** *or uphold* ***the petition*** *in whole or in part*'. The Electoral Commission contends that this indicates a drafting error since the absurd effect is produced that a petition cannot be dismissed by the Court if there is only a trivial error on the part of the Commission.

Clause 15 appropriately rectifies the situation by replacing s.137(1)(b) with new s.137(1A) which makes it explicit that an order to dismiss a petition is an exception to the restriction that the Court must not make an order under s.136(2) because of trivial error.

3.9. The Powers of the Court and Incorrect Information Supplied by Electors

In addition, **clause 15** introduces a new restriction to the orders which the Court can make, namely, that the Court cannot make an order under s.136(2) '*because incorrect information an elector gives to an issuing officer is written on a declaration envelope the elector signed*'. In assisting electors on polling day, polling officials often complete declarations on envelopes for absentee votes or votes where, for example, an elector's name cannot be located on the electoral roll and the elector claims that the Electoral Commission is at fault. Electors are then asked to check the details and sign the declaration envelope.

The Commission sought the **clause 15** amendment so that an elector is held responsible for the contents of a declaration signed by them and that any incorrect details contained in a declaration so signed is not able to be adjudged by the Court as official error where a polling official assisted the elector in completing the declaration.

3.10. Requirement of Election Matter to State Name of the Printer

Clause 16 amends s.161 of the Act so that the name and place of business of the printer of election matter will no longer be required to be stated on election matter. The name and address of the person who authorised the electoral material will continue to be required to be shown on the advertising or handbill. The Committee endorses this amendment which, in light of advances in printing and photocopying technology, sensibly removes the requirement for advertisements and

'how-to-vote' material to show who printed the material. Often, and especially in the case of independent candidates, there is no commercial printing involved.

4. AMENDMENT CONTAINED IN THE BILL NOT PREVIOUSLY CONSIDERED BY THE COMMITTEE

As already mentioned, all of the above amendments had been considered at proposal stage by the LCARC in its earlier report on *Matters Pertaining to the Electoral Commission of Queensland.* However, the current Bill does contain one provision not previously considered by the LCARC. This will now be considered.

4.1. Election Funding and Financial Disclosure

Clause 18 amends the Schedule to the *Electoral Act* by repealing s.294B. The Schedule to the Act is based on Part XX of the *Commonwealth Electoral Act* and was introduced via the *Electoral Amendment Act 1994* (Qld). The Schedule introduced a comprehensive system of providing for:

- electoral funding for registered political parties and candidates other than candidates endorsed by registered parties; and
- public disclosure of political donations by registered parties for elections and, on an annual basis, by candidates for elections and by entities involved with the electoral process.

Section 294B, with no counterpart provision in the Commonwealth Act, was introduced to impose an obligation on a political party which intended to make a claim for election funding in respect of an election to be held in the following year to notify the Electoral Commission of such an intention by 31 December in any particular year.

According to the Attorney-General, in his Second Reading Speech to the current Bill:

> '*The rationale for this provision is difficult to establish.*
> …
> *It has been considered that this provision imposes an unjustifiable and unrealistic burden on political parties as well as an unwanted and unnecessary administrative burden on the Electoral Commission. … Put simply, it casts an onus on political parties, if they are desirous of participating in the reimbursement arrangements, to be able to forecast that an election, be it a general election or a by-election, will be held in the ensuing year. I understand this provision has led to the practice of political parties routinely submitting such notices …*'. [Electoral Amendment Bill 1996 (Qld), Queensland Parliamentary Debates, Second Reading Speech, Hon D E Beanland MLA, 3 December 1996, p.4786]

It could have been that the provision played some sort of role at the introduction of the election funding and financial disclosure scheme. However, the Committee agrees that existing s.294B currently places an unreasonable continuing administrative burden on political parties and on the Electoral Commission. The Committee endorses the repeal of s.294B. The Attorney-General's Second Reading Speech, at page 4786, notes that the repeal of the provision also has the Electoral Commission's support.

5. CONCLUSION

The Committee finds the current Bill unobjectionable and considers the Bill a fitting legislative response to the proposals made by the Electoral Commission in light of the Mundingburra and Greenslopes decisions and the Electoral Commission's experience with regards to the 1995 State election generally.

Appendix I: Letter from the Attorney-General to the Committee Dated 3 December 1996

Committee Meeting Attendance Record

MEETING ATTENDANCE RECORD						
MEETING DATE	DARRYL BRISKEY	FRANK CARROLL	JUDY GAMIN	KEN MCELLIGOTT	GLEN MILLINER	FIONA SIMPSON
4 APRIL 1996	✓	✓	✓	✓	✓	✓
17 APRIL	✓	✓	✓	✓	✓	✓
29 APRIL	✓	✓	✓	✓	✓	✓
2 MAY	✓	✓	✓	✓	✓	✓
16 MAY PM	✓	✓	✓	✓		✓
16 MAY PM	✓	✓	✓	✓	✓	✓
11 JULY AM	✓	✓	✓	✓	✓	✓
11 JULY PM	✓	✓	✓	✓	✓	✓
25 JULY		✓	✓	✓	✓	✓
6 AUGUST AM	✓	✓	✓	✓	✓	✓
6 AUGUST PM	✓	✓	✓	✓	✓	✓
30 AUGUST AM	✓	✓	✓	✓	✓	✓
30 AUGUST PM	✓	✓	✓	✓	✓	✓
10 SEPTEMBER	✓	✓	✓	✓	✓	✓
8 OCTOBER	✓	✓	✓	✓	✓	✓
31 OCTOBER	✓	✓	✓	✓	✓	✓
13 NOVEMBER	✓	✓	✓	✓	✓	✓
14 NOVEMBER AM	✓	✓	✓	✓	✓	✓
14 NOVEMBER PM	✓	✓	✓	✓	✓	✓
14 NOVEMBER PM	✓	✓	✓	✓	✓	✓
28 NOVEMBER	✓	✓	✓	✓	✓	✓
5 DECEMBER	✓	✓	✓	✓	✓	✓
30 JANUARY 1997 AM	✓	✓	✓	✓	✓	✓
30 JANUARY PM		✓	✓	✓	✓	✓