

LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

**Matters Pertaining to the
Electoral Commission Of Queensland**

August 1996

Report No. 2

**LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW
COMMITTEE**

48TH PARLIAMENT

SECOND SESSION

CHAIRMAN: Mrs Judy Gamin MLA, Member for Burleigh

DEPUTY CHAIRMAN: Mr Darryl Briskey MLA, Member for Cleveland

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CHAIRMAN'S FOREWORD

Electoral and voting systems are of intense interest to Members and candidates and also, from time to time, attract expressions of concern from the general public.

The Electoral Commission of Queensland was established on 19 June 1992 by the *Electoral Act 1992*, and replaced the State Electoral Office. It resulted from the review of, and subsequent reform of, electoral matters undertaken by Electoral and Administrative Review Commission (EARC), which in turn was established as a result of the Fitzgerald Inquiry.

As an independent statutory authority, the Commission was established not only to conduct elections and referendums, but also to conduct a program of education and research and provide information and advice to the community. As part of this, the Commission has initiated a number of publications, not only relating to statistical returns but also manuals, research reports and information packs. Much emphasis has been placed on increasing community awareness of and participation in the electoral process.

From June 1993 the Commission also assumed responsibility for conducting industrial ballots.

The Legal, Constitutional and Administrative Review Committee met with the Electoral Commissioner on 16 May 1996, and matters discussed included false or misleading electoral material and issues relating to how-to-vote cards.

I will not canvass these matters at the present time as the Committee's current inquiry deals with the matter of Truth in Political Advertising including bogus how-to-vote cards. The Electoral Commissioner has made a submission on this inquiry, a public hearing will be held on 30 August 1996 and a report will be presented to Parliament later in the year.

Mr O'Shea also explored issues relating to electronic voting and electronic counting of voters, both of which are raised by the general public in the wake of close election results where there can be some delays while all votes are checked and counted.

Allegations of multiple voting or cemetery voting and other voting misdeeds are also frequently made and this report addresses those matters.

Importantly, the Commissioner raised a number of perceived problems with the Electoral Act 1992. These matters are canvassed in chapter 5 of this report.

The Committee will continue to deal with its statutory responsibilities in relation to electoral matters and will continue to keep the Parliament informed on its deliberations.

Judy Gamin MLA

Chairman

8 August 1996

1. THE COMMITTEE'S RESPONSIBILITY

Section 9 of the *Parliamentary Committees Act 1995* (Qld) provides that the Legal, Constitutional and Administrative Review Committee has responsibility for, amongst other things, electoral reform.

Section 12 of the Act provides:

The Committee's area of responsibility about electoral reform includes monitoring generally the conduct of elections under the Electoral Act 1992 and the capacity of the electoral commission to conduct elections.

On 2 April 1996 the composition of the Legal, Constitutional and Administrative Review Committee was changed by resolution of the Legislative Assembly.

The following day the Committee's new Chairman, Mrs Judy Gamin MLA, wrote to the Electoral Commissioner, Mr Des O'Shea, noting the Committee's jurisdiction under the *Parliamentary Committees Act* and suggesting that it would be beneficial if the Committee and the Electoral Commissioner could meet and discuss the Court of Disputed Returns decisions of *Tanti v Davies* (unreported) Petition No. 16 of 1995 and *Fenlon v Radke* (unreported) Petition No. 15 of 1995 (respectively the Mundingburra and Greenslopes decisions) and any other matters which concerned the Committee's statutory responsibilities.

Subsequently, on 16 May 1996 a meeting took place between the Electoral Commissioner and the Committee.

This meeting was extremely productive and a number of issues were raised including:

- False and misleading electoral material
- Issues relating to how-to-vote cards
- Difficulties arising from the Mundingburra and Greenslopes decisions, especially in respect of postal voters
- Electronic Voting
- Electronic Counting of votes
- Multiple Voting and so-called Cemetery Voting

The Committee considers that it would be beneficial for the Committee to report to the Parliament on a number of matters arising from the meeting.

2. ELECTRONIC VOTING

In the days following the July 1995 State election a number of criticisms or comments were made about the delay in achieving a result.

During the course of the meeting with the Electoral Commissioner, the general issue of electronic voting was canvassed.

The Commissioner advised that the Commission has attempted to keep abreast of developments in the area of electronic voting and/or the electronic counting of votes, through reading overseas literature and through meetings with interstate electoral officials who are also keenly monitoring developments in this field. The Commissioner advised that the Australian Electoral Commission has on a number of occasions in recent years sent officers overseas to study automated voting systems. The Commissioner stated that in his opinion electronic voting could not be introduced in Queensland without a massive outlay of money. The Commissioner queried whether this expenditure would be worthwhile given the following factors:

- Currently, every vote taken on polling day is counted by approximately 9.00pm that evening. Delays in obtaining results are not the result of vote counting, rather they are the result of having to wait for postal and absentee votes. In short, electronic voting would not significantly improve the speed in which results can be determined.
- Using expensive technology to improve counting by a relatively short period is not considered justified, especially in view of potential problems which will be posed by an electronic voting system. The potential problems of an electronic voting system include:
 - The cost of placing terminals in every booth with links back to a central database.
 - The system would not be as user-friendly as the current system.
 - It is predicted that any potential electronic system would incur at least a 10% informal voting rate.
 - Such a system could effectively limit a voter to one local polling booth. (In this regard, the Commissioner referred to electronic systems in use in the United States which resulted in electors having to vote at one allocated voting booth.)
 - There would be no hard copies of votes, which would create suspicion regarding the whole process.

The issue of electronic voting was considered by the Electoral and Administrative Review Commission (EARC) in its *Report on the Review on the Elections Act 1983-1991 and Related Matters*. At that time EARC concluded that electronic voting was not a viable option. However, EARC recommended that the Electoral Commission of Queensland investigate the possibility of electronically scanning ballot papers as a means of counting votes.

The Commissioner reports that the Commission has carefully investigated the potential of electronically scanning ballot papers. Unfortunately, the Commissioner reports that no equipment currently on the market can reliably read handwriting, nor can such equipment allocate preferences with a simply-designed preference paper, although suppliers of scanning equipment expect to have such equipment available in the “foreseeable future”.

2.1 The Use of the Totalisator Administration Board (TAB) Facilities

Suggestions have often been made that TAB facilities could be used on voting day. The Commissioner reports that this option has been carefully explored. However, it was concluded that the TAB computer network was not suitable for electoral purposes for the following reasons:

- TAB has 408 outlets in Queensland (of which 191 are located on licensed premises) which, in the absence of phone voting, would be inadequate to service the State. There were 1,672 polling booths established for the 1995 elections.
- A ballot paper would have to be specifically designed to provide for the preferential voting system. Many electors would have difficulty completing such a ballot paper.
- TAB equipment limits the number of candidates to 8 per ballot paper. In the case of the Mundingburra by-election with 12 candidates, two ballot papers would have had to be used with the obvious potential for large-scale voter confusion.
- Because of the large number of transactions that would have to be processed on polling day, elections would have to be called on Sundays provided there were no race meetings.

2.2 The Overall Value of Electronic Voting

It must be advised that in the July 1995 state election a primary count of 1,573,898 ordinary votes (85.75% of the vote) was completed manually by 9.00pm on polling night. A state-wide preferential notional count was on hand in the tally room by 10.30pm. Therefore, in normal circumstances the most important question, that is, which party or parties will form Government, is known within five hours of the close of polls.

The Commissioner concedes that with an electronic system these votes would have been counted within minutes of the close of polls. However, the Commissioner also points out that 48,739 postal votes were taken in the 1995 poll. These votes were received within 10 days of polling day. In a close election such as the 1995 election, where 109 votes determined three Seats and effectively determined Government, postal votes represent a significant proportion of the overall vote and nullify the benefit of electronic voting as far as quick results are concerned. In other words, when the outcome of an election is dependent on relatively few votes, electronic voting would not be helpful in achieving an earlier result.

3. MULTIPLE VOTING

On occasions, allegations of double or multiple voting (that persons have voted more than once at different polling booths) are made after an election. The Commissioner thought that the problem was more one of speculation than of reality, as the allegations are usually only based upon double markings occurring on the rolls at the various polling booths.

The Commissioner considered that, if there is any double or multiple voting, it is not significant. The Committee was informed that in 1992, 27 cases of suspected multiple voting were referred to Queensland Police Service for investigation. Only three prosecutions were launched which resulted in three pleas of guilty.

The Commissioner noted that between 7 and 60 double markings occurred on the roll per electoral district, with an average of 22 per district, and most of these were satisfactorily resolved through the process of sending out notices requiring explanation.

The Commissioner emphasised that, despite the intense scrutiny which occurred during the Mundingburra Court of Disputed Returns trial, no multiple voting fraud was uncovered.

4. CEMETERY VOTING

The term *cemetery voting* refers to people voting in the names of recently deceased persons whose name still appears on the roll. Allegations of cemetery voting are commonly made after elections.

The Commissioner indicated that there was little evidence of cemetery voting. In this regard, the Commissioner referred to research in South Australia which indicates that during the last general election in that state there was no cemetery voting. The Commissioner provided the Committee with a copy of a report from the South Australian Electoral Commission on this issue. That report states:

In South Australia, where sixteen of the 47 seats could be won or lost with a swing of 5%, at the December 1993 General Elections, it was considered appropriate to assess whether cemetery voting affected the outcome of those elections.

All death notices appearing in The Advertiser from the date the election was announced on 28 October until Friday prior to polling day 3 December 1993, were compared against the electoral rolls to determine if a match were possible. Between 28 October and 26 November a total of 450 names were matched and details were supplied to Returning Officers, together with instructions to cross those names off all copies of their certified scannable lists. Only one of those deceased electors claimed an ordinary vote on polling day and on further inquiry it was established that the Department had made an incorrect assumption about the identity of the reported deceased person.

A further 158 names were matched between 27 November and 3 December but as it was then too late to annotate these on the certified lists a post poll check was undertaken to determine if any had voted. Again this produced a negative result which puts the nail in the coffin of anyone who suggests that cemetery voting occurred during these elections.

The Commissioner noted that, whilst cemetery voting is always possible, the need to spend extra money to be vigilant against it was questionable. The Commissioner pointed out that if a seat was won by 200 votes the issue was irrelevant, and if the poll is close, the scrutiny of the Court of Disputed Returns would probably uncover any irregularities.

5. MATTERS ARISING FROM THE MUNDINGBURRA DECISION

The Commissioner noted that difficulties arose for the Electoral Commission of Queensland as a result of the above decision. In particular, the definition of ‘special postal voters’ given by His Honour Ambrose J in the Mundingburra decision causes problems for the Commission.

The special postal voter category is defined under the Act to include those electors whose ‘real place of living’ is not within 15 kilometres of a polling booth. The Commissioner stated that the category was created to ensure the timely receipt of ballot papers by people living in remote areas of Queensland so that they could cast a vote before the close of polls on election day. Under the Act, the Commission must, as soon as practicable after an election is called, post ballot papers to all special postal voters. Ordinary postal voters must make an application to the Electoral Commission to be sent ballot papers.

His Honour held that the soldiers located in Rwanda could be classified special postal voters. The Electoral Commissioner indicated that this interpretation places an impossible burden on the Commission since it means that all electors temporarily residing outside their electorates are entitled to be sent ballot papers without first making an application.

The Commissioner advised the Committee that he had been in communication with the Attorney-General about this and other issues and was seeking amendments to the *Electoral Act* which would rectify the situation.

The Committee has been informed by the Commissioner, in detail, as to the amendments sought as a result of the decision which may be summarised as follows:

- **Special Postal Voters** - As discussed above, the interpretation of this term given by Ambrose J presents practical difficulties for the Electoral Commission.

The Commissioner has suggested an amendment to the Act by defining “real place of living” as used in s.105(3)(a) of the *Electoral Act 1992*. In this regard, the Commissioner suggests that use be made of the definition in the *Commonwealth Electoral Act 1918*, which states: “*real place of living*” includes the place of living to which a person, when temporarily living elsewhere, has a fixed intention of returning for the purpose of continuing to live at that place.

Alternatively, the Commissioner recommends that s.105(3)(a) be amended by defining the term ‘special postal voter’ as one whose registered address as shown on the roll is not within 15 kilometres of a polling booth.

- **Register of Special Postal Voters** - The Commissioner has suggested that for the purposes of clarification the Act be amended to provide for the keeping of a Register of Special Postal Voters. The Commissioner points out that in practice such a roll is already maintained.
- **Declaration Envelopes and the power of the Court** - This concerns where on polling day a declaration on an envelope must be completed for each absentee vote, or for a vote claimed by an elector whose name cannot be found on the electoral roll and who alleges official error.

The Commissioner informs the Committee that, to assist electors and also to reduce the problem of reading handwriting later, polling officials are encouraged to complete the declarations on behalf of electors and ask the electors to check the details before signing the form. This practice is also adopted because a number of persons have difficulty completing the forms.

However, in the Mundingburra decision Ambrose J found that official error had occurred in cases where the names of electors, as filled out on the declaration, could not be matched with the electoral roll. The result being that the votes could not be counted.

The Commissioner suggests that the Act be amended to make it clear that any vote disallowed because of incorrect details in a declaration not be classified as official error as polling officials are relying on information provided by the electors and it is reasonable that electors be responsible for the consequences of any incorrect declarations signed by them.

Further, the Committee's attention was also drawn to the power of the Court to open declaration votes and the need to clearly spell out in the Act as to whether the Court should have the power to open votes and add them to the count. In this regard, the Commissioner notes that the Courts have in the past opened the votes and added them to the count but that recent decisions by Courts interstate have raised some doubt on the matter.

The Commissioner suggests that the Act be amended to provide that the Court of Disputed Returns have a discretion to open declaration votes and add them to the count provided that the secrecy of the votes is not jeopardised.

- **Trivial Errors** - Section 137(1) of the Act provides:

The Court must not make an order mentioned in s.136(2) because of -

...

(b) an absence or error of, or omission by, any member of the Commission's staff that appears unlikely to have had the effect that the person elected would not have been elected.

It appears that this is a drafting error, in that s.137(1) appears to preclude the Court of Disputed Returns from dismissing a petition in whole or in part because of a trivial error.

- **Postal Voting** - The Commissioner has highlighted a number of apparent anomalies or omissions in s.110 of the Act.

The section limits the means by which an elector lodges an application for a postal vote to using either post or fax. This section effectively prohibits personal delivery of an application. The Commissioner suggests that the Act be amended to enable an elector to submit an application for a postal vote to the Returning Officer by any available means.

The section does not require the elector to specify an address to which the postal vote and ballot paper must be sent. This also requires amendment.

In relation to the delivery of postal votes and declaration envelopes, s.110 provides that the Commission must post them. No discretion is given to the Commission to use a more effective delivery system. Therefore, a decision by the Commission to cause delivery by the best available means, rather than by post, could potentially result in another election if delivery should fail.

The Commissioner suggests that the Commission be given a discretion to cause delivery other than by the postal service and that failure of this alternative system should not be cause for another election.

- **Miscellaneous Matters** - The Commissioner also made a number of relatively minor but very practical suggestions to amend the Act which would improve the electoral process, including:
 - That the Act be amended to provide for registered political parties to appoint a Deputy Registered Officer who is able to carry out the functions and responsibilities of the Registered Officer if the Registered Officer was unavailable.
 - That s.102(2) of the Act be amended to enable the Commission to appoint polling booths outside of a district when there is an election for one (1) district only.
 - That s.106(1)(a) of the Act be amended to make it clear that electors can cast absent declaration votes at mobile polling booths and declared institutions.
 - That s.99 of the Act be amended to enable examination of the declarations on declaration envelopes before the Sunday following election day.
 - That s.114(1)(c) of the Act (requiring a ballot to be placed in a ballot box) requires amendment to clarify the intent of the section.
 - That s.116(2) of the Act be amended to define the extent of inquiry necessary by a Returning Officer in relation to a declaration envelope in which an elector cannot be identified.
 - That s.116(2) of the Act be amended to provide a cut-off time (eg. 6pm) on the tenth day after the poll after which postal votes cannot be returned.

Recommendation

The Committee endorses most of the above suggested amendments to the *Electoral Act 1992* made by the Electoral Commissioner.

However, whilst the Committee agrees that the Commissioner should have a discretion to use an alternative mode of delivery (other than the post) for postal votes, the Committee does not endorse the Commissioner's suggestion that the failure of this alternative system should not be the cause for another election.

The Committee recommends that these amendments be made to the Act as soon as practicable.

The Electoral Commissioner did bring to the Committee's attention one matter arising from the Mundingburra decision which he had not raised with the Attorney-General, namely, the issue of which party has the onus of proving multiple voting when a petition disputing an electoral result is brought before the Court.

Following a disputed electoral return for the seat of Maryborough in 1984, Thomas J, acting as the former Elections Tribunal, held that the onus of proving double voting lies on the petitioner disputing the election result who is alleging double voting (*Re Maryborough Election Petition; Nightingale v Alison* [1984] 2 Qd.R. 214). In that case, His Honour stated that double markings on an electoral roll were just as likely to have resulted from human error as from someone having voted twice. An electoral officer can incorrectly put a line through the wrong name when handing a ballot paper to someone else entitled to vote. His Honour required the petitioner to show more than mere inconsistencies on the roll if the Court was to consider the matter further.

However, the Mundingburra ruling indicates that Ambrose J was satisfied that double markings on the electoral rolls before him were sufficient to establish that some persons not entitled to vote did vote, in circumstances where the Respondents were able to prove that the electors had not voted twice but were unable to verify the exact circumstances of polling official error. It would appear that the onus of proof has altered.

The Electoral Commissioner stated the following to the Committee:

In my view, the onus of proof has moved from the petitioner in satisfying the Court that an offence of either double voting or personation had occurred to the Commission to prove that a polling official error had occurred.

The consequence of a judge determining that invalid votes have arisen from electors marked off more than one roll is, of course, most significant as all such determinations reduce the margin between the candidates (eg the three such determinations by Ambrose J reduced the margin in Mundingburra from 16 to 13).

The Commission has no reservation about approaching apparent double voters and in fact does so in the normal course of business in every electorate following an election.

The Commission is also of the view that parties to a petition before the Court of Disputed Returns should not be denied access to alleged double voters or any other electors if irregularities are suspected. Evidence from such interviews may be fundamental to their case.

It must be stressed that, despite all care and attention, double marking as a result of human error is inevitable.

The Commissioner stated his view on the matter is that, if multiple voting is to be alleged by petitioners disputing an election result, then petitioners themselves should be required to show evidence of actual multiple voting.

The Committee notes the Commissioner's identification of the apparent shift in the Court's position with regards to which party needs to prove that multiple voting has occurred and to what extent multiple voting needs to be demonstrated.

6. FUTURE DISCHARGE OF THE RESPONSIBILITY

The Committee, in seeking to discharge its area of responsibility under ss.9 and 12 of the *Parliamentary Committees Act*, will continue to meet with the Electoral Commissioner in order to receive his expert opinion on matters relating to the *Electoral Act 1992* and the more practical application of that Act.

Of course, the Committee is always prepared to receive and consider submissions made by Members or the general public about the *Electoral Act* and the conduct of elections.

7. CONCLUSION

The matters canvassed in this report not only relate to commonly raised issues concerning electoral reform, but also address issues previously raised by EARC.

This report outlines to the Parliament the manner in which the Committee has, to date, discharged its responsibilities relating to electoral reform under the *Parliamentary Committees Act* and in which it will continue to discharge the responsibilities.

The Committee trusts that the Parliament will find the above discussion both informative and beneficial.

**LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE
REVIEW COMMITTEE**

**48TH PARLIAMENT
FIRST SESSION**

MEETING ATTENDANCE RECORD							
MEETING DATE	ROD WELFORD	VINCE LESTER	ANNA BLIGH	FRANK CARROLL	GORDON NUTTALL	PAT PURCELL	FIONA SIMPSON
15 SEPTEMBER 1995	✓	✓	✓	✓	✓	✓	✓
17 OCTOBER	✓	✓	✓	✓	✓	✓	✓
31 OCTOBER	✓	✓	✓	✓	✓	✓	✓
3 NOVEMBER	✓	✓	✓	✓	✓	✓	✓
14 NOVEMBER	✓	✓	✓	✓	✓	✓	✓
15 DECEMBER	✓	✓	✓	✓	✓	✓	✓

**48TH PARLIAMENT
SECOND SESSION**

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	✓	✓	✓	✓	✓	✓

