Report No. 18, September 1999

Issues of electoral reform raised in the Mansfield decision:

Regulating how-to-vote cards and providing for appeals from the Court of Disputed Returns

LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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Regulating how-to-vote cards and providing for appeals from the Court of Disputed Returns

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6.	Report on the study tour relating to the preservation and enhancement of individuals' rights and freedoms and to privacy (31 March 1997—14 April 1997)	1 October 1997
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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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* Dr Prenzler was appointed to the committee on 11 November 1998 having replaced Mr Charles Rappolt whose resignation from Parliament was received by the Speaker of the Legislative Assembly on 4 November 1998.

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CHAIR'S FOREWORD

This inquiry has its genesis in events which occurred in the Mansfield electorate on the day of the 1998 State general election. In a decision on a subsequent petition challenging the electoral result for that electorate, the Honourable Mr Justice Mackenzie (sitting as the Queensland Court of Disputed Returns) raised a number of issues of electoral law reform for the legislature's consideration. Given that this committee's areas of responsibility include 'electoral reform', the committee resolved to inquire into those issues following a request by the Attorney-General.

The two issues raised by Justice Mackenzie are quite distinct. The first concerns the regulation of second preference how-to-vote cards to try and minimise the recurrence of the conduct complained of in the Mansfield petition. After considering various 'regulatory' options, the committee has broadly agreed with Justice Mackenzie's suggestion that how-to-vote cards should be required to bear, in sufficiently sized print, the name of the party (or independent candidate) on whose behalf they are distributed. The committee believes that by clearly stating the political source of such material, voters will be equipped with the means to make informed decisions when handed how-to-vote material.

While more robust regulation of how-to-vote cards than what is proposed by the committee is clearly possible, there is also a real limit to the degree to which a voter's hand should be held within the voting booth. The intention of these provisions is to create adequate laws upon which a voter may rely in understanding any particular how-to-vote material. Beyond that, it is not unlike any consumer matter, that is, *caveat emptor*.

The second issue Justice Mackenzie raised concerns appeals from the Court of Disputed Returns to the Court of Appeal. Previously, Queensland's electoral legislation allowed for such appeals on questions of law. However, Queensland's 1992 *Electoral Act* provides that decisions of the Court of Disputed Returns are final and not subject to appeal.

The issue of appeals raises the competing policy considerations of ensuring the quick resolution of disputes, especially important in the formation of Parliament and hence Government after general elections, and the need to provide parties to a dispute with procedural justice. The committee believes that it has achieved an appropriate balance between these two considerations by recommending the introduction of a right of appeal from the Court of Disputed Returns on questions of law only, together with certain other procedural requirements designed to ensure that appeals are dealt with expeditiously.

The committee has recommended that this appeal be to a new Appeals Division of the Court of Disputed Returns, not the Court of Appeal. The committee has also recommended that the existing provisions regarding the Court of Disputed Returns be reviewed to ensure that Court's clear separation from the Supreme Court. Some of the reasoning behind this is drawn from the logic of the recent High Court decision of *Sue v Hill* which the committee believes raises issues that warrant closer consideration. Essentially, the committee is adamant that there should only be one layer of appeal, which is to a State body, and that the possibly of (further) appeals to the High Court are, to the extent achievable, precluded.

On behalf of the committee, I thank those who have assisted the committee throughout its inquiry, namely: submitters for their valuable contribution; the various Australian electoral commissioners and, in particular, the Queensland Electoral Commissioner, Mr Des O'Shea; Justice Mackenzie who arranged for a copy of his decision to be easily accessed by members of the public, Parliamentary Counsel, Mr Peter Drew, and his officers, particularly Mr Ian Larwill; and the committee's research staff.

Finally, I wish to record my appreciation of the hard work of my fellow committee members throughout this inquiry.

Gary Fenlon MLA
Chair

September 1999

1. INTRODUCTION

The Legal, Constitutional and Administrative Review Committee ('the committee' or 'LCARC') is established under the *Parliamentary Committees Act 1995* (Qld). The committee has four statutory areas of responsibility: administrative review reform; constitutional reform; electoral reform; and legal reform. This report concerns issues arising under the committee's area of responsibility about electoral reform.

1.1 THE MANSFIELD DECISION

On 21 September 1998, the Honourable Mr Justice Mackenzie of the Supreme Court of Queensland, sitting as the Court of Disputed Returns, handed down a decision in relation to a petition by Mr Frank Carroll disputing the 1998 State election result for the electorate of Mansfield (the 'Mansfield decision').[1] Mr Carroll had been the sitting member for the Mansfield electorate representing the Liberal Party and a candidate in the 1998 election.

Mr Carroll's petition concerned the distribution by Australian Labor Party ('ALP') affiliates of two 'unofficial' Pauline Hanson's One Nation party ('One Nation') how-to-vote cards in the electorate of Mansfield on the day of the 1998 State election. These how-to-vote cards, which were headed 'Thinking of voting One Nation…?', encouraged electors to distribute their second preference vote to, alternatively, the ALP or the ALP candidate, Mr Rhil Reeves. (Copies of these two cards appear as **Appendix A**.) The 'official' One Nation how-to-vote card in fact did not indicate any preference allocations.

Mr Carroll alleged that the ALP had misled voters by handing out these cards prior to them voting at various polling booths in the electorate of Mansfield and by simultaneously representing by words and conduct that the cards were authorised, distributed or issued on behalf of One Nation. The combined effect of this, according to Mr Carroll, was to increase the One Nation primary vote and increase the flow of preferences to the ALP.[2] Mr Carroll primarily argued that the ALP's conduct in distributing these cards was in breach of ss 158 and/or 163 of the *Electoral Act 1992* (Qld) and that it occurred with the knowledge of the ALP and/or the ALP candidate, Mr Reeves.[3]

Section 158 makes it an offence for a person to '*hinder or interfere with the free exercise or performance, by another person, of another right or duty under [the Electoral Act] that relates to an election*'. According to Justice Mackenzie, the underlying question in relation to s 158 was whether proved conduct of the ALP workers was a hindrance or interference with the exercise of the right to vote.[4]

Section 163(1) of the Electoral Act provides that: '*A person must not, during the election period for an election, print, publish, distribute or broadcast anything that is intended or likely to mislead an elector in relation to the way of voting at the election*'.

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1 *Re Carroll v Electoral Commission of Qld & Reeves* [1998] QSC 190. A copy of the decision can be obtained from the Internet via the Austlii website at <http://www.austlii.edu.au>.

2 Judgment, para 22. In evidence, Mr Reeves deposed that it was ALP strategy to nullify the flow of One Nation preferences except where voters might give their second preference to the ALP: Judgment, para 26.

3 Mr Carroll also argued that the conduct in question breached ss 153 and/or 154 of the *Electoral Act 1992* which concern false and misleading statements published 'under or for the purposes of the Act'. However, Justice Mackenzie held that those sections did not apply because handing out how-to-vote cards did not meet the threshold requirement of being 'under or for the purposes of the Act': Judgment, paras 79-80.

4 Judgment, para 82.

Critical to determining whether these sections were breached was High Court authority which restricts the operation of sections like s 163(1) to the voter's act of actually recording their judgment as to whom they wish to vote for, rather than the formation of that judgment.[5] Thus, misleading electoral advertising merely directed at encouraging an elector to vote for a particular party or candidate generally does not breach sections such as s 163(1).[6]

In the case of s 158, Justice Mackenzie accepted that a misleading statement might hinder a voter freely recording a vote. However, His Honour noted that a similar question to that under s 163 must be asked, namely, whether '*the conduct alleged hindered or interfered with the right to express, by marking the ballot paper, his decision to vote in a particular way*'. His Honour observed that the section is not concerned with conduct affecting an elector's making of a political judgment for whom to vote.[7]

In applying the law to the facts at hand, Justice Mackenzie noted that, if the cards were all that was objected to and there was no suggestion that any 'subterfuge or disinformation' had been engaged in when the cards were handed out, neither s 158 nor s 163(1) would be infringed. In this regard, His Honour noted that the cards were not materially different from a card that had been previously held by the High Court (sitting as the Commonwealth Court of Disputed Returns) not to contravene a provision similar to s 163(1) and, importantly, the cards were not directly contradictory to One Nation's 'official' how-to-vote card.[8] Therefore, neither provision was infringed by mere distribution of the cards.

However, His Honour considered it possible that handing out a card *combined with* saying words while handing it out could convert '*the case from one where the formation of political judgment is affected to one where the act of recording or expressing the political judgment is affected*'. In this regard, Justice Mackenzie heard evidence from polling booth workers associated with various political parties, including the ALP and the Liberal Party, and voters who received the cards in question. In evidence, it was alleged that ALP workers distributing the cards either purported to represent One Nation or represented that the card was an official One Nation card indicating that party's preferred preference flow.

Justice Mackenzie found that in a number of instances there were deliberate attempts to represent that the card was a One Nation card when handed out and that in those cases it was '*an inevitable inference that such conduct was intended to mislead the voter*'.[9] However, as noted above, the key issue was whether that conduct was intended to mislead voters in relation to recording or expressing their political judgment already made (a breach of the Act), or in relation to the formation of their political judgment as to for whom they would cast a vote (not a breach of the Act). While noting the 'artificiality' of this subtle distinction, His Honour found that there was little direct evidence of people actually being influenced in their

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5 Principally, *Evans v Crichton-Browne* (1981) 147 CLR 169 which has been applied in Queensland: *Robertson* v *Knuth* (1997) 1 Qd R 95. For a good discussion on judicial interpretation of the Commonwealth's s 163(1) equivalent—*Commonwealth Electoral Act 1918*, s 329(1)—see the Australian Electoral Commission's (AEC) *Electoral Backgrounder No 3*, *Misleading and deceptive electoral advertising: 'unofficial' how-to-vote cards*, AEC, May 1998 and *Electoral Backgrounder No 5*, *Electoral Advertising*, AEC, July 1998. (Available on the Internet at http://www.aec.gov.au.) In Backgrounder *No 3* (p 3), the AEC gives the example of conduct that would breach s 329(1) as an erroneous statement about the operating hours of a polling booth so that an elector consequently missed out on the opportunity to vote.

6 Although, in *Evans* the High Court said that a statement that a person who wished to support a particular party should vote for a particular candidate, when that candidate in fact belonged to a rival party, might breach s 329(1).

7 Judgment, paras 81-83.

8 Judgment, para 120, referring to the decision of Gaudron J in *Webster v Deahm* (1993) 116 ALR 223.

9 Judgment, para 127.

vote by the card.[10] Accordingly, on this interpretation of the sections and the factual evidence there had been no contravention of either s 158 or 163(1).[11]

The final threshold issue was whether, having regard to the impropriety proved, such conduct resulted in a situation where there was good ground for believing that the result recorded did not reflect the actual preference of the majority of voters.[12] In this regard, Justice Mackenzie held that '*where the margin was 83 votes it is insufficiently established that there is good ground for believing that the result recorded did not reflect the actual preference of a majority of electors.*'[13] Accordingly, the petition was dismissed.

Issues for the legislature

In the concluding paragraphs of his judgment, Justice Mackenzie raised a number of issues concerning electoral reform that the Queensland legislature might consider addressing. In particular, His Honour made some suggestions to avoid the recurring problem of misleading how-to-vote cards. While Justice Mackenzie recognised that it might be legitimate to argue that encouraging voters to express preferences is ultimately a matter for candidates and parties and not the electoral system, His Honour felt that nevertheless the electoral system '*ought to at least minimise the opportunity to engage in conduct directed towards obtaining a preference which, while not unlawful, is likely to exacerbate disillusionment with the political process'*.[14]

In the current case it was, His Honour noted, a 'compelling conclusion' that the intention of some of the ALP workers distributing the cards in question was to conceal from unwary voters that the cards in question were in fact ALP cards. Similarly, one of the cards was 'cleverly designed' to make the words 'One Nation' particularly conspicuous at first glance, even though there were other words on the card which should have alerted the more observant voter to the fact that it was not a One Nation card. This was despite the fact that the cards bore in small print at the bottom of the card the name and address of the ALP official who authorised the card as well as the letters 'ALP'.[15]

Accordingly, at paragraphs 153-154 Justice Mackenzie stated:

> *153 The fact that issues of the kind involved in this case have had to be determined by this Court suggests that something should be done to minimise the possibility of them arising again. An inexpensive measure which neither limits solicitation of preferences nor inhibits freedom of debate would be to require all cards distributed with a view to obtaining second and subsequent preferences to bear on their face (and on each face if it is double sided) the name of the party on whose behalf or on whose candidate's behalf it is distributed. Where it is issued by a person who is not a party candidate, the fact that he or she is an independent should be stated. Such information should be required to be printed in type of a size which is sufficiently large to be easily read and is not overwhelmed by other printing on the card.*
>
> *154 If this is done, there would be little room for the kind of confusion alleged to have occurred in this case to occur again. In view of its inexpensive nature and simplicity of*

10 Judgment, paras 128-129.
11 Judgment, paras 133-135.
12 This arises from the 'proper approach' to the *Electoral Act 1992*, s 136 (Powers of the court), as recently expounded by Ambrose J in *Tanti v Davies* (no 3) [1996] 2 Qd R 602 and followed by Mackenzie J: Judgment, paras 9-12.
13 Judgment, para 138.
14 Judgment, para 148.
15 Judgment, para 151.

> *implementation, and the fact that it promotes the ideal of voters being fully informed before they decide whether to give a second or subsequent preference and, if so, to whom, consideration should be given to amending the Electoral Act accordingly. Since, on the evidence of the how-to-vote cards of all of the parties contesting the election, there is no practical problem about including the party's name prominently on the card, it is difficult to see any reason why there should be any objection to its implementation.*

Justice Mackenzie also made the following observation regarding appeals from the Court of Disputed Returns.

> *155 One other matter which may bear consideration is that sometimes, as in this case, complex questions of law arise. Under the former Act there was provision for an appeal to the Court of Appeal on questions of law only (s.154) and a power to state a special case (s.156) or reserve questions of law for determination by the Court of Appeal (s.157). Those provisions are absent from the current Act. At present s.141 precludes any appeal. No doubt finality is important in a case of this kind. However, in cases of genuine difficulty, there is always a risk that one of the parties may feel aggrieved, with no redress available. Whether there should be some mechanism to alleviate this is, once again, for the legislature to decide.*

1.2 THE COMMITTEE'S INQUIRY

The Attorney-General and Minister for Justice and Minister for The Arts, the Honourable Matt Foley MLA, wrote to the committee on 22 September 1998 advising that, as the Minister responsible for the *Electoral Act*, he proposed to give urgent consideration to Justice Mackenzie's suggestions regarding how-to-vote cards and appeals from the Court of Disputed Returns to the Court of Appeal. In his letter, the Attorney-General requested that the committee examine Justice Mackenzie's suggestions and report to Parliament as a matter of priority.

Given the committee's statutory responsibility in relation to electoral reform, the committee at its meeting on 30 September 1998 resolved to conduct an inquiry and report to Parliament on these two issues. In particular, the committee resolved that the terms of reference of its inquiry be limited to inquire into whether—and, if so, how—the *Electoral Act* should be amended in light of the comments made by Justice Mackenzie in his judgment:

- at paragraphs 153 and 154 regarding how-to-vote card specification requirements, as currently set out in s 161 of the *Electoral Act*; and
- at paragraph 155 regarding the possibility of appeals to the Court of Appeal from decisions of the Court of Disputed Returns.

As the first step in its inquiry process, the committee called for public submissions by advertising in *The Courier-Mail* on Saturday, 3 October 1998 and writing directly to a number of identified stake-holders inviting them to make a submission. Potential submitters were assisted by Justice Mackenzie kindly arranging for a copy of the Mansfield decision to be posted on the Supreme Court of Queensland's website. (Submissions closed on 2 November 1998.)

The committee received 40 submissions to its inquiry, the majority of which the Chair tabled on 12 November 1998. A list of persons and organisations who made submissions to the committee appears as **Appendix B**.

The committee's approach

The committee has been concerned throughout its inquiry that it has considered all possible options and carefully assessed the *practical* advantages and disadvantages of each option in responding to the issues under question. After conducting and considering preliminary research, the committee wrote to the electoral commissioner of each Australian jurisdiction seeking responses to specific questions about the practical operation of current electoral laws in their jurisdiction as they related to the committee's terms of reference.

In the case of the how-to-vote card issue, the committee felt that the only way in which it could be confident that its final proposal would be workable in practice was to see its proposal as draft legislation. Accordingly, once the committee had reached a preliminary position on addressing this issue, the committee requested, and kindly received, the assistance of the Office of Queensland Parliamentary Counsel in drafting proposed amendments to the *Electoral Act*. Once the committee was satisfied with these draft provisions, the committee met with the Queensland Electoral Commissioner, Mr Des O'Shea, in order to gain his thoughts on the practicalities of the committee's proposals. The committee has considered the Commissioner's comments in preparing this final report to Parliament.

The decision of the High Court of Australia in *Sue v Hill* (handed down on 23 June 1999) has had major implications for the committee's consideration of the issue of appeals from the Court of Disputed Returns. The potentially significant considerations raised by that decision are evident from the discussion in chapter 3.

In accordance with the committee's terms of reference for this inquiry, the following chapters of this report separately deal with:

- how-to-vote card specification requirements; and
- appeals from the Court of Disputed Returns.

2. HOW-TO-VOTE CARDS

How-to-vote cards play an important role in the electoral process in Queensland. While their significance has been reduced with the introduction of candidates' party affiliations appearing on ballot papers, how-to-vote cards inform voters about how to allocate their preferences in order to most advantage the candidate or party they wish to support. How-to-vote cards are usually the last piece of electoral information that electors receive before casting their vote.

Since 1992, a system of optional preferential voting has operated in Queensland's State elections.[16] This means that, in order to record a valid vote, an elector need only indicate their most preferred candidate on the ballot paper. Prior to 1992, a system of compulsory preferential voting operated whereby for electors to record a valid vote they were required to designate a preference for each candidate on the ballot paper. This change in voting system has made it particularly rewarding for parties, especially in closely contested seats, to encourage electors to not only record second and subsequent preferences, but to record their preferences in the manner desired by the party.[17]

Queensland's *Electoral Act* contains few provisions regulating the publication and distribution of how-to-vote cards and other electoral material. The relevant provisions are contained in Part 9 (sections 149-177) of the *Electoral Act*.

As already noted, the petitioner in the Mansfield decision relied heavily on s 158 and s 163(1) of the *Electoral Act*. Yet, as is evident from the Mansfield decision, these sections must be read in light of the narrow interpretation that the High Court has given s 163(1)'s equivalent in the *Commonwealth Electoral Act 1918* (Cth).

In addition, s 166 prohibits during the 'election period',[18] the canvassing for votes, inducing an elector to vote in a particular way, loitering or obstructing the free passage of voters inside a polling place or within six metres of the entrance to a polling place. Section 169 likewise prohibits the displaying of political statements inside polling places or within six metres of the entrance to a polling place.

Section 161 of the *Electoral Act* provides that a person must not during the election period for an election:

- print, publish, distribute or broadcast; or
- permit or authorise another person to print, publish, distribute or broadcast;

any advertisement, handbill, pamphlet or notice containing 'election matter'[19] unless there appears, or is stated, at its end the name and address (other than a post office box) of the person who authorised the advertisement, handbill, pamphlet or notice.

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16 *Electoral Act 1992,* s 113. This change followed a recommendation by the former Electoral and Administrative Review Commission (EARC) in its *Report on Queensland Legislative Assembly Electoral System*, Government Printer, Brisbane, November 1990, volume 1, para 6.26.

17 See further comments on the importance of how-to-vote cards particularly in a preferential voting system by: Justice Mackenzie in the Mansfield decision (para 147); Dr Paul Reynolds' submission; Professor Colin Hughes' submission; the Electoral Commission of Queensland's submission.

18 'Election period' for an election is the period: (a) beginning on the day after the writ for the election is issued; and (b) ending at 6pm on the polling day for the election: *Electoral Act 1992,* s 3.

19 'Election matter' is anything able to or intended to: (a) influence an elector in relation to voting at an election; or (b) affect the result of an election: *Electoral Act 1992,* s 3.

Section 161, like its Commonwealth counterpart, is apparently designed to ensure that '*anonymity does not become a protective shield for irresponsible or defamatory statements in election advertising, where there is no legal recourse for those whose interests may have been damaged by such statements'*.[20]

If a person is engaging in conduct or failing to do anything and that conduct or failure constitutes a contravention or offence against the *Electoral Act*, then, pursuant to s 177, a candidate or the Electoral Commission of Queensland (the 'ECQ' or the Commission') may apply to the Supreme Court for an injunction.

At paragraph 153 of his judgment, Justice Mackenzie raises for the legislature's consideration whether the *Electoral Act* should be amended to additionally require:

- all how-to-vote cards distributed with a view to obtaining second and subsequent preferences to bear on each face the name of the party on whose behalf or whose candidate's behalf it is distributed (and where the card is issued by a person who is not a party candidate, the fact that he or she is an independent); and
- that this information be printed in type of a size which is sufficiently large to be easily read and is not overwhelmed by other printing on the card.

In this chapter, the committee considers the merits of, and alternatives to, Justice Mackenzie's suggestion. As explained in this chapter, in reaching its final recommendation, the committee has reviewed relevant work undertaken by its predecessor committee, considered the regulation of how-to-vote cards in other Australian jurisdictions and taken into account suggestions raised in public submissions.

2.1 BACKGROUND

2.1.1 The former LCARC's inquiry into truth in political advertising

The issue of restricting misleading how-to-vote material was considered by the former LCARC in its Report No 4, *Truth in political advertising*.[21] The committee's terms of reference for that inquiry specifically included inquiring into the matter of 'bogus' how-to-vote cards, which that committee defined to include:

> *cards which are designed to mislead, or have the potential to mislead, voters as to which political party has issued that card and how that particular party wishes its preferences to be placed. The term would also include cards that have incorrect statements of fact as a preamble*.[22]

The former committee considered a number of broad options with respect to regulating how-to-vote cards. These options were:

1. support the status quo of the current Queensland legislation;

2. seek to increase regulation via the prohibition of distributing how-to-vote material near polling places;

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[20] Australian Electoral Commission, *Electoral Backgrounder No 5*, 17 July 1998, p 1. The precise intention of s 161 is not stated in either the explanatory memorandum or second reading speech to the *Electoral Act 1992*. The precursor to s 161 was s 111 of the *Elections Act 1983* (Qld). It is similarly unclear as to precisely why s 111 was introduced.

[21] Government Printer, Brisbane, December 1996.

[22] Ibid, p 42.

3. allow continued distribution but restrict the content of what may be distributed through a regime of registration and/or authorisation;

4. a combination of 2 and 3, for example, ban distribution on polling day but allow the distribution of pre-poll material which is registered;

5. allow continued distribution but make it an offence to distribute misleading information.[23]

Important to the former committee (and equally so to this committee) was the consideration that any proposal to further regulate how-to-vote material must be able to withstand legal challenge that it is unduly interfering with the freedom of political discussion implied in the *Commonwealth Constitution*.

However, as the former committee went on to note:

> *a regime which expressly and specifically limited itself to prohibiting only untruths and confusion, might well pass the test that the legislation is a considered and proportionate attempt by Parliament to strike a balance between the implied right and promoting the public interest of preventing the misleading of voters in recording the preferences they hold.*[24]

On that basis, the former committee concluded that a provision banning how-to-vote cards or placing serious restrictions on their availability would run the risk of being considered unduly restrictive of constitutionally protected free speech.

The former committee also concluded that:

- there are too many practical difficulties with requiring the ECQ's prior *approval* of how-to-vote cards; and
- a system requiring *registration* of how-to-vote material with the ECQ prior to polling day (without any coinciding requirement for the authorising of that material by the ECQ) would also be 'highly impractical'. In particular, the committee was concerned that registration prior to the election would prevent candidates from altering their preferences or publishing late how-to-vote material because of changed circumstances.[25]

Instead, a majority of that committee recommended that there should be a general legislative restriction on misleading how-to-vote material. In this regard, the majority recommended that its proposed 'truth in political advertising' provision (recommended earlier in its report[26]) be extended to include how-to-vote material which, while not containing false 'statements of fact', are nonetheless designed to mislead electors. In particular, the majority recommended that there should be restrictions on material that was designed to represent how-to-vote material of other entities.[27]

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23 Ibid, p 45.

24 Ibid, p 46.

25 Ibid, p 48. Approval and/or registration of how-to-vote material is discussed further in sections 2.2 and 2.3.3.

26 The majority of the committee believed that its proposed 'truth in political advertising' provision would be '*a reasonable, proportionate interference with the right of free speech and thus acceptable in terms of recent decisions of the High Court and in terms of the fundamental legislative principles outlined in the Legislative Standards Act 1992 (Qld)*'. Ibid, p 29.

27 Consequently, the majority of the committee recommended that the remedies and penalties which it had recommended apply to its general truth in political advertising provision should also apply to misleading how-to-vote material. Ibid, pp 48-49.

While the government of the day accepted the majority's recommendation, events subsequent to the former committee's report have shown that, in practice, drafting a general provision aimed at ensuring truth in political advertising (and thus banning how-to-vote material designed to mislead voters) is difficult.

2.1.2 The regulation of how-to-vote cards in other Australian jurisdictions

The electoral laws of other Australian jurisdictions regulate how-to-vote cards in a variety of ways.

The Commonwealth, each state (except New South Wales) and the Territories ban or restrict canvassing for votes within a certain radius of a polling booth.[28] In most cases canvassing is banned within six metres of a polling booth. However, in Tasmania and the ACT the radius is 100 metres. Moreover, in the ACT the ban not only relates to the canvassing and soliciting of votes but the doing of '*anything for the purpose of influencing the vote of an elector as the elector is approaching, or while the elector is at, the polling place'*.[29]

In Tasmania, how-to-vote cards play a limited role in the electoral process given that in addition to the 100 metre canvassing ban, there is also:

- a total prohibition on the distribution of matter including how-to-vote cards on polling day[30]; and
- a provision which makes it unlawful for a person to print, publish or distribute matter (including a how-to-vote card) which contains the name of a candidate without the written consent of the candidate.[31] Thus, parties/candidates would require the consent of *all* candidates before *any* how-to-vote card could be issued (effectively prohibiting all 'unofficial' cards).

It might be questioned whether the ACT and Tasmanian provisions would withstand constitutional challenge for infringing the implied freedom of political discussion.[32]

The electoral laws of most Australian jurisdictions make it an offence to mislead an elector 'in relation to the casting of a vote' (or some equivalent phrase).[33]

New South Wales and Victoria have systems requiring registration of how-to-vote cards. In Victoria, the handing out of printed electoral material except for registered how-to-vote cards

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28 *Commonwealth Electoral Act 1918* (Cth), s 340(1); *Electoral Act 1985* (SA), s 125(1); *Electoral Act 1985* (Tas), s 133; *Constitution Act Amendment Act 1958* (Vic), s 193(1); *Electoral Act 1907* (WA), s 192(1).

29 *Electoral Act 1992* (ACT), s 303(1)(a).

30 *Electoral Act 1985* (Tas), s 246(1)(a).

31 *Electoral Act 1985* (Tas), s 243(4).

32 See G Williams, *The state of play in the constitutionally implied freedom of political discussion and bans on electoral canvassing in Australia,* Commonwealth Parliamentary Library, Research Paper No 10, Canberra, 1996-97, pp 10-13. See also Williams' submission and evidence to the former committee's inquiry into truth and political advertising. An ACT parliamentary committee recently recommended that the ban on how-to-vote cards at polling places remain: Select Committee on the Report of the Review of Governance, *Report of the Select Committee on the Report of the Review of Governance,* Canberra, June 1999, para 3.36.

33 See the: *Commonwealth Electoral Act 1918* (Cth), s 329(1); *Parliamentary Electorates and Elections Act 1912* (NSW), s 151A(1)(b); *Electoral Act 1985* (Tas), s 209(1); *Electoral Act 1992* (Qld), s 163(1); *Constitution Act Amendment Act 1958* (Vic), s 267B(1); *Electoral Act 1907* (WA), s 191A; *Northern Territory Electoral Act 1995* (NT), s 96(1)(c) and (d); *Electoral Act 1992* (ACT), s 297(1). However, as already noted, *Evans* v *Crichton-Browne* indicates that these provisions only relate to statements which affect the recording of a person's vote, not the formation of their political judgment.

is banned within 400 metres of the entrance to or within a polling booth on polling day.[34] In New South Wales, only registered how-to-vote cards can be distributed in public places on polling day.[35]

South Australia is the only Australian jurisdiction to have a 'truth in political advertising' provision, that is, a provision which makes it an offence for a person to authorise or publish an electoral advertisement which contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.[36]

The Commonwealth and the ACT also have laws stipulating that a person shall not, on behalf of a body or association, publish a statement:

- expressly or impliedly advocating that an election candidate is associated with or supports the policies or activities of that body or association; or
- expressly or impliedly advocating that a candidate should be given the first preference vote;

without the written authority of the candidate.[37]

The *Northern Territory Electoral Act* similarly makes it an offence for a person to publish on behalf of any body or persons, without the written consent of the candidate, that a candidate in an election is associated with, or supports the policy or activities of, that person or body of persons.[38]

The intent and operation of some of these 'candidate consent' provisions is discussed later in section 2.3.5 of this report.

Currently, no other Australian jurisdiction's electoral legislation requires printed electoral/how-to-vote cards to bear the name of the party on whose behalf, or whose candidate's behalf, it is printed, published or distributed. Like s 161 of Queensland's *Electoral Act*, all that is required is the name and address of the person who authorised the matter and, in some cases, the name and place of the printer.[39]

However, the issue of whether the name of the party or candidate should be included with the name and address of the person who authorised the electoral matter was canvassed by the ACT Electoral Commission in its December 1998 report on the operation of the *Electoral Act 1992* (ACT) in regard to the 1998 ACT Legislative Assembly election.[40]

The ACT Electoral Commission reported that it had received complaints about political advertising that commented about various candidates and recommended casting votes for

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34 *Constitution Act Amendment Act 1958* (Vic), s 267P(1).

35 *Parliamentary Electorates and Elections Act 1912* (NSW), s 151F(1).

36 *Electoral Act 1985* (SA), s 113(1). As the former LCARC noted in its Report No 4 (Op cit, pp 13-15), the constitutional validity of this section was upheld in *Cameron v Becker* (1995) 64 SASR 238.

37 *Commonwealth Electoral Act 1918* (Cth), s 351; *Electoral Act 1992* (ACT), s 301.

38 *Northern Territory Electoral Act 1995*, s 105(1).

39 See the: *Commonwealth Electoral Act 1918* (Cth), s 328(1)(a); *Parliamentary Electorates and Elections Act 1912* (NSW), s 151E(1)(a); *Electoral Act 1985* (Tas), s 243(1)(a); *Constitution Act Amendment Act 1958* (Vic), s 267A(1)(a); *Electoral Act 1907* (WA), s 187(1); *Electoral Act 1985* (SA), s 112(1)(a); *Northern Territory Electoral Act 1995* (NT), s 96(1)(b); *Electoral Act 1992* (ACT), s 292(1). The requirement for electoral advertisements to bear the name and place of business of the printer was removed from Queensland's *Electoral Act* in 1997.

40 ACT Electoral Commission, *Review of the Electoral Act 1992 (The 1998 ACT Legislative Assembly election)*, Publishing Services, Canberra, December 1998, p 11.

particular candidates but did not directly identify which party or candidate was responsible for the advertisement. The Commission went on to note that in some cases the printed authoriser's name was the name of a party office holder and the printed address was their party's address. However, any elector who wished to clarify which party was responsible for the material would have to conduct some research to link the name and address with the party.

The Commission reasoned:

> *The purpose of the authorisation provisions is to prevent "irresponsibility through anonymity". By being aware of the sources of political advertising, voters are better able to judge the messages being imparted. However, where material is being published on behalf of political parties and candidates, but that fact is being hidden behind an authorisation that does not clearly identify the name of the party or candidate, it could be argued that the spirit of the authorisation provisions is not being complied with.*[41]

Accordingly, the Commission recommended that the ACT's *Electoral Act* be amended to provide that, where printed electoral matter is being published by or on behalf of a registered political party or a candidate, the name of the party or candidate should be included with the name and address of the person who authorised the matter.

The ACT Government is yet to publicly respond to this recommendation.

2.1.3 The (private member's) Electoral Amendment Bill 1999 (Qld)

On 23 March 1999, Mr Bill Feldman MLA (Member for Caboolture) introduced the Electoral Amendment Bill 1999 (Qld), a private member's bill. The objective of the bill is to amend the *Electoral Act 'to provide truth in political advertising by preventing as far as possible, the production and distribution of false or misleading political advertising material'*.[42] The member's second reading speech refers to the distribution of 'fake' One Nation how-to-vote cards during the 1998 state election in the Mansfield electorate, Justice Mackenzie's comments in this regard, and the recommendations of the majority report of this committee's predecessor regarding truth in political advertising (discussed in section 2.1.1 above).[43]

To this end, the bill seeks to include in the *Electoral Act* provisions which make it an offence for a person, during the election period for an election, to publish or authorise an electoral advertisement or how-to-vote card containing a statement that is false or misleading in a material particular. The bill also seeks to amend s 161 of the *Electoral Act* to, amongst other matters, require an authoriser who is a member of a political party, to state the name of the party (in addition to their name and address), and require the authorisation to be in print not smaller than 12 point.

In its *Alert Digest* no 4 of 1999,[44] the Queensland Parliament's Scrutiny of Legislation Committee raised a number of concerns regarding the bill. At the time of writing, there had been no further debate on the bill.

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41 Ibid.

42 Explanatory notes to the Electoral Amendment Bill 1999.

43 Mr Feldman MLA, Electoral Amendment Bill 1999, *Queensland Parliamentary Debates*, Second Reading Speech, 23 March 1999, pp 618-620.

44 Tabled 13 April 1999, pp 18-21.

2.2 COMMENTS MADE IN SUBMISSIONS

The committee's call for submissions drew a wide range of suggestions on regulating how-to-vote cards. Some submissions canvassed issues which clearly fell outside the terms of reference of the committee's inquiry. Issues in this category included abolishing optional preferential voting and returning to compulsory preferential voting, and extending the current restrictions on canvassing for votes within a certain radius of polling booths. The committee has not canvassed these issues in this report.

It was also suggested that there be some prescribed/general ban on how-to-vote material designed to mislead or deceive electors. The committee has not, as part of this inquiry, revisited the former committee's truth in political advertising inquiry (discussed above in section 2.1.1).

Other submissions made suggestions which might be seen as alternatives or modifications to Justice Mackenzie's suggestion. These are discussed below and in the following section.

A large proportion of submitters advocated the abolition of how-to-vote cards—some altogether and some on their distribution outside poling booths on election day—primarily on the basis that this would reduce the opportunity to mislead voters and reduce cost, harassment of electors, and waste. Some submitters also claimed that how-to-vote cards give organised parties an advantage over independent candidates. Most of these submitters proposed that, instead, how-to-vote cards be replaced with a single how-to-vote poster in each voting compartment which would effectively amount to one official how-to-vote 'card' for each party/independent candidate. Included in the group who made a submission along these lines were the Australian Democrats (Queensland division) and Brenda Mason of the Queensland Greens.[45]

At the same time, a number of submitters, including the ECQ and Professor Colin Hughes, highlighted problems associated with how-to-vote posters. These submitters largely endorsed the former Electoral and Administrative Review Commission's (EARC's) arguments in its 1991 *Report on the review of the Elections Act 1983-1991 and related matters*[46] (EARC's 'Elections Act report') against having general posters in voting compartments. These arguments include concerns that posters would not be satisfactory where there are a large number of candidates and consideration would have to be given to the effect of actions such as a failure to display a poster and displaying a defaced poster on the validity of an election.

The majority of submissions advocating (or at least working on the basis of) the retention of how-to-vote cards supported the suggestion that how-to-vote material bear the name of the party/independent candidate on whose behalf it is distributed, and that it do so in sufficiently sized print.

The ALP (Qld) submitted that the committee consider a requirement that the registered *abbreviation* of registered political parties appear in the authorisation information of all material produced on that party's behalf (or the word 'independent' in the case of candidates of non-registered parties or independents). The ALP also submitted that the *Electoral Act* contain a minimum print size for this authorisation line but that '*it would be an inappropriate and complex task to seek to legislate on matters of design*'.

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45 See also similar submissions by: Mr A Sandell; Mr E Walker; J Calway, Ms S Moles; C Gwin; Mr R Weber; Ms D Mahoney; Mrs J Werner; Dr M Macklin, Ms M Johnston; Mr J and Mrs L Leatherbarrow; Dr E Connors; Mr F Brown; Mr A J H Morris QC and Mr J Pyke.

46 Government Printer, Brisbane, December 1991, para 8.112.

Similarly, the Liberal Party (Qld) agreed that the possibility of situations such as occurred in Mansfield arising again could be reduced by '*a clear authorisation on the card indicating the name or logo of the political party which produced the card, and in suitable typeface and font size as to be clearly readable'*.

Mr Anthony Morris QC, in supporting a requirement that how-to-vote cards bear the name of the party/independent candidate on whose behalf it is distributed, also cautioned that this would:

> *require careful legislative drafting, both to ensure that there are no 'loop-holes', and also that the legislative provision does not constitute an unreasonable inhibition of freedom of expression.*

Mr Morris warned that there is always a risk of such a legislative provision being circumvented where how-to-vote cards are produced and distributed by supporters of a candidate without that candidate's (or the candidate's party's) knowledge or approval. Mr Morris submitted that the only solution to this would be a requirement that any card, leaflet, or other printed material provided with a view to soliciting votes (whether first or subsequent preferences) bear a statement declaring whether or not the card is distributed on behalf of any candidate or party.

Mr Morris further submitted that it should be an offence to distribute such material without containing one or other of these statements, or to distribute such material claiming that it is distributed on behalf of a particular candidate or party when that is not the case.

In order to avoid such information being concealed amongst other information presented on the how-to-vote card, Mr Morris also suggested a number of requirements regarding position, type-face, colouring and layout. Mr Morris suggested that the federal regulations relating to warnings on cigarette packets might be a useful guide in this regard.

Dr Paul Reynolds suggested a slightly different system whereby:

- each candidate be permitted two how-to-vote cards, with the second designated as a second preference how-to-vote card;
- the second preference how-to-vote card carry that title, incorporating that party's name and seat (or the independent's name and seat) as a defined header;
- an authorisation in upper case lettering appear immediately below the header identifying the person and status in whose name the card is issued; and
- both how-to-vote cards be registered with the ECQ within seven days of polling day.

Mr John Pyke submitted that, in the first instance, parties should not be allowed to distribute how-to-vote cards or similar matter on polling day. Failing that submission being accepted, Mr Pyke advocated a different system whereby there be a ban on the use of the terminology 'how-to-vote (party name)' as he considers the use of the phrase is misleading and deceptive and hides from uninformed voters the fact that the way they number their subsequent preferences (if any) is entirely up to them. Instead, Mr Pyke advocated that parties should be made to use the language of 'advice' or 'recommendation' and cards should be required to contain a reminder in '*print no less than half the size of the biggest print on the card'* along the lines of:

> *This is a recommendation only. Your choice of which candidate to place first, and which candidates (if any) to give other preferences to, is entirely up to you.*

While Mr Pyke argued that this should greatly reduce the need for second preference cards, he also submitted that, given the current system, the canvassing of second preference votes should only be allowed if done in a way which is not misleading. Mr Pyke submitted that Justice Mackenzie's suggestion at para 153 of his judgment would '*go a long way in ensuring that aim'*.

There was also discernible support in submissions for some sort of registration or approval of how-to-vote cards by the ECQ.[47] For example, the National Party of Australia (Queensland) submitted that the practice of misleading voters by 'bogus' how-to-vote cards should be prevented by:

- establishing a system of registration of how-to-vote material prior to polling day;
- allowing sufficient time for objections to any misleading material to be dealt with by the courts prior to polling day; and
- preventing the representation that how-to-vote material is the material of an entity other than the entity making the material available.

Mr Carroll recommended a simplified system of registration of how-to-vote cards whereby candidates be required to register their cards with their district returning officer only and that it be the duty of that officer to register one card for each candidate/party.

Some submitters advocated that a system of approval or registration should be in addition to a requirement that how-to-vote cards bear the name of the party/independent candidate on whose behalf they are distributed.[48]

However, the ECQ—while supporting Justice Mackenzie's suggestion that how-to-vote cards should bear on their face the name of the party on whose behalf or on whose candidate's behalf it is distributed—reiterated its opposition to any system of registration or approval of how-to-vote cards by the ECQ prior to distribution. The Commission stressed that both systems would delay the availability of how-to-vote cards for early pre-poll and postal voting (though this would be less the case with registration than with approval).

> *It is the view of the Commission that it will be necessary to provide each polling booth with either approved or registered how-to-vote cards at least for the relevant electoral district otherwise the legislation would be virtually unenforceable. Therefore, there would have to be a cut-off of the approval or registration at least eight days before polling day to allow sufficient time for the how-to-vote cards to be transported to the relevant booths. (Faxed copies would not address colour and size issues and would not be a satisfactory substitute for an original card.)*
>
> *The suggestion by Mr Justice Mackenzie for how-to-vote cards distributed with a view to obtaining second and subsequent preferences to bear on their face the name of the party on whose behalf or on whose candidate's behalf it is distributed offers a practical solution which minimises interference in the campaign processes while promoting the ideal of voters being fully informed.*
>
> *The Commission strongly supports the suggestion made by Justice Mackenzie.*

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47 An approval system would require the ECQ to approve how-to-vote cards before they could be legally distributed. A registration system would mean that how-to-vote cards would only have to be registered with the ECQ's office and put on display in that office before they can be legally distributed to the public. Political parties and candidates could then take their own legal action to restrain the use of how-to-vote cards which they considered misleading or offensive.

48 See submissions from W J Gabriel and Professor Colin Hughes.

Finally, some submitters suggested that persons handing out how-to-vote cards should be required to be authorised or to wear some form of identification.[49]

The committee canvasses various submissions relevant to its terms of reference below.

2.3 ANALYSIS AND CONCLUSIONS

2.3.1 The abolition of how-to-vote cards

The abolition of how-to-vote cards is beyond the scope of the committee's inquiry. However, the committee believes that, given the number of submissions which advocated this option, it is appropriate that the committee record its opposition to a total prohibition on how-to-vote cards. While the issue is still to be tested in the courts, the committee believes that the likelihood of a provision banning how-to-vote cards being held constitutionally invalid in light of the constitutionally guaranteed freedom of political discussion is high.[50] However, irrespective of this legal issue, the committee believes that on policy grounds an outright ban of how-to-vote cards is unwarranted.

The committee also notes that banning how-to-vote cards has been considered and rejected at the federal level on a number of occasions for reasons including (apart from civil liberties implications) practical difficulties in enforcing such a ban and that it would deny many supporters of political candidates one of the few means by which they can participate in a campaign.[51]

2.3.2 The replacement of how-to-vote cards with how-to-vote posters

A number of submitters who advocated the banning of how-to-vote cards proferred that, as an alternative, parties/independent candidates be able to place how-to-vote posters in the voting compartments of polling booths. The committee has a number of concerns with this suggestion. In addition to inappropriately involving the ECQ in the party political process, potential difficulties with this option include:

- the ECQ would need to receive the posters prior to polling day which could be administratively cumbersome and costly, cause delay, and prevent candidates from making 'last minute' changes to their how-to-vote material;
- difficulties in determining the precise location of how-to-vote posters in voting compartments (presumably there would be much jockeying for eye height positions);
- difficulties in specifying poster shape and size, especially where a large number of candidates are contesting a seat;
- complications in electorates with large numbers of candidates as there is a limit on how much printed material can effectively be displayed inside voting compartments (including ECQ voter assistance material) so as to be equally visible by voters;
- the ECQ would need to be given specific powers to ensure that posters that had been (successfully) objected to were not displayed; and

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49 See submissions from Professor Colin Hughes and the Liberal Party (Qld).

50 Similar concerns were expressed by EARC in its 1991 *Report on the review of the Elections Act 1983-1991 and related matters*, op cit, para 8.113 and by Professor Colin Hughes in his submission.

51 See comments by the Joint Standing Committee on Electoral Matters (JSCEM) in: *The 1990 Federal Election*, AGPS, Canberra, December 1990, pp 55-56; *The 1993 Federal Election*, AGPS, Canberra, November 1994, p 113; and *The 1996 Federal Election*, AGPS, Canberra, June 1997, p 94.

- there would need to be additional legislative provisions stating that failing to display, or displaying defaced, posters etc would not affect the validity of an election.

As noted above, EARC expressed similar concerns in its 1991 Elections Act report:

> *If there were to be a statutory requirement that a general poster or posters in every voting compartment were displayed, consideration would have to be given to the effect on the validity of the election of a failure to discharge the responsibility. If the poster was not displayed, or was placed in a position where it was difficult to read, would this be a ground for challenging and overturning the election? Where a large number of candidates are standing, and some recommend alternative distributions of preferences, the size of the poster required could be a problem, as could the additional time required by each elector to find their preferred option. With separate cards it is relatively simple to take only the desired one, or to take all of them but use the preferred one in the compartment.*[52]

The option of how-to-vote posters and/or booklets has also been rejected at the federal level on similar grounds.[53]

For these reasons, the committee does not endorse the suggestion that how-to-vote posters in voting compartments either replace, or supplement, how-to-vote cards.

2.3.3 A system of registration and/or approval of how-to-vote cards

A system of registration and/or approval of how-to-vote cards was considered by this committee's predecessor in its truth in political advertising report. As noted in section 2.1.1 above, that committee recommended against both a system of registration and a (more onerous) system of approval. The former committee was clearly influenced in its conclusion by evidence given by the ECQ. The ECQ has reiterated its concerns to this committee.

While registration systems operate in NSW and Victoria, the concept has been rejected at the federal level. In 1990, the Joint Standing Committee on Electoral Matters ('the JSCEM') noted—in relation to the Victorian registration system—that:

> *while such an approach may overcome the difficult problem of misleading and deceptive publications [the committee] would not support such a system because it would be almost impossible to enforce. In addition, registration would represent bureaucratic interference in the political process and further restrictions placed on political parties. Any such restrictions could interfere with the conduct of a campaign and prevent the option of any last minute material being distributed on polling day to address issues which may arise in the final days of campaigning.*[54]

As noted in section 2.2 above, the suggestion was made in submissions that registration be simplified by requiring how-to-vote cards to be registered with a candidate's local returning officer. However, this would still not overcome some of the problems identified by the former committee and by the JSCEM. For example, registration prior to the election (whether with

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52 Op cit, para 8.112.

53 JSCEM, *The 1990 Federal Election*, op cit, p 55. In its report on the 1996 federal election, the JSCEM rejected a proposal for banning or restricting how-to-vote material: *The 1996 Federal Election*, op cit, p 94. This followed a previous JSCEM recommendation that the AEC investigate means by which how-to-vote material could be displayed inside polling places at future federal elections: *The 1993 Federal Election*, op cit, pp 113, recommendation 55.

54 Op cit, p 59. Instead, that committee recommended that a more appropriate solution would be to introduce harsher penalties for existing provisions aimed at the distribution of misleading publications.

the ECQ in Brisbane or with the local returning officer) would still prevent candidates from publishing late (amended) how-to-vote material because of changed circumstances.

Further, while registration would ensure that all parties/candidates could scrutinise opponents' how-to-vote material prior to election day and take action to restrain the use of how-to-vote material which they consider misleading, the likelihood of a court granting an injunction restraining the use of 'second preference' how-to-vote cards must also be considered. In the Mansfield decision, Justice Mackenzie noted that he had been referred to three previous Queensland cases, all of which were *un*successful applications for injunctions made on election day to restrain the use of signs in one case and cards seeking preferences in the others.[55]

The committee believes that more effective alternatives to systems of registration and/or approval of how-to-vote material can be employed.

2.3.4 Party workers wearing identification

A couple of submitters suggested that, in order to reduce the possibility of the type of conduct that occurred in Mansfield arising again, there should be an additional requirement that persons distributing how-to-vote material be authorised to do so and/or wear some form of party (or 'independent candidate') identification.

The committee has concerns about the practicality of such a requirement (of which there is no equivalent in any other Australian jurisdiction's electoral legislation). On polling day, a large number of volunteers work in shifts to staff each polling booth. Prescriptive regulations requiring hundreds of volunteers to be authorised and/or wear some form of identification only adds to the administration of elections. Policing such requirements would increase the already substantial burden on the ECQ during the election period and inevitably cause difficulties. Consideration would also have to be given to the effect of a distributor not being authorised and/or not wearing the required identification, especially where that distributor has engaged in objectionable conduct.

2.3.5 A consent of first preference candidate provision

As part of its inquiry, the committee has considered whether Queensland's *Electoral Act* should contain a provision making it an offence to use any candidate's name on how-to-vote material as the candidate for whom a first preference vote should be given without that candidate's written consent. This would mean that a first preference candidate would have some control over whether, and how, their name was to be used on second and subsequent preference cards.

As noted in section 2.1.2, the electoral laws of various jurisdictions contain provisions which, on their face, appear to be of this nature.

Section 351(1) of the *Commonwealth Electoral Act* provides that:

> *If, in any matter announced or published by any person, or caused by any person to be announced or published, on behalf of any association, league, organisation or other body of persons, it is, without the written authority of the candidate (proof whereof shall lie upon that person):*

[55] Judgment, paras 111-113.

> *(a) claimed or suggested that a candidate in an election is associated with, or supports the policy or activities of, that association, league, organisation or other body of persons; or*
>
> *(b) expressly or impliedly advocated or suggested:*
>
> …
>
> *(ii) in the case of an election of a Member of the House of Representatives—that that candidate is the candidate for whom the first preference vote should be given;*
>
> *that person shall be guilty of an offence.*[56]

During the last federal election the AEC received complaints about certain second preference how-to-vote cards distributed by the Western Australian Liberal Party. Advice received by the AEC on polling day indicated that the cards in question might have breached s 329(1) and s 351(1)(b)(ii) of the *Commonwealth Electoral Act*. However, the AEC later decided not to prosecute for a breach of either of those sections based on legal advice from the Director of Public Prosecutions (DPP) and further advice from Senior Counsel that such prosecutions might not succeed.

In its advice, the DPP examined the legislative history to s 351 and established that the section, inserted into the *Commonwealth Electoral Act* in 1940, was not originally intended to have a bearing on how-to-vote cards issued by the major political parties.[57] Instead, the section was apparently introduced to prevent the unauthorised endorsement of candidates by certain associations other than the major political parties. The concern was that this might cause detriment to the candidate as persons who did not agree with the views of the association might have been discouraged from voting for the candidate.[58] (In particular, the provision appeared to be aimed at the Communist and Temperance parties.[59])

In this light, the DPP considered that there was some doubt as to whether second preference cards, such as had been the subject of complaints during the last two federal elections, would be in breach of s 351.

Section 351 had been previously considered in some detail in 1987, also in relation to an 'unofficial' second preference how-to-vote card.[60] However, in that case the DPP advised the AEC that there was insufficient evidence to prosecute either the second preference candidate listed on the how-to-vote card or the 'authoriser' of the card (allegedly an associate of the second preference candidate).[61]

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56 The penalty is $1000 if the offender is a natural person or $5000 in the case of a body corporate. The section does not apply to any publication made or authorised by any political party respecting a candidate who is a candidate for that party (ss 4).

57 In fact, it was made clear during the bill's passage through the Senate that the (then proposed) provision '*does not affect the distribution of preferences as between candidates of genuine political parties*', Senator Foll, Electoral Bill 1939, Senate, *Debates*, 23 May 1940, p 1176. For a detailed discussion on the history and operation of s 351 see the AEC's submission to the JSCEM's inquiry into the conduct of the 1998 federal election, 12 March 1999, section 6.8 and attachment 13 (available on the Internet at <http://www.aec.gov.au>).

58 See the House of Representatives debate on the Electoral Bill 1939, *Debates*, 21 May 1940, pp 1059-1063.

59 Although, the section is so widely drafted that it arguably encompasses political parties.

60 *Gary Johns v John Hodges & Max Mathers*, Unreported decision, Supreme Court of Qld, no 2689 of 1987.

61 Joint Standing Committee on Electoral Matters, *The 1987 Federal Election*, AGPS, Canberra, May 1989, pp 66-68. The facts of the particular case and the evidentiary difficulties are described in the report.

In its report on the conduct of the 1987 federal election, the Joint Standing Committee on Electoral Matters (JSCEM) recommended some amendments to overcome the seeming unenforcability of s 351.[62] While the government accepted some of the JSCEM's recommended amendments, it noted that the recommended deletion from s 351 of the requirement to prove that a matter is published on behalf of any association, league, organisation or any other body of persons:

> *…will have the effect of creating an offence of claiming that a candidate is associated with or supports the policies of any organisation. Such an offence would be very broad and would constitute a major restriction of free speech. Because of these unintended results, it is suggested that the Committee should reconsider the recommendation.*[63]

Despite the presence of s 351, it is apparent that the AEC usually relies upon s 329(1) of the *Commonwealth Electoral Act* (Misleading or deceptive publications etc) when considering whether to prosecute for misleading 'unofficial' second preference how-to-vote cards.

In its submission to the JSCEM's inquiry into the conduct of the 1998 federal election,[64] the AEC canvassed both the current relevance of s 351 and Justice Mackenzie's recommendation regarding party/independent candidate identification on how-to-vote cards. In particular, the AEC:

- noted that the issue of second preference cards is a 'vexed one' under the *Commonwealth Electoral Act* as: (a) s 329(1) may not apply to some of the second preference cards now increasingly in use at federal elections (based on the High Court's interpretation of that section described in section 1.1 above); and (b) it appears s 351 was never intended to cover second preference how-to-vote cards as they are currently issued by major political parties;
- noted that Justice Mackenzie's suggestion in the Mansfield decision '*might provide an avenue for further consideration of the federal legislation*'; and
- submitted that the JSCEM might consider amending the authorisation provision in the *Commonwealth Electoral Act* (that is, s 328 which is equivalent to s 161 of the Queensland *Electoral Act*) to put into effect Justice Mackenzie's recommendation and what the detailed wording of such an amendment should be:

  > *For example, section 328 could be amended to require that, in addition to the standard authorisation requirements, any electoral advertisement that recommends a second or later preference vote for a candidate from another political party, or an independent candidate, must contain at the top of the advertisement, the name and address of the person authorising the advertisement, and the political party where applicable, in no less than 12 point font.*

The AEC went on to note that if s 328 was to be amended along the lines of Justice Mackenzie's suggestion, then the JSCEM might consider recommending the repeal of s 351 given its peculiar legislative history and to avoid 'any further confusion'. Alternatively, the AEC noted that the JSCEM might conclude that second preference cards should be prohibited altogether and that s 351 does not currently provide for such an express prohibition. If this view was taken, then s 351 could be completely recast to suit contemporary political realities.

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62 Ibid, p 68.

63 Senate, *Debates*, 30 April 1992, p 1932.

64 AEC, submission to the JSCEM's inquiry into the conduct of the 1998 federal election, 12 March 1999, paras 6.8.17-6.8.23 (available on the Internet at <http://www.aec.gov.au>.

Section 301 of the ACT's *Electoral Act 1992* is based on s 351 of the *Commonwealth Electoral Act.* This provision, which has only been in force for the 1995 and 1998 Territory elections, provides that:

> ***301. Publication of statements about candidates***
>
> *(1) A person shall not publish, or authorise to be published, on behalf of a body (whether incorporated or unincorporated) a statement—*
>
> *(a) expressly or impliedly claiming that a candidate in an election is associated with, or supports the policy or activities of, that body; or*
>
> *(b) expressly or impliedly advocating that a candidate should be given the first preference vote in an election;*
>
> *without the written authority of the candidate*.[65]

The ACT electoral commissioner advised that the section is mainly intended to:

> *prohibit a candidate from being disadvantaged by appearing to be associated with a body with which the candidate may not wish to be associated.* ***It would also act to prohibit a party or candidate issuing a how-to-vote card that advocated casting a first preference for another candidate without that candidate's consent****. It would not prevent the type of how-to-vote card along the lines of "Thinking of voting Democrat?" Then give your second preference to…".*[66] [Emphasis added.]

The ACT electoral commissioner also advised that s 301 has not been the subject of any complaints or legal action.

It is clear from the above discussion of s 351 of the *Commonwealth Electoral Act* that, in the words of the AEC, the section '*was never intended to cover second preference how-to-vote cards as they are currently issued by major political parties, but is in fact restricted to a narrow set of historical circumstances*'. Further, the experience with s 351 highlights that there might be evidentiary difficulties with enforcing such a provision.

By careful drafting it might be possible to overcome these and other potential difficulties with such a provision. Other potential difficulties include:

- the provision only requires the consent of a first preference candidate and does not apply to second and subsequent preference candidates and these preferences can, in close seats, be important; and
- the provision would not apply to how-to-vote cards which, instead of listing a candidate as a first preference, merely list a party's name.

However, the committee is concerned about the free speech implications of such a provision which, in reality, would very likely operate to restrict lawful how-to-vote cards to those which are, or are in accordance with, 'official' party/independent candidates' second preference cards. This is because a first preference candidate (or their party) is likely to only consent to a card which *fully* accords with their desired preference allocation. In a case where a party/candidate is not directing any preferences, presumably that party/candidate would not consent to any second preference how-to-vote material. Such a provision therefore has the potential to restrain, for example, concerned community groups from issuing how-to-vote material. The committee believes that, in a democratic society, an organisation should be able

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65 The penalty for non-compliance is $3000. Again, the section does not apply to any publication on behalf of a political party respecting a candidate who is a candidate for that party (ss 3).

66 Letter to the committee dated 22 November 1998.

to say "vote for candidate X" (whether that person is a first preference candidate or otherwise) without that candidate's consent.

For these reasons, the committee is not supportive of a 'first preference candidate' consent provision.

2.3.6 A party/candidate identification requirement

Currently, s 161 of Queensland's *Electoral Act* requires certain election material, including how-to-vote cards, to bear the name and address of the person who authorised the material. In light of the 1998 election events in the Mansfield electorate, Justice Mackenzie suggested that Queensland's *Electoral Act* be amended to insert a requirement that all cards distributed with a view to obtaining *second and subsequent preferences*:

- should *bear on their face* (and on each face if double sided);
- the *name of the party* on whose behalf or on whose candidate's behalf it is distributed (and where it is issued by a person who is not a party candidate, the fact that he or she is an independent should be stated); and
- such information should be required to be *printed in type of a size which is sufficiently large* to be easily read and is not overwhelmed by other printing on the card.[67]

As discussed, no other Australian jurisdiction currently has a provision in its electoral laws to this effect (though, the ACT Electoral Commission has recently proposed a similar requirement be inserted into the ACT *Electoral Act*).

No submission to the committee's inquiry provided a reason why Justice Mackenzie's suggestion should *not* be adopted. In fact, the majority of submissions which advocated the (or at least worked on the basis of) retention of how-to-vote cards supported such a requirement.

The committee is similarly supportive of Justice Mackenzie's suggestion.

Requiring how-to-vote material to bear, where applicable, the name of the party/candidate on whose behalf it is distributed in sufficiently sized print, should reduce the potential for voters to be misled. More specifically, such a requirement will equip voters with the means to make informed decisions when handed how-to-vote material. Voters will be in a better position to judge how-to-vote material if it is ensured that the (political) source of that material is clearly stated.

Making voters aware of the source of electoral material is an important aspect of voter education as it helps to ensure that voters are making fully informed political judgments.

As Justice Mackenzie observed of previous Queensland cases concerning applications for injunctions to restrain the use of 'misleading' how-to-vote material:

> *The point to be made in respect of these cases is that the issue whether cards advocating a second preference are likely to mislead is not uncommon. Controversy whether identification of the source of the document is adequate is a common feature of the cases*.[68]

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67 Judgment, para 153.

68 Judgment, para 113.

His Honour also noted that his suggested solution to reduce the kind of confusion alleged to have occurred in the Mansfield electorate promoted '*the ideal of voters being fully informed before they decide whether to give a second or subsequent preference and, if so, to whom…*'.[69]

The committee concurs that Justice Mackenzie's suggestion promotes the ideal of voters being fully informed before casting their vote. The committee also believes that Justice Mackenzie's suggested requirement is:

- inexpensive;
- practical and simple to implement (in fact, as was evident from the Mansfield decision, some parties already state their party name in the s161 authorising statement); and
- likely to minimise interference in the campaign process.

However, while the committee agrees with Justice Mackenzie's general suggestion, the committee proposes a number of modifications to it. The committee's final proposed provision appears in recommendation 1 of this report. The discussion below explains the committee's policy position behind its provision.

The broad application of a party/candidate identification requirement

The committee believes that a party/candidate identification requirement must be (a) directed to the mischief it is attempting to address and (b) be workable. To this end, the committee advocates a minimalist approach to implementing such a requirement.

Having said this, the committee makes the following observations at the outset.

- The requirement should only apply to the 'distribution' of 'how-to-vote cards'. Stipulating additional requirements regarding the distribution of how-to-vote cards—that is, additional to those which apply to other forms of electoral advertisements and material—can be justified on the basis that such cards are usually the last piece of information that voters receive before casting their vote. At that stage, voters are not only vulnerable to being influenced/misled by the cards but are also unlikely to have any independent means at their disposal to verify the political source of the cards provided to them.
- 'How-to-vote card' should be defined to encompass all cards, handbills and pamphlets whether they represent part or all of a ballot paper, or are narrative in nature. (A narrative card might state, for example, 'Voting for the ABC party?. Then make your vote count and give your next preference to the XYZ party'.)
- The requirement should apply to *all* how-to-vote cards distributed with a view to soliciting votes whether first or subsequent preferences. (Justice Mackenzie's comments were confined to how-to-vote cards distributed with a view to obtaining *second and subsequent preferences*.) To have different requirements applying to different types of how-to-vote cards would cause confusion and increase the likelihood of inadvertent non-compliance. (Nevertheless, the committee concedes that when it comes to narrative how-to-vote cards, the provision should not cast too wide a net, and should instead be confined to second and subsequent preference cards.)

[69] Judgment, para 154.

The essential details

Clearly, the party/candidate identification requirement should be additional to the current authorisation required by s 161, that is, the name and address[70] (other than a post office box) of the person who authorised the card.

In particular, the committee believes that the following should be required to appear with this statement:

- in the case of cards authorised for a registered political party or a candidate endorsed by a registered political party—the party's name (or where an abbreviation of the party's name is included on the register of political parties, the abbreviation);
- in the case of cards authorised for a candidate of a non-registered political party or an independent candidate—the candidate's name and the word 'candidate'.[71]

The committee recognises that various organisations interested in the outcome of an election, such as community and lobby groups, might wish to issue how-to-vote cards. Moreover, the committee believes that this is appropriate in a democratic society whose constitution contains an implied freedom of political discussion. Where cards are distributed without the authorisation of any candidate or party, only the current requirement under s 161 would apply.

The fact that a party's name or the words 'candidate' do not appear on how-to-vote material should put voters on notice that the material is not authorised for any candidate or party. Again, general voter education should assist in alerting voters to the fact that such material is issued for either individual citizens or organisations such as community and lobby groups. The latter in particular may well choose to clearly state authorship on their material for the ready information of their members.

Ensuring that the requirement is not circumvented

The committee is conscious that any legislative provision requiring how-to-vote material to bear the name of the party/candidate on whose behalf it is distributed must be carefully drafted to ensure that it is not easily circumvented and that it does not constitute an unreasonable inhibition on freedom of expression.

Mr Morris submitted that there is a risk of a party/candidate identification requirement being circumvented where how-to-vote cards are produced and distributed by supporters for a particular candidate without that candidate's (or the candidate's party's) knowledge or approval. Mr Morris submitted to the committee that the only solution to overcome this problem is to require that any card distributed with a view to soliciting votes (whether first or subsequent preferences) must bear a statement which either:

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70 The committee notes that the AEC recommended in its submission to the JSCEM's 1998 federal election inquiry that the Commonwealth equivalent of s 161 be amended to define 'address' as the full address, including the street number, the street name and the suburb/locality: para 6.4 (available on the Internet at <http://www.aec.gov.au>). This submission was made as a result of a number of queries of the AEC during the election period. The committee is not aware of similar difficulties in Queensland and therefore has not addressed this matter as part of its current inquiry. However, the committee notes that this issue might be considered in relation to amendments proposed by the ECQ to the *Electoral Act 1992* following the 1998 general State election.

71 The committee had considered the words 'independent candidate' but believes that it would be misleading for candidates endorsed by, or who identify with, unregistered political parties to be required to state that they are 'independent candidates'.

1. commences with the words: "This card is distributed on behalf of…[followed by the name of the candidate or the candidate's party]"; or

2. in the case of material distributed without the express permission of any candidate or party, commences with the words: 'This card is not distributed on behalf of any candidate or party'.

Mr Morris further submitted that it should be an offence to distribute how-to-vote material without containing one or other of these statements, or to distribute such material claiming that it is distributed on behalf of a particular candidate or party when that is not the case.

While the committee agrees that all practical steps should be taken to ensure that the party/candidate identification requirement is not circumvented, the committee is not convinced that the additional words suggested by Mr Morris are necessary or desirable. As noted above, if a card is distributed without the authorisation of any party or candidate, this would be evident by the fact that only the current s 161 statement appears on the card. The committee has real concerns as to cluttering how-to-vote material by overly prescriptive requirements. This is exacerbated if, as the committee advocates below, size requirements are also to apply to the statement.

The committee is more concerned with the possibility that unscrupulous parties or candidates might arrange for third persons to distribute how-to-vote cards in their favour but supposedly not 'authorised' on their behalf. The committee does not believe that the likelihood of this occurring is high. In fact, the how-to-vote cards in issue in the Mansfield decision did bear the registered abbreviation of the political party issuing the cards. Nevertheless, the committee agrees that it should be an offence to:

- distribute a how-to-vote card which does not contain the party/candidate identification requirement where applicable;
- distribute a how-to-vote card if the card states that it is authorised for a registered political party or a candidate and the person knows that the statement is false.

The committee further recommends that the penalty for these offences should be the same as the penalty for a breach of s161.

Stipulations as to print size, colour and legibility

Justice Mackenzie noted that any requirement for how-to-vote material to bear a party/candidate identification statement would also have to be accompanied by stipulations as to print size to ensure that the statement is both 'easily read' and 'not overwhelmed by other printing on the card'. The committee agrees that without such stipulations the requirement could be rendered ineffective.

In terms of print size requirements, the committee has considered a number of options (many of which were suggestions made in submissions). These options include:

- highly prescriptive regulations (such as the federal regulations regarding health warnings on cigarette packets);
- a broad requirement such as 'not less than half (third etc) the size of the biggest print on the face of the card'; or
- a graded minimum print size per page size requirement.

Of these options, the committee favours the last. Overly prescriptive requirements might make compliance and the adjudication of alleged breaches more difficult, and increase the chances of inadvertent, technical non-compliance. A broad requirement, which seeks to make the print size proportional to the largest font on the card, has the potential to interfere with the design of how-to-vote cards. Both would be difficult for ECQ officers to monitor and enforce.

A graded minimum print size per page size requirement seemingly achieves a balance between these two options. It is neither overly prescriptive, nor is it likely to unnecessarily interfere with preferred designs of how-to-vote cards. Further, the committee believes that compliance would be relatively easy to monitor by the use of pre-printed transparency overlays.

The committee believes that, in the case of how-to-vote cards, the authorising statement be required to appear in print no smaller than:

- if the card is not larger than A6—10 point; or
- if the card is larger than A6 but not larger than A3—14 point; or
- if the card is larger than A3—20 point.[72]

A suggestion was also made in submissions that there should be requirements with respect to the colour in which the statement should be printed. For example, Mr Morris submitted that his proposed statement/s occupy the top quarter of each face, which should be blank apart from the required statement and that the colouring and lay-out should be such that the required statement is no less distinctive than any other part of the document.

Again, rather than being overly prescriptive on matters of design, the committee believes that a general requirement that the statement appear in prominent and legible characters is sufficient.

Position of the required statement

It was suggested to the committee that it might be necessary to stipulate the position of the party/candidate identification statement on how-to-vote cards. As noted above, Mr Morris submitted that his proposed statement/s occupy the top quarter of each face of a card. Some submitters also advocated that a party/candidate identification statement be required to appear at the top rather than the bottom of the card.

For similar reasons to those stated above, the committee does not favour such requirements. Attempting to legislate on such specific matters is not only complex but, in the committee's opinion, inappropriately interferes with matters of preferred design. The committee believes that requiring the statement to be prominent and legible should be sufficient. The requirement that the statement appear at the bottom of the card also accords with the current s 161 requirement. This means that, where applicable, the party/candidate identification statement will be located in a position with which most people should be familiar.

However, the committee does agree with Justice Mackenzie's suggestion that the party/candidate identification statement be required to appear on each printed face of any document.

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[72] Australian Standard AS 1612-1974 (which is based on international standards) characterise A6 as 148 x 105mm, A5 as 210 x 148mm, A4 as 297 x 210mm, A3 as 420 x 297mm and A2 as 594 x 420mm. This page is A4 with body text in 12 point (footnote text is 10 point). Under the committee's proposals, if this page was a how-to-vote card the required statement would have to appear in at least 14 point.

RECOMMENDATION 1

The committee recommends that the Attorney-General, as the Minister responsible for the *Electoral Act 1992* (Qld), amend the Act along the lines of the following draft provisions.

Amendment of s 161 (Author of election matter must be named)

(1) Section 161(1), 'Subject to subsection (3), a'—

omit, insert—

'A'.

(2) Section 161—

insert—

'**(4)** Also, subsection (1) does not apply to distributing, or permitting or authorising another person to distribute, a how-to-vote card.

'**(5)** In this section—

"distribute", for subsection (4), has the meaning given by section 161A.

"how-to-vote card" has the meaning given by section 161A.'.

Insertion of new s 161A

After section 161—

insert—

'**Distribution of how-to-vote cards**

'**161A.(1)** During the election period for an election, a person must not distribute, or permit or authorise another person to distribute, a how-to-vote card that does not comply with subsections (2) to (4).

Maximum penalty—

(a) for an individual—20 penalty units; or

(b) for a corporation—85 penalty units.

'**(2)** A how-to-vote card must state the following particulars—

(a) the name and address of the person who authorised the card;

(b) if the card is authorised—

(i) for a registered political party or a candidate endorsed by a registered political party—the party's name; or

(ii) for a candidate who is not endorsed by a registered political party—the candidate's name and the word 'candidate'.

Example for paragraph (b)(i)—

'Authorised P. Smith, 100 Green Street Brisbane for the ALP'.

Example for paragraph (b)(ii)—

'Authorised R. Jones, 1 Green Street Brisbane for R. Jones (candidate)'.

'**(3)** For subsection (2)(a), the address must not be a post office box.

'**(4)** The particulars mentioned in subsection (2) must appear—

(a) at the end of each printed face of the how-to-vote card; and

(b) in prominent and legible characters in print no smaller than—

(i) if the card is not larger than A6—10 point; or

(ii) if the card is larger than A6 but not larger than A3—14 point; or

(iii) if the card is larger than A3—20 point.

'**(5)** During the election period for an election, a person must not distribute, or permit or authorise another person to distribute, a how-to-vote card if the person knows, or ought reasonably to know, that the particulars, or any of the particulars, mentioned in subsection (2) on the card are false.

Maximum penalty—

(a) for an individual—20 penalty units; or

(b) for a corporation—85 penalty units.

'**(6)** In this section—

"distribute" a how-to-vote card—

(a) includes make the card available to other persons; but

(b) does not include merely display the card.

Examples—

1. A person "distributes" a how-to-vote card if the person hands the cards to other persons or leaves them at a place for other persons to take away.

2. A person does not "distribute" a how-to-vote card if the person attaches the cards to walls and other structures, merely for display.

"how-to-vote card" means a card, handbill or pamphlet that—

(a) is or includes—

(i) a representation of a ballot paper or part of a ballot paper; or

(ii) something apparently intended to represent a ballot paper or part of a ballot paper; or

(b) lists the names of any or all of the candidates for an election with a number indicating an order of voting preference against the names of any or all of the candidates; or

(c) otherwise directs or encourages the casting of preference votes, other than first preference votes, in a particular way.

"name", of a registered political party, means the party's full name on the register of political parties or, if an abbreviation of the name is also included on the register, the abbreviation.'.

2.3.7 Extending the committee's proposal to local government

Amending the *Electoral Act* as recommended in section 2.3.6 above would operate to further regulate how-to-vote cards distributed in general State elections.[73] However, while the Mansfield decision related to the conduct of State elections, the question arises as to whether the proposed requirement should also apply to local government elections. To impose similar requirements in the case of elections at local government level, the *Local Government Act 1993* (Qld) would also need to be amended.[74]

The *Local Government Act* governs the conduct of local government elections.[75] 'Election' is defined in s 3 of the *Local Government Act* to mean an election of councillors, or a councillor, of a local government.

The *Local Government Act* provides for optional preferential voting in the case of elections of a councillor if the local government area is divided into single-member divisions.[76] Therefore, the arguments for further regulating of how-to-vote cards (made more imperative in optional preferential voting) equally apply to at least some local government elections.

The offences which apply to local government elections are contained in Chapter 5, Part 6, Division 16 of the *Local Government Act* and largely mirror the offences contained in Part 9 of the *Electoral Act*.

For example:

- s 161 of the *Electoral Act* (Author of election matter must be named) is largely repeated in the *Local Government Act*, s 392 (Responsibility for election matter);[77]
- s 163 of the *Electoral Act* (Misleading voters) is largely repeated in the *Local Government Act*, s 394 (Misleading voters); and
- s 177 of the *Electoral A*ct (Injunctions) is largely repeated in the *Local Government Act*, s 407 (Injunctions to restrain contravention of chapter).

The committee believes that, for consistency, the additional requirements it proposes in relation to how-to-vote cards for State general elections should apply in relation to local government elections. For this to occur, the committee's proposed s 161A (and proposed amendments to s 161) will need to be mirrored in the *Local Government Act*.

RECOMMENDATION 2

The committee recommends that the Minister responsible for the *Local Government Act 1993* (Qld) amend the Act along the lines of the draft provisions contained in recommendation 1 above.

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73 'Election' is defined in s 3 of the *Electoral Act 1992* to be an election of a member or members of the Legislative Assembly.

74 See discussion regarding local government elections in the Mansfield judgment, para 108.

75 The committee notes that, in the case of Brisbane City Council elections, the *City of Brisbane Act 1924* (Qld) provides that the *Electoral Act 1992* generally applies to the conduct of elections: *City of Brisbane Act 1924*, ss 3A(2) and 17(5) & (6).

76 See the *Local Government Act*, s 354. Section 355 (first-past-the-post voting) provides for voting in elections other than those covered by s 354.

77 Although, notably, the requirement to state the printer's name and place of business still applies in s 392 of the *Local Government Act 1993*. This requirement was removed from the *Electoral Act 1992* in 1997.

3. APPEALS FROM THE COURT OF DISPUTED RETURNS

The Mansfield decision demonstrates that electoral disputes can involve complex factual and legal matters. Currently, the *Electoral Act 1992* (Qld) provides that there is no appeal from decisions of the Court of Disputed Returns. In the Mansfield decision, Justice Mackenzie raised for Parliament's consideration whether the *Electoral Act* should be amended to:

- provide for appeals from the Court of Disputed Returns to the Court of Appeal; and
- enable the Court of Disputed Returns to state a special case or to reserve questions of law for determination by the Court of Appeal.[78]

As Justice Mackenzie noted: '*No doubt finality is important in a case of this kind. However, in cases of genuine difficulty, there is always a risk that one of the parties may feel aggrieved, with no redress available*'.[79]

In this chapter, the committee considers the law reform issues raised by Justice Mackenzie concerning the Court of Disputed Returns. First, however, the committee provides some important background information regarding:

- Queensland's current and previous legislative regimes for resolving electoral disputes (and the regimes in other Australian jurisdictions);
- submissions received by the committee; and
- the law concerning appeals from state Courts of Disputed Returns.

3.1 BACKGROUND—RESOLVING ELECTORAL DISPUTES

3.1.1 The current Queensland situation

Part 8 of the *Electoral Act* governs the way in which state electoral results are disputed in Queensland. Section 127(1) of the Act provides that the Supreme Court is Queensland's Court of Disputed Returns for the purposes of the *Electoral Act.* Section 127(2) provides that a single Judge of the Supreme Court may constitute, and exercise all the jurisdiction and powers of, the Court of Disputed Returns. It has been standard for the Court to be constituted by a single Judge since the Act was introduced in 1992.[80]

An election result for a State electoral district may be challenged by bringing a petition to the Court of Disputed Returns.[81] Petitions may be lodged by a candidate for the relevant electoral district, an elector for the district or the Electoral Commission of Queensland.[82] Petitions must be filed within seven days of the return of the writ for the election.[83]

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78 At paragraph 155 of Justice Mackenzie's judgment, reproduced on page 4 of this report.

79 Ibid.

80 Note, however, that the equivalent of s 127(2) in the *Commonwealth Electoral Act 1918* [s 354(6): '*The jurisdiction … may be exercised by a single Justice*…'] was recently interpreted as '*permissive rather than mandatory*': *Sue v Hill* [1999] HCA 30 (23 June 1999); 73 ALJR 1016; para 40 per Gleeson CJ, Gummow and Hayne JJ.

81 *Electoral Act 1992*, s 128.

82 *Electoral Act 1992*, s 129. A petition may also be lodged under s 129 by a person whom the ECQ had earlier decided was not properly nominated under s 85A. The ECQ is automatically a respondent to a petition not filed by it: s 133(2).

83 *Electoral Act 1992*, s 130. The petition may be subsequently amended: s 130(4); and the ECQ may also apply for an order dismissing the petition because of excessive delay by the petitioner in relation to it: s 135.

The Court of Disputed Returns has broad powers. Subject to certain restrictions, the Court may make any order or exercise any power in relation to the petition that the Court considers '*just and equitable*', including that: the successful candidate is not elected, another candidate is instead elected or that a new election be held.[84]

The Court of Disputed Returns is not to be overly technical or legalistic in its approach. The Act requires that the Court '*must not have regard to legal forms and technicalities, and is not required to apply the rules of evidence*'.[85] The Supreme Court may make rules regarding the practices and procedures of the Court of Disputed Returns.[86] However, no such rules have been made.

There is a general requirement on the Court of Disputed Returns to '*deal with the petition as quickly as is reasonable in the circumstances*'. In giving effect to this requirement, the Court '*must use its best efforts to ensure*' that: (a) the proceeding begins within 28 days after the petition is lodged; and (b) the Court's final orders are given within 14 days after the end of the proceeding.[87]

The Court sends a copy of its final orders to the Clerk of the Legislative Assembly[88] and may order an unsuccessful party to pay the reasonable costs of other parties.[89]

In addition to hearing petitions disputing the election of a person under Part 8, Division 2 of the *Electoral Act*, the Court of Disputed Returns is also the forum for determining:

- disputes about the results of any State referenda;[90] and
- referrals from the Legislative Assembly of '*any question*' regarding qualifications of members of, and vacancies in, the Legislative Assembly.[91]

Any changes to the law concerning the Court in relation to electoral petitions would—without further amendment of the *Electoral Act*—affect how the Court undertakes these other functions.

Appeals

Section 141 of the *Electoral Act* provides that there are no appeals available from determinations of the Court of Disputed Returns. It provides that a decision of, or order made by, the Court of Disputed Returns in relation to a petition is final and conclusive, and cannot be appealed against or otherwise called in question on any ground.

However, does 'no appeal' really mean no appeal?

It has been accepted in Queensland (and in other states with electoral legislation containing provisions like s 141) that there are no appeals from decisions of the Queensland Court of Disputed Returns to either the Queensland Court of Appeal or the High Court of Australia.

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84 *Electoral Act 1992*, s 136. Restrictions on certain orders are set out in s 137 and restrictions on certain evidence and inquiries are set out in s 138.

85 *Electoral Act 1992*, s 134(2).

86 *Electoral Act 1992*, s 134(6). This can include rules about the withdrawal of petitions, substitution of petitioners, etc: s 134(7).

87 *Electoral Act 1992*, ss 134(3) & (4).

88 *Electoral Act 1992*, s 139.

89 *Electoral Act 1992*, s 140.

90 *Electoral Act 1992*, s 127(1).

91 *Electoral Act 1992*, s 143. See ss 144-148 for the procedures involved.

However, it appears increasingly likely that the view that there is no appeal from state Courts of Disputed Returns to the High Court will be questioned. This issue, which is integral to this inquiry, is discussed further in section 3.3 below.

Referral of special cases

Queensland's *Electoral Act* does not make provision for the Court of Disputed Returns to state a special case or reserve questions of law for determination by the Court of Appeal.

Ordinarily, during a proceeding of the Supreme Court, the Supreme Court may, under the *Uniform Civil Procedure Rules*,[92] state a case for the opinion of the Court of Appeal.[93]

Even though no reference is made in the *Uniform Civil Procedure Rules* to the Court of Disputed Returns or to the resolution of electoral disputes, presumably a Court of Disputed Returns Judge might look to the *Uniform Civil Procedure Rules* (or previously might have looked at the former *Rules of the Supreme Court*) for guidance on procedural matters. However, whether a Court of Disputed Returns Judge can invoke the the *Uniform Civil Procedure Rules* to state a case is not clear.[94] This is especially so in light of s 141 of the *Electoral Act* and the statutory duty on the Court of Disputed Returns to act expeditiously. It is apparent from the Mansfield decision that Justice Mackenzie did not consider that he was empowered to do so (under the former *Rules of the Supreme Court*).

3.1.2 The previous Queensland situation

Prior to the introduction of the *Electoral Act* in 1992, the framework for disputing elections in Queensland was provided by the *Elections Act 1983* (the 'former Act'). Under the former Act, the election result for a State electorate could be challenged through a petition to the then Elections Tribunal.[95] The Elections Tribunal was constituted by a single Judge of the Supreme Court.[96] Unlike the current situation, the Chief Justice appointed the particular Judge in January of each year.[97]

Similar to the current Court of Disputed Returns, the former Elections Tribunal was to be '*guided by the real justice and good conscience of the case, without regard to legal forms and solemnities'*.[98] The Tribunal had wide powers and could make broad orders.[99]

However, the procedures of the Elections Tribunal under the former Act differed in some material ways from the current provisions relating to the Court of Disputed Returns.

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92 The *Uniform Civil Procedure Rules* commenced on 1 July 1999 replacing the *Rules of the Supreme Court*.

93 Rule 483(2) (Order for decision and statement of case for opinion) and chapter 18, part 2, division 2 (Cases stated). Formerly, the *Rules of the Supreme Court*, order 38, rule 1 provided that the parties to any cause could agree to state a question of law as a special case for the Court's determination. Under order 38, rule 2, the Judge could direct a special case for the Court's determination.

94 Section 2 of the former *Rules of the Supreme Court* provided that the rules '*so far as they are applicable, apply to proceedings in the Court* ***in all its jurisdictions***' [Emphasis added].

95 *Elections Act 1983*, ss 129 and 135. Like the current Court of Disputed Returns, the Elections Tribunal was also empowered to determine questions referred to it by the Legislative Assembly about the validity of a member's election [s 131(b)] and any matter or question concerning the qualification or disqualification of a member [s 131(c)].

96 *Elections Act 1983*, ss 129. The Judge sat alone: s 132.

97 *Elections Act 1983*, s 134. Currently, a Judge is allocated to hear a petition when a petition is received.

98 *Elections Act 1983*, s 145(1).

99 *Elections Act 1983*, s 151.

First, under the former Act, time-frames in relation to lodgement, processing and hearing of an electoral petition were much longer. For example, a petitioner had eight weeks after the return of the writ for the election to file a petition challenging the election result.[100] The successful candidate or an elector had six weeks to give notice that he or she wanted to join as a party to the petition.[101]

Secondly, determinations of the former Elections Tribunal *could* be appealed to the then Full Court of the Supreme Court (now the Court of Appeal) upon a question of law. Notice of the appeal had to be filed in the registry of the Supreme Court within 21 days of the Elections Tribunal's decision.[102]

Thirdly, if the Judge considered, upon the application of any party, that the case raised was a 'special case', the Judge could state it as such for the determination of the then Full Court of the Supreme Court. The subsequent decision of the Full Court was final.[103]

In addition, where the Judge considered that a question of law required further consideration, the Judge could direct the question for the opinion of the Full Court pursuant to s 157. That section provided that the Judge could postpone certifying his or her determination until the Full Court determined the question.

Prior to the introduction of the *Elections Act 1983*, the jurisdiction to hear electoral petitions in Queensland had passed from a:

- parliamentary Elections and Qualifications Committee under the *Legislative Assembly Act 1867*; to
- an Elections Tribunal consisting of a Judge of the Supreme Court and six assessors (being members of the Legislative Assembly chosen from a panel nominated by the Speaker each year) under the *Elections Tribunal Act 1886*; to
- an Elections Tribunal constituted solely by a Judge of the Supreme Court under the previous *Elections Act 1915*.

3.1.3 Other Australian jurisdictions

The general legislative regimes for disputing election results in other Australian jurisdictions are quite similar to that currently in place in Queensland. Nevertheless, there are some differences.

In New South Wales, Victoria, South Australia and Western Australia, electoral disputes are determined by a single Judge of the Supreme Court sitting as the Court of Disputed Returns.[104] The same situation applies in Tasmania and the territories, except that: in the Northern Territory, the Judge of the Supreme Court sits as what is called the Election Tribunal; in Tasmania, the Judge of the Supreme Court sits as the 'Supreme Court'; and in the Australian Capital Territory, the Supreme Court is called the Court of Disputed Elections

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100 Unless the petition related to a charge of bribery or corruption during an election; the petition could then be presented, with the Assembly's leave, within 12 months of the return of the writ: *Elections Act 1983*, s 136(2).

101 *Elections Act 1983*, s 138.

102 *Electoral Act 1992*, ss 154(1) & (2).

103 *Electoral Act 1992*, s 156. Compare with order 38, rules (1) & (2) of the former *Rules of the Supreme Court* (Qld), referred to in n 93 above.

104 *Parliamentary Electorates and Elections Act 1912* (NSW), ss 155-157; *Constitution Act Amendment Act 1958* (Vic), ss 279-281; *Electoral Act 1985* (SA), ss 102-104; *Electoral Act 1907* (WA), ss 157 & 158.

when hearing electoral petitions but there is no express provision for that Court to be constituted by a single Judge or otherwise.[105]

Division 1 of Part XXII of the *Commonwealth Electoral Act 1918* provides that an election result for a House of Representatives division or for a state or territory for the Senate may be challenged through a petition to the High Court sitting as the Court of Disputed Returns. The High Court may try the petition or refer it to the Federal Court or to the Supreme Court of the state or territory in which the election was held. A single Justice or Judge may constitute the Court of Disputed Returns.[106]

Compared with the current Queensland deadline of seven days for lodging an electoral petition, petitioners in New South Wales, Victoria, South Australia, Western Australia and the Australian Capital Territory have 40 days after the return of the writ to challenge an election result of their state or territory.[107] The period is 21 days in the Northern Territory and 90 days in Tasmania.[108] Petitioners have 40 days to dispute a federal election result.[109]

Apart from Queensland, the Commonwealth is the only jurisdiction with an express provision stating that the Court of Disputed Returns (or a like electoral tribunal) must deal with electoral matters expeditiously. The *Commonwealth Electoral Act* was amended in 1998 to insert a new s 363A to provide that the Court of Disputed Returns must make its decision on a petition '*as quickly as is reasonable in the circumstances'*.[110]

In relation to appeals, the electoral legislation of all Australian jurisdictions—except Tasmania—bars appeals from the determinations of their respective Courts of Disputed Returns or equivalent electoral tribunals.[111] The electoral commissioners of these jurisdictions informed the committee during this inquiry that there has been no recent consideration in their respective jurisdictions to introduce an appeals process.[112]

Section 228 of the Tasmanian *Electoral Act 1985* provides:

> ***228. (1)*** *Subject to and in accordance with the rules, an appeal against a determination or order of the Supreme Court under the Part may be made to the Full Court, but only with the* ***special leave*** *of the Supreme Court.*
>
> ***(2)*** *At the hearing of an appeal under subsection (1), the Full Court may confirm the determination or order appealed against or may quash that determination or order, in which case the Court has and may exercise all the powers that the Supreme Court has and may exercise under this part in relation to an election application.* [Emphasis added]

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105 *Northern Territory Electoral Act 1995*, ss 107 & 108; *Electoral Act 1985* (Tas), ss 214 & 215; *Electoral Act 1992* (ACT), ss 252, 258.

106 *Commonwealth Electoral Act 1918*, ss 353 & 354.

107 *Parliamentary Electorates and Elections Act 1912* (NSW), s 157; *Constitution Act Amendment Act 1958* (Vic), s 281; *Electoral Act 1985* (SA), s 104; *Electoral Act 1907* (WA), s 158; *Electoral Act 1922* (ACT), s 259.

108 *Northern Territory Electoral Act 1995*, s 108; *Electoral Act 1985* (Tas), s 214(5).

109 *Commonwealth Electoral Act 1918*, s 355(e).

110 The new s 363A copied s 134(3) of the Queensland *Electoral Act*. The JSCEM, on the suggestion of the AEC, had recommended inserting the provision: JSCEM, *The 1996 federal election*, op cit.

111 *Commonwealth Electoral Act 1918*, s 368; *Parliamentary Electorates and Elections Act 1912* (NSW), s 169; *Constitution Act Amendment Act 1958* (Vic), s 292; *Electoral Act 1985* (SA), s 108; *Electoral Act 1907* (WA), s 167; *Electoral Act 1922* (ACT), s 255; *Northern Territory Electoral Act 1995*, s 119.

112 In fact, the ACT recently asked the Commonwealth to delete a residual appeals provision applicable to the ACT Court of Disputed Returns from the *Federal Court of Australia Act 1976* (Cth). The Commonwealth did so: Phillip Green, ACT Electoral Commissioner, letter to this committee dated 27 November 1998.

Tasmania is also the only Australian jurisdiction with electoral legislation that provides for a Court of Disputed Returns to direct either a special case or a question of law to a higher court.

Section 220 of the *Electoral Act 1985* (Tas) provides:

> ***220. (1)*** *If, on an election application coming before the Supreme Court, it appears to the Supreme Court that an issue raised by the election application can be conveniently stated as a special case, the Supreme Court may direct it to be stated accordingly and the special case shall be heard before the Full Court.*
>
> ***(2)*** *If it appears to the Supreme Court on the hearing of an election application that a question of law requires further consideration by the Full Court, the Supreme Court may refer the question to the Full Court by stating a case for determination of that Court.*
>
> ***(3)*** *At the conclusion of the hearing of a special case under subsection (1) or the reference of a question under subsection (2), the Full Court shall determine the case or question and remit its determination to the Supreme Court for reconsideration, together with any directions that the Full Court considers it appropriate to give in the circumstances of the case.*

During proceedings of the Commonwealth Court of Disputed Returns, a special case can be reserved for the consideration of the High Court under order 35 of the *High Court Rules* (which are made applicable to proceedings of the Commonwealth Court of Disputed Returns by order 68, rule 2 of those rules).

3.2 COMMENTS MADE IN SUBMISSIONS

Appeals from the Court of Disputed Returns

A number of submitters supported the (re)introduction of appeals from the Court of Disputed Returns.[113] Dr Reynolds summed up the policy issues surrounding the issue of appeals:

> *The question of appeals is always difficult, especially where the court is one of original and final jurisdiction. In cases of judicial review, we have lived with this situation vis-a-vis the High Court of Australia since that Court abolished appeals to the Privy Council. To some it is an expeditious method of dealing with contentious matters requiring swift adjudication. To others, it is inherently unjust not to allow an appeal mechanism which will either confirm the original judgment, thereby making it more water tight; or overturn it, thereby preventing a miscarriage of justice, or sending it back for re-trial so that matters and evidence can be more assuredly addressed. I favour the latter situation.*
>
> *However I am conscious that electoral matters need comparatively swift resolution especially as, in both the Mundingburra and Mansfield cases, the fate of the government depended on the court's judgement.*

The Chief Justice of the Supreme Court of Queensland, Hon P de Jersey, submitted:

> *The Judges of the Supreme Court recently gave some consideration to this issue, although I stress not in the context of any particular inquiry or case. As a matter of general principle, the Judges were of the view that there should be a right of appeal limited to matters of law from determinations of the Court of Disputed Returns. I surmise that the need for expeditious resolution in this arena may have prompted the removal of even limited avenue for appeals from previous legislation. It is, these days,*

[113] For example: Ms J Sharples, Mr R Webber, Dr P Reynolds, Mr F Carroll (the Mansfield petitioner) and the Queensland Law Society.

> *possible to convene a Court of Appeal without delay, and acknowledging the sometimes momentous significance of the determinations of the Court of Disputed Returns, it does seem desirable that a right of appeal, so limited, be introduced.*

The Queensland Law Society submitted:

> *The Society views the right of appeal in these matters and the speedy resolution of such appeals as singularly important because of the significant effect that such determinations may have for government and for the entire community ... (I)t is appropriate that appeal(s) to the Court of Appeal be re-established so as to ensure that decisions dealing with fundamental principles which underpin democratic government are resolved by the highest judicial authority in the State.*

Submissions to the committee from the Queensland divisions of the Liberal Party of Australia, the Greens Party, the National Party of Australia and the Australian Democrats did not address the issue of appeals from the Court of Disputed Returns or of referrals of special cases or questions of law. The Australian Labor Party (Qld) submitted:

> *It is the Labor Party's view that such an appeal mechanism should again be provided, particularly given that the Court of Disputed Returns consists of only one judge and that in cases of dispute complex questions of law frequently arise.*

On the other hand, Mr A Sandell submitted that the current legislation should continue to preclude any appeal. While acknowledging that the case for the re-introduction of appeals was reasonable, Mr Sandell submitted: '*In these instances speed is paramount, although this does not necessarily follow it would be at the expense of justice, or correct legal interpretations*'.

Dr M J Macklin, Dr N Preston and former Australian Electoral Commissioner, Professor C A Hughes, considered the issue but neither supported nor opposed appeals. Likewise, the Queensland Electoral Commission submitted: '*In the interest of justice, the Commission would support an amendment to the Electoral Act as suggested by Mr Justice Mackenzie. However, the matter is a policy one and the Commission does not wish to argue a case one way or the other'*.

Dr Macklin nevertheless stated that: '*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*'. Dr Macklin suggested that the 'certainty' achieved by determination by a higher court might be warranted, but warned: '*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*'.

A number of other submissions either expressly or impliedly recognised that an appeals mechanism might lend itself to possible abuse by parties whose interests might be served by a protracted electoral dispute, and suggested some measures to lessen the possibility of abuse or, at least, prolonged delays. For example, Professor Hughes suggested that '*ensuring that the Electoral Commission is a full party to any appellate proceedings with a capacity to apply similar to that set out in s 135(1) would be advisable*.' [Section 135(1) gives power to the Commission to apply for an order dismissing the petition because of excessive delay by the petitioner.]

The Queensland Law Society and Dr Reynolds recommended that the Court of Appeal be required to deal with any appeals from the Court of Disputed Returns in an expeditious manner. The Queensland Law Society stated the re-introduction of an appeals mechanism would be:

> *... enhanced by a statutory provision affording priority to such matters to ensure that they come on before the Court of Appeal with the necessary degree of expedition, say*

> *within 14 days...The Society does not propose that legislation ensuring speedy resolution of appeals should descend into detail as to procedure, necessary material etc as these matters can and would, no doubt, be adequately addressed in practice directions of the Court of Appeal*.

Dr Reynolds submitted the following procedural points for the committee's consideration:

- *That any appeal from the Court of Disputed Returns must be lodged with the Court of Appeal within seven (or possibly 14) days;*
- *That a judge from the Court of Appeal be designated the Appeal Court of Disputed Returns and be obliged to hear the appeal within 14 days of the appeal being lodged;*
- *That the Appeal Court of Disputed Returns' procedures be limited to hearing addresses from counsel, except where that Court is satisfied that genuinely fresh evidence, not considered in the court of original jurisdiction, requires consideration;*
- *That judgment, if not given immediately the case is heard, be reserved for a specified period of time (again possibly 14 days).*

However, Professor C Hughes suggested some caution in relation to directing the Court of Appeal to deal with electoral matters expeditiously:

> *The unfortunate examples of the protracted Nicklin Case and a number of unheard petitions in Western Australia encouraged the recommendation for what became s 134(3) and (4)* [i.e. the provisions of the *Electoral Act 1992* requiring the Court of Disputed Returns to deal with electoral petitions '*as quickly as is reasonable in the circumstances*' and requiring the court to begin proceedings and make final orders within prescribed periods]. *I would be hesitant to see such peremptory language directed to the Court of Appeal, but I seem to recall the Privy Council imposing on itself an obligation of urgency when hearing electoral appeals and it may be that a formula could be found to encourage a similar outcome if appeals are to be introduced*.

Mr A Morris QC proposed an entirely different solution to the question of appeals:

> *... It is unsatisfactory that* [such a potentially significant] *decision ... should depend on the judgment of a single individual.*
>
> *One solution, which I would urge as warranting serious consideration, is a legislative amendment to stipulate that the Court of Disputed Returns is to be constituted by a bench of three judges. This would ensure that a quick and final decision is reached, whilst at the same time avoiding a situation where the outcome in such a case depends entirely on the opinion of one individual.*
>
> *This is, I think, preferable to having a hearing before a single judge, with a right of appeal to a bench of three judges constituting the Court of Appeal. In the first place, it will be quicker to have the initial decision made by three judges, rather than an initial decision by one judge and a subsequent appeal to a bench of three judges. Also, if a right of appeal is introduced, there is a risk of the very unsatisfactory situation where the decision at first instance is overturned by a 2:1 majority in the Court of Appeal, with the result that two judges decided one way and two judges decided the other way: whilst this occasionally happens with ordinary civil and criminal appeals, it is much more important that in electoral matters there is no scope for the community to feel that the outcome of a particular case is unsatisfactory because of what is effectively a 2:2 split amongst four judges.*
>
> *Moreover, the traditional appeal structure leaves very little scope for challenging findings of fact made by the judge at first instance. If the initial hearing is conducted before a bench of three judges, the parties (and the community) may feel a greater degree of confidence in factual conclusions reached by the court.*

Mr Morris considered the counter-argument that three Judges sitting as the Court at first instance would put unnecessary pressure on court resources, but suggested that '*such cases do not arise very often*' and that the potential importance of such cases and the community's confidence in their determination justified the additional judicial resources.

Nevertheless, Mr Morris said that, should his proposal not be accepted by the committee, he would then '*strongly urge*' consideration of Justice Mackenzie's proposals for reinstating appeals and enabling the Judge to submit special cases or reserve questions of law for determination by the Court of Appeal. He added: '*It is unsatisfactory that, in cases which are amongst the most important which judges are called upon to decide, a single judge must decide the case alone, without the comfort of knowing that any errors or mistakes can be reviewed on appeal*.'

It should be noted that submissions were received before the High Court's June 1999 decision of *Sue v Hill*, the implications of which are discussed below in section 3.3.3.

Ability of the Court of Disputed Returns to state a special case or refer questions of law to the Court of Appeal

Only very few submissions received by the committee specifically addressed the issue of the Court of Disputed Returns referring special cases or questions of law to a higher court. Professor Hughes submitted that his concern that a right of appeal might be '*abused by protracting essentially political attacks on the conduct of an election and on its outcome'* did not extend to restoring the reference of special cases. Professor Hughes stated that there would be '*no difficulty*' with a special case procedure.

The Queensland Law Society's submission implied that the Society's support for appeals included support for special cases. As just mentioned, Mr Morris submitted that, should his proposal for a bench of three Judges hearing electoral disputes from the outset not be implemented, then he supported enabling the single Judge constituting the Court of Disputed Returns to submit special cases or reserve questions of law for determination by the Court of Appeal.

3.3 THE CURRENT CAPACITY TO APPLY FOR AN APPEAL FROM THE COURT OF DISPUTED RETURNS

The committee noted above that there is some doubt over whether s 141 (Decisions and orders to be final, etc) of the *Electoral Act* is, in fact, effective in barring appeals from the Queensland Court of Disputed Returns. This query is raised partly by EARC's remarks in its Elections Act report.

EARC [at paragraph 13.100(g)] recommended that determinations by the Court of Disputed Returns be '*final and without appeal'*, and cl 141 of the draft Bill attached to EARC's report is almost identical to current s 141. However, in the discussion leading up to this recommendation, EARC made the following apparently contradictory statements:

> *[T]he abolition of appeals to the Full Court would shorten the time taken to determine a dispute. However, if this option were followed a party to the dispute should still be able to challenge the decision of the Court of Disputed Returns on a matter of law.*[114]
>
> …

[114] EARC, Elections Act report, op cit, para 13.94.

> *If the express provision in the Act relating to the hearing of appeals by the Full Court of the Supreme Court on all matters relating to a question of law were abolished, it is likely that a higher court could still review the decision of the Court of Disputed Returns notwithstanding the absence of an express provision in an Electoral Act to that effect.*[115]

It appears EARC was suggesting that, despite the fact that it proposed an explicit clause in its draft Electoral Bill providing for no appeals from the Court of Disputed Returns, not all appeals (at least on matters of law) would actually be barred. EARC provided no explanation for these comments.

The issue is whether the resultant s 141 of the *Electoral Act* is indeed effective in purporting to stop all appeals. The committee has considered the issue in some depth.

3.3.1 Appeals to the High Court

There is no inherent right of appeal from a court; a right of appeal is conferred by statute rather than the common law. The clear wording of s 141 would be effective in barring appeals to a higher court *so long as there are no other overriding laws.*

In relation to appeals from the Court of Disputed Returns to the Queensland Court of Appeal,[116] there is no such other over-riding law. It is therefore clear that there is currently no appeal available from the Court of Disputed Returns to the Court of Appeal.

In relation to possible appeals from the Court of Disputed Returns to the High Court of Australia, there is *on the face of it* such an overriding law. Section 73 of the *Commonwealth Constitution* confers upon Australia's highest court, the High Court, jurisdiction to hear appeals from '*all judgments, decrees, orders, and sentences*' from '*the Supreme Court of any State*'. (The *Judiciary Act 1903* (Cth) makes the right of appeal conditional on the High Court granting special leave to appeal.[117])

Any state law that attempted to stop appeals from the Supreme Court to the High Court would not be effective in light of s 73 of the *Commonwealth Constitution*.[118] Section 141 of the Queensland *Electoral Act* is potentially such a law. This is because the *Electoral Act*, s 127 provides, amongst other things, that '*The Supreme Court is the Court of Disputed Returns …*', and that '*A single judge*[119] *may constitute, and exercise all the powers of, the Court of Disputed Returns*'.

However, the High Court has previously held that entities *similar to* the existing Queensland Court of Disputed Returns were not the 'Supreme Court' within the meaning of s 73 of the *Commonwealth Constitution*. This occurred in the two cases discussed under the next section: *Holmes v Angwin*[120] and *Webb v Hanlon.*[121]

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115 Ibid, para 13.95.

116 The Supreme Court has two divisions, the Court of Appeal and the Trial Division: *Supreme Court of Queensland Act 1991* (Qld), s 16. There is a primary right of appeal in Queensland from decisions of the Trial Division of the Supreme Court to the Court of Appeal: *Supreme Court of Queensland Act 1991*, s 69.

117 *Judiciary Act 1903* (Cth), ss 35, 35A, 39(2)(c). Also see order 69A of the *High Court Rules*.

118 *Commonwealth Constitution*, s 109 (Inconsistency of laws).

119 The *Acts Interpretation Act 1954* (Qld), s 36, provides that 'judge' is a reference to a Supreme Court Judge.

120 (1906) 4 CLR 297.

121 (1939) 61 CLR 313.

Holmes and *Webb* have been taken to mean that s 73 does not override s 141 of the *Electoral Act* because s 73 is not applicable to the Court of Disputed Returns.[122]

While that is so, developments in case law since *Holmes* (decided in 1906) and *Webb* (decided in 1939) have meant that the reasoning in those cases could be questionable. In particular, the recent case of *Sue v Hill*[123] supports this suggestion. If any such challenge was successful, it could open up the possibility of an appeal from a decision of a state Court of Disputed Returns to the High Court under s 73, despite any finality clause like s 141 of the Queensland *Electoral Act*.

Sue v Hill, and its possible implications for Queensland in this regard, is also discussed below.

3.3.2 *Holmes v Angwin* and *Webb v Hanlon*

In 1906, the High Court in *Holmes v Angwin*[124] held that a decision of a single Judge of the Western Australian Supreme Court sitting as that state's Court of Disputed Returns was not a decision of the 'Supreme Court' appealable to the High Court under s 73 of the *Commonwealth Constitution*. The High Court found that, while *prima facie* it appeared otherwise from the then *Electoral Act 1904* (WA), the Parliament had *not* merely given new jurisdiction to the Supreme Court.[125] Instead, Parliament had created a new and separate tribunal—the Court of Disputed Returns—that happened to consist of a Judge of the Supreme Court. The power to resolve electoral disputes was conferred on the Judge in the Judge's personal capacity, rather than on the Supreme Court as a court (according to a doctrine known as *persona designata*).[126]

The Court's finding that '*no appeal lay because, in exercising its power in relation to disputed returns, the Supreme Court was not a 'Supreme Court' within the meaning of s 73*'[127] was:

- based on the provisions of the former Western Australian *Electoral Act 1904* (provisions analogous to those in the current Queensland and Commonwealth electoral legislation); and

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122 For example, there has been no High Court challenge to a decision of the Queensland Court of Disputed Returns since the *Electoral Act* was introduced in 1992. However, after the last South Australian state election (held October 1997), an elector applied to the High Court for special leave to appeal to it from a decision of the South Australian Court of Disputed Returns. At a directions hearing on 12 August 1998, Gummow J stated that '*special leave would probably not be granted absent a challenge to the Holmes v Angwin line of cases*': *King v South Australian Electoral Commissioner* (High Court, Adelaide No A6 of 1998, Directions hearing, Gummow J, 12 August 1998). The application for special leave was subsequently refused on 12 February 1999 by Callinan and Kirby JJ, who stated that the case was not a '*suitable vehicle*' for a constitutional challenge to *Holmes*. This was because the grounds of the case did not have '*sufficient prospect of success*' to warrant the grant of special leave. (There was '*no arguable question of law and only challenges to the factual determinations of the Court of Disputed Returns*'.): High Court, Adelaide No A6 of 1998, Application for special leave to appeal, Callinan and Kirby JJ, 12 February 1999).

123 *Sue v Hill* [1999] HCA 30 (23 June 1999); 73 ALJR 1016.

124 (1906) 4 CLR 297, Griffith CJ, Barton and Higgins JJ.

125 Relevant provisions of the *Electoral Act 1904* (WA) included the following. **Section 159:** The validity of any election or return may be disputed by petition addressed to the Supreme Court, and not otherwise, and the Supreme Court shall have jurisdiction to hear and determine the same. **Section 163:** The Court shall be constituted by a Judge sitting in open Court…. **Section 165:** The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities.

126 *Holmes v Angwin* (1906) 4 CLR 297 at 306-307 per Griffith J.

127 As Mason CJ described the finding of *Holmes* in *Re Brennan; Ex p Muldowney* (1993) 116 ALR 619 at 622.

- influenced by the Court having characterised the power being exercised by the Court of Disputed Returns as non-judicial in nature. Instead, it was characterised as a power that was ancillary to legislative power.[128]

Factors that influenced the Court in *Holmes*[129] determining that the power being exercised by the Western Australian Court of Disputed Returns was non-judicial included:

- the historical exercise of the power: electoral disputes were originally resolved by Parliament itself;[130]
- that the Court itself did not enforce its decisions (apart from the awarding of costs) but rather Parliament did so, for example, by holding new elections;[131] and
- the nature of the discretions exercisable by, and the requirements[132] placed on, the Court.

In 1939, the High Court in *Webb v Hanlon*[133] heard an application for special leave to appeal to the High Court from a decision of the Full Court of the Supreme Court of Queensland, itself having heard an appeal from the Elections Tribunal constituted under the former *Elections Act 1915* (Qld).

Webb was similar to *Holmes* in that it involved the jurisdiction of the High Court to hear appeals from decisions of State electoral tribunals. *Webb* differed, however, in that the central issue before the Court was whether there was an appeal to the High Court from the appellate jurisdiction of the Supreme Court of Queensland hearing an appeal (on a question of law) from the State's Court of Disputed Returns. *Holmes* had been about whether there was an appeal from the Elections Tribunal (Court of Disputed Returns) itself. [The *Electoral Act 1904* (WA) considered in *Holmes* had no such provision for appeals.]

The judgments in *Webb* on the question of appeals from the Full Court are discussed more fully later in section 3.4.1. For current purposes, it is sufficient to say that some of the Justices found that appeals to the High Court *were* available from the Full Court under the *Commonwealth Constitution*.

In relation to the issue of appeals from the Elections Tribunal itself, all the Justices in *Webb* followed *Holmes* and held that a decision of the Elections Tribunal was not a judgment or order of a Supreme Court within s 73 of the *Commonwealth Constitution*.[134]

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128 *Holmes v Angwin* (1906) 4 CLR 297. At least according to Barton J, who squarely characterised the power as '*purely incidental to the legislative power*': at 309. Higgins J stated no judicial power was being exercised because it was not '*a judgment … as to persons or to property*': at 310. Griffith J placed more emphasis on the fact that it was not the '*Supreme Court in the sense that that term is used in the Constitution*': at 306.

129 The majority of the Court in the recent *Sue v Hill* case, discussed below, had quite different interpretations of these factors and/or the equivalent provisions upon which they were based at Commonwealth level.

130 *Holmes v Angwin* (1906) 4 CLR 297 at 305 per Griffith CJ; at 307-308 per Barton J; at 310 per Higgins J.

131 Ibid at 308 per Barton J; at 310-311 per Higgins J; '*Parliament nevertheless retained control to a certain extent*': at 305 per Griffith CJ. (Higgins J at 310 considered that the fact that the Act made specific provision for the Court to award costs was an important indication that Parliament intended the Court not to operate as the Supreme Court itself since the Supreme Court had pre-existing powers to award costs.)

132 For example, that the Court had to be guided by good conscience: ibid at 306 per Griffith CJ; at 308-09 per Barton J.

133 (1939) 61 CLR 313, Latham CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ.

134 Ibid at 322 per Rich J; at 323-24 per Starke J; at 327 per Dixon J; at 330 per Evatt J; at 334-35 per McTiernan J. Latham CJ said at 319: s 101 created a new tribunal that '*could not be identified with*' the Supreme Court.

The drafting of the *Elections Act 1915* (Qld) was in quite different terms from that of the Western Australian legislation considered in *Holmes*, arguably in terms that were even more suggestive that the Elections Tribunal was not the Supreme Court.[135]

The nature of the power conferred on the Elections Tribunal was again an important factor in the Justices coming to this conclusion. McTiernan J stated the Elections Tribunal exercised '*a special and peculiar jurisdiction which once belonged to legislative bodies…*'.[136] Similarly, Starke J referred to the fact that the legislature itself once determined such questions and characterised the nature of the inquiry as legislative or ancillary to legislative power; it had '*nothing to do with the ordinary rights of parties who are litigants*.'[137]

Evatt J referred to s 111 of the *Act* which (as did the legislation considered in *Holmes*) directed that the Elections Tribunal be '*guided by the real justice and good conscience of the case, without regard to legal forms or solemnities…*'. Evatt J stated that such a provision emphasised the '*administrative as distinct from the judicial nature of the special tribunal*'.[138]

Holmes and Webb questioned

In summary, *Holmes* and *Webb* stand for the proposition that there is no appeal from state Courts of Disputed Returns (or like tribunals) direct to the High Court.

In coming to their conclusions, a number of the Justices in *Holmes* and in *Webb* also commented that the nature of the power of the Court of Disputed Returns (in *Holmes*) or the Elections Tribunal (in *Webb*) to determine electoral disputes is inherently non-judicial. However, there have since been doubts expressed in different cases about this proposition. There had been suggestions that a Court of Disputed Returns may actually exercise judicial power or that the power to determine electoral disputes is indeterminate—'*capable of being viewed in different aspects, that is, as incidental to legislation … or to judicial action, according to the circumstances*'.[139]

Until recently, there was an argument that, if *Holmes* and *Webb* had been correct in finding that the power to determine disputed elections is non-judicial, then the *Commonwealth Electoral Act*, breached the separation of powers contained in the *Commonwealth Constitution* by conferring the jurisdiction of the Commonwealth Court of Disputed Returns

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135 Relevant provisions of the *Elections Act 1915* (Qld) included the following. **Section 101(1):** There shall be an Elections Tribunal, which shall be constituted by a judge of the Supreme Court. The Election Tribunal shall be a Court of Record. **Section 101(2):** Such Tribunal shall have power to inquire into and determine- (a) Election petitions…(etc). **Section 101(4):** …the Judge shall have all the powers, jurisdiction, and authority of a Judge of the Supreme Court. **Section 102:** In … January each year the Chief Justice shall notify to the Speaker the name of one of the Judges of the Supreme Court at Brisbane who will be the Judge to preside at sittings of the Elections Tribunal for that year… **Section 111:** the Tribunal shall be guided by the real justice and good conscience of the case, without regard to legal forms and solemnities ...

136 *Webb v Hanlon* (1939) 61 CLR 313 at 333 per McTiernan J.

137 Ibid at 324 per Starke J.

138 Ibid at 330 per Evatt J. Compare Evatt's characterisation of the power as administrative with its explicit characterisation as legislative or incidental to legislative power by McTiernan J and Starke J in this case, and by Barton J in *Holmes* noted above.

139 *Commissioner of Taxation (Cth) v Munro* (1926) 38 CLR 153, at 178-179 per Isaacs J. See also *Medical Board of Victoria v Meyer* (1937) 58 CLR 62, at 97 per Dixon J; *Hilton v Wells* (1985) 157 CLR 57 at 80 per Mason and Deane JJ; and see the discussion of *Sue v Hill* below in this section.

on the High Court.[140] This is because non-judicial power cannot be conferred on a federal Court.[141]

Some commentators[142] suggested that *Holmes* and *Webb* were—in the words of one of the commentators—'*ripe for reconsideration'*.[143] This was on the basis that the High Court would now have difficulty in accepting that a Court of Disputed Returns (at least the Commonwealth Court of Disputed Returns) was not exercising some form of judicial power. A potential consequence is that a decision of a state Supreme Court in relation to an electoral dispute (as a Court of Disputed Returns) might be held appealable to the High Court (with special leave) under s 73 of the *Commonwealth Constitution.*

3.3.3 *Sue v Hill*

During the course of this inquiry, the High Court decided *Sue v Hill*,[144] a decision which, the committee suggests, confirms that *Holmes* and *Webb* are indeed 'ripe for reconsideration'.[145] While the case received attention for finding that the United Kingdom was now a 'foreign power' (and Senator elect Heather Hill was not duly elected because she held dual citizenship with the United Kingdom), it is the Court's discussion of jurisdictional issues concerning the Commonwealth Court of Disputed Returns that is pertinent to the issue of appeals in this inquiry.

Sue v Hill addressed the following jurisdictional questions concerning the Commonwealth Court of Disputed Returns, as provided for in Part XXII of the *Commonwealth Electoral Act*:

1. Are questions regarding the eligibility of persons for election to the Senate capable of being referred to the Court of Disputed Returns *via a petition* brought under the *Commonwealth Electoral Act*, Pt XXII, Div 1 (Disputed elections and returns)?[146]

2. Is the conferral of jurisdiction under Div 1 nevertheless ineffective because non-judicial power is being vested in a federal court, contrary to the constitutional separation of judicial power from legislative and executive power?

   (At Commonwealth level, the consequence of *non-judicial* power being vested in a federal court is a breach of the separation of powers. At State level, the *potential* consequence of *judicial* power being vested in the State Court of Disputed Returns is that the Court of Disputed Returns is consequently recognised as the Supreme Court,

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140 This argument was raised in *Re Brennan Ex p Muldowney* (1993) 116 ALR 619, where Mason CJ (at 622) stated that the question raised by the argument was '*interesting and important*', but found that the facts of the case did not require the Court to decide the issue.

141 *R v Kirby; Ex p Boilermakers' Society of Australia* (1956) 94 CLR 254 (High Court); (1957) 95 CLR 529 (Privy Council). There is no such absolute barrier on state Parliaments conferring non-judicial power on courts.

142 P Schoff, 'The electoral jurisdiction of the High Court as the Court of Disputed Returns: Non-judicial power and incompatible function?', *Federal Law Review*, vol 25, 1997, pp 317-350; K Walker, 'Disputed returns and parliamentary qualifications: Is the High Court's jurisdiction constitutional?', *UNSW Law Journal*, vol 20, 1997, pp 257-273.

143 Walker, ibid, p 269.

144 [1999] HCA 30 (23 June 1999); 73 ALJR 1016. There the Full Court of the High Court (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) determined cases stated for its opinion by the Commonwealth Court of Disputed Returns.

145 None of the Justices in *Sue v Hill* expressly overruled *Holmes* or *Webb.* The point would apply to at least the *Holmes* case. As mentioned above, the former *Elections Act 1915* (Qld) considered in *Webb* appears to be more supportive of a finding that the Tribunal being considered in that case was separate to the Supreme Court.

146 It was argued that Pt XXII, Div 2 (Qualifications and Vacancies - referred to the Court of Disputed Returns from the Senate itself) *exhaustively* prescribes the Court of Disputed Return's jurisdiction to determine questions about *qualification* of Senators.

giving rise to a right of appeal to the High Court under s 73 of the *Commonwealth Constitution*.)

The minority (McHugh, Kirby and Callinan JJ in separate judgments) answered 'no' to question 1 above. In doing so, they did not need to address question 2, the important question for present purposes. [147]

The majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ) answered 'yes' to question 1 and 'no' to question 2. [The majority went on to find that Senator elect Hill was disqualified under the *Commonwealth Constitution*, s 44(i)].

In a joint judgment, Gleeson CJ, Gummow and Hayne JJ held the following.

- The legislative intention behind the *Commonwealth Electoral Act* was to confer the jurisdiction to resolve electoral disputes on the High Court but that the Court in exercising that jurisdiction nevertheless be identified as the Court of Disputed Returns; there was no new court created nor were Justices selected to exercise functions as *personae designatae.*[148] (According to their Honours, s 354(1) of the *Commonwealth Electoral Act*—which establishes the Commonwealth Court of Disputed Returns and specifies that the High Court '*shall be the Court of Disputed Returns*'—differs from the provisions of the *Electoral Act* (WA) considered in *Holmes*.[149])
- The argument that the power being exercised by the Court of Disputed Returns was, based on historical considerations, legislative (and therefore ineffectively conferred on a federal court) should be rejected. Their Honours noted that, since *Holmes*, the High Court had recognised that some powers were indeterminate depending on which entities they were entrusted to.[150] Their Honours found: '*There is nothing in the nature of the resolution of disputed elections which places such controversies outside the exercise of the judicial power of the Commonwealth.*'[151]
- Specific argument that particular provisions establishing and providing for the powers of the Commonwealth Court of Disputed Returns were inconsistent with the exercise of the judicial power of the Commonwealth should also be rejected.[152]

Gaudron J similarly reasoned that:

- some powers bear a '*double aspect*' and take their character from the body or tribunal in which they are reposed. The power to resolve electoral disputes is such a power, and when conferred upon a court, it is possible for the power to be judicial in nature;[153]
- *prima facie*, the making of a binding determination in an electoral dispute (unless made by the Parliament) should be regarded as an exercise of judicial power because it concerns *the right* of a person to sit and vote in the Parliament;[154] and

147 Though, note Kirby J at paras 280 & 281. Nor did the minority Justices subsequently have to answer the question of the Senator elect's eligibility or otherwise under s 44(i) of the *Constitution*.

148 *Sue v Hill* [1999] HCA 30 (23 June 1999); 73 ALJR 1016 at 1023, para 30 per Gleeson CJ, Gummow and Hayne JJ.

149 Ibid, para 29 per Gleeson CJ, Gummow and Hayne JJ.

150 Ibid, paras 31-36 per Gleeson CJ, Gummow and Hayne JJ.

151 Ibid, para 37 per Gleeson CJ, Gummow and Hayne JJ.

152 Their Honours agreed with Gaudron J's analysis that none of the particular provisions placed sufficient doubt on the proposition that judicial power had been conferred: ibid, para 39 and paras 40-45 per Gleeson CJ, Gummow and Hayne JJ.

153 Though, when exercised by a House of Parliament, the power is properly characterised as ancillary to the exercise of legislative power: ibid, paras 130-135 per Gaudron J.

- the power to resolve electoral disputes is conferred by the *Commonwealth Electoral Act* on the High Court as an additional, special jurisdiction (and is not intended to be reposed in a special tribunal whose functions the High Court is conscripted to perform).[155]

In addressing arguments that various provisions of the *Commonwealth Electoral Act* suggested that the power conferred is non-judicial,[156] Gaudron J grouped the provisions under the three categories below. (These categories are established by case law as three indicia of *non-judicial power.*)

- Provisions which arguably confer general discretions on the Court that are so broad as to be incompatible with the exercise of judicial power.
- Provisions which arguably give directions of a kind not normally associated with the exercise of judicial power/power given to courts.
- Provisions with respect to the nature of the Court's decisions (judicial power is indicated by *binding* adjudications upon disputes as to rights; if the decision of the Court of Disputed Returns is not binding, it is unlikely that judicial power is being exercised).[157]

Gaudron J dismissed each provision as not sufficiently suggestive of a power that is non-judicial in nature.[158]

Sue v Hill does not directly deal with the issue of appeals from *state* Courts of Disputed Returns. Nevertheless, if the reasoning of the majority in *Sue v Hill* can be extrapolated to the state situation, then it would seemingly follow that: (i) the way is now paved to seriously challenge the two old cases of *Holmes* and *Webb*; and (ii) consequent to a successful challenge of those cases, s 73 of the *Commonwealth Constitution* might be held to apply to a state Court of Disputed Returns because it *is* a Supreme Court, making appeals available to the High Court.

However, the logic of *Sue v Hill* does not, of course, *automatically* extrapolate to Queensland's Court of Disputed Returns. Instead, the extrapolation—and the resultant conclusion that *Holmes* and *Webb* are no longer unchallengeable precedents—depends on:

- the extent to which the provisions of *Electoral Act 1992* (Qld) are analogous to the provisions of the *Commonwealth Electoral* Act in all material particulars;
- the logic of *Sue v Hill* being otherwise applicable to the situation in, and legislative history of, Queensland (including that there is no absolute prohibition on conferring non-judicial power on state courts); and
- the attitude of a future High Court determining the issue to any policy consideration of keeping state electoral disputes in state courts.

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154 Ibid, para 136 per Gaudron J. Many of the Justices in *Holmes* and *Webb* conceived the process more in terms of determining the Parliament's membership, not in terms of an adjudication of a particular person's rights.

155 Ibid, para 143 per Gaudron J. This critical conclusion is based on Her Honour's interpretation of s 360(1) of the *Commonwealth Electoral Act*: see paras 143, 144. (The equivalent provision in the *Electoral Act* (Qld), s 136(2), is drafted somewhat differently.) Also note that s 354(1), the provision 'establishing' the Court of Disputed Returns [the Queensland *Electoral Act* equivalent is s 127(1)], is potentially one of the strongest indicators that the Court was meant to be established as a tribunal separate from the High Court. However, at para 143 Her Honour dismissed the suggestion by stating that '*s 354(1) could have been better expressed*'.

156 Many of the provisions proferred by Counsel for Hill were in fact held in the earlier cases of *Angwin* and *Webb* to indicate that the power being exercised by the electoral tribunals in those cases was legislative.

157 *Sue v Hill* [1999] HCA 30 (23 June 1999); 73 ALJR 1016, para 145 per Gaudron J.

158 Ibid at paras 146-156 per Gaudron J.

3.4 ANALYSIS AND CONCLUSIONS

Whether the *Electoral Act* should be amended to provide for appeals and/or the referral of special cases from the Court of Disputed Returns to the Court of Appeal raises competing policy questions. As Justice Mackenzie recognised, in resolving electoral disputes there is a tension between ensuring '*finality*' and ensuring procedural justice.

On the one hand, it is important to resolve disputes about electoral results quickly, so that the Parliament—and the government which is formed from Parliament—can proceed with confidence as quickly as possible. Parliamentary representation for constituents of an electorate should also be finalised without undue delay.

On the other hand, principles of procedural justice suggest that the decisions of most courts, particularly those which disputants come before for the first time, should be subject to appeal to a higher court. An appeals mechanism in the electoral disputes process would enable a person aggrieved by a decision of the Court of Disputed Returns to apply to have the decision revisited by another, higher court. A mechanism whereby complex legal questions can be referred to a higher court can also help ensure that the disputed matter (potentially significant in electoral disputes) is determined by the highest available judicial authority, or at least by more than one Judge.

Below, the committee considers—in turn—the questions of appeals and referrals of special cases/questions of law. Before doing so, the committee might state that it considered with interest the proposition submitted by Mr Morris that the Court of Disputed Returns, at first instance, be constituted by three Judges of the Supreme Court rather than one.

Mr Morris suggested that the Court so constituted would mean the timely resolution of electoral disputes *and* more authoritative determinations. Mr Morris' alternative would circumvent the need both for a referrals process and an appeals mechanism because a Court of Disputed Returns with three Judges would be of the highest judicial authority.

However, the committee considers that the judicial resources involved in providing for such an alternative are not warranted, especially for uncomplicated cases or ill-founded arguments. Instead, the committee considers that an appeals mechanism, in the terms that it recommends below, is appropriate.

3.4.1 Appeals from the Court of Disputed Returns

To summarise the background material that has been outlined above:

- currently, s 141 of the *Electoral Act 1992* (Qld) makes no provision for, and indeed purports to bar, appeals from the Court of Disputed Returns to the Court of Appeal, on questions of law or otherwise. However, especially after the recent *Sue v Hill* decision, the effectiveness of s 141 to prevent appeals to the High Court might be questionable;
- previously, s 154 of the *Elections Act 1983* (Qld) provided that a determination of a Judge sitting as the Elections Tribunal could be appealed (within 21 days of the Tribunal's determination) to the Full Court of the Supreme Court (now the Court of Appeal) upon a question of law; and
- the electoral legislation of the Commonwealth and of the other states and territories does not provide for appeals from Judges sitting as Courts of Disputed Returns or equivalent tribunals except for Tasmania, where there is provision for appeals to the Full Court of the Supreme Court with the special leave of the Supreme Court.

The committee endorses the principle that parties to a dispute should, if aggrieved by a decision of the Court, have an avenue of appeal open to them. The ability to appeal from the decisions of courts at first instance is commonplace.

At the same time, the committee recognises that electoral disputes are materially different from other types of disputes that come before the courts. There are very good reasons for electoral disputes to be determined quickly, and for determinations to be made with a sense of finality. (The validity of this reasoning is perhaps reflected by the position regarding appeals in other jurisdictions.) Finality ensures that parliaments and governments can get on with their business as quickly as possible after a general election. Speedy resolution of electoral disputes means that constituents are denied parliamentary representation for the shortest possible period.

However, the committee also believes that there should be public confidence that the election result for each electoral districts is the 'right' result. Providing at least the possibility of appeal[159] can enhance the public's confidence that difficult and possibly tantamount issues are determined satisfactorily.

Mr Morris submitted that an appeals mechanism would also relieve some of the pressure from single Judges sitting as the Court of Disputed Returns whose decisions would otherwise be final. This would be especially so in complex cases arising in close State contests, as seen in the last two petitions determined by the Queensland Court of Disputed Returns: *Mundingburra*[160] and *Mansfield*.

The committee considers that the objectives of affording disputants procedural justice and enhancing the public's confidence that the outcomes of potentially significant electoral disputes are arrived at in a just and satisfactory manner are of sufficient importance to justify potential further (albeit minimised—see below) delay in the resolution of electoral disputes by providing for appeals from decisions of the Court of Disputed Returns.

The committee therefore—in principle—supports the (re)introduction of appeals from the Court of Disputed Returns.

The parameters of appeal

Although supportive of the introduction of appeals, the committee believes that it is imperative to nevertheless resolve electoral disputes as quickly as possible. Potential prolonged delay is the real down-side to introducing an avenue of appeal. Presumably, most candidates/political parties who are unsuccessful before the Court of Disputed Returns will seek to appeal the decision. Clearly, inordinate delay involved in resolving petitions, such as the Nicklin petition under the former *Elections Act 1983* (Qld), is undesirable and to be avoided. A number of submissions the committee received also expressed concern about possible abuse of any appeals mechanism.

At the same time, the committee is pleased to note the submission of the Chief Justice that '*these days*' a Court of Appeal can be convened '*without delay*'.

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159 Under the previous Queensland electoral legislation, only one decision of a single Judge sitting as the Elections Tribunal was overruled this century on appeal on a matter of law; namely, *The Ithaca Election Petition 1939*, appealed to the High Court as *Webb v Hanlon*: EARC, Elections Act report, op cit, para 13.95.

160 *Tanti v Davies* (No 3) (1996) Qd.R 602.

The committee has considered how to ensure that the introduction of appeals does not unduly delay the resolution of electoral disputes—through limiting the grounds of, or process for, appeal and through specifying procedural deadlines in relation to bringing, hearing and determining any appeal.

The committee has concluded that the grounds for appeal should be limited to questions of law. The committee notes that appeals under the former *Elections Act 1983* (Qld) were limited to questions of law and believes that such a limitation is appropriate in respect of appeal from determinations regarding electoral disputes.

In relation to procedural deadlines, the committee believes that it is appropriate to specify that parties unsuccessful before the Court of Disputed Returns should only have 10 days from the decision of that Court to file a notice to appeal.[161]

The committee has also considered how proceedings might be ensured to run expeditiously once a notice of appeal is filed. The committee is confident that any superior court Judges hearing an appeal relating to an electoral dispute would recognise the importance of dealing with the matter as expeditiously as possible and would place upon themselves—and the parties through appropriate directions—an imperative to do so.

Nevertheless, the committee notes the existing requirement on the Court of Disputed Returns [in s 134(3)] to act expeditiously and believes that such a *principle* should be restated in the Act in relation to any entity hearing an appeal from the Court of Disputed Returns.

The committee had also considered giving specific effect to this principle by imposing on the appeals body actual statutory time limits to begin its hearings and/or deliver its determination [such as appears in s 134(4) concerning the Court of Disputed Returns at first instance]. While the committee favours mechanisms designed to ensure the expeditious resolution of electoral disputes, the committee believes that it would be more appropriate that the Attorney-General consult with the Chief Justice about this matter if and when the Attorney-General makes the threshold decision to implement the committee's recommendations concerning appeals.

The committee (endorsing Professor Hughes' submission) has nonetheless concluded that:

- it be expressly provided that the Electoral Commission is a party to any appeals; and
- the Commission be empowered to apply to the Court for an order dismissing an appeal because of excessive delay by the appellant in relation to it.[162]

RECOMMENDATION 3

The committee recommends that the Attorney-General, as the Minister responsible for the *Electoral Act 1992* (Qld), insert a new division 4 (Appeals) into part 8 of the Act (after section 148) to provide for appeals from judgments or orders of the Court of Disputed Returns on questions of law.

(The entity to hear such appeals is specified in recommendation 4 below.)

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[161] Despite the relevant period for lodging an appeal from the Trial Division of the Supreme Court being 28 days.

[162] This would reflect the Commission's ability (under s 135 of the *Electoral Act*) to seek an order dismissing *a petition* because there had been excessive delay by the petitioner in relation to it.

Specifically, the committee recommends that proposed division 4 provide for the following mechanisms to expedite appeals proceedings, namely, that:

- **the appellant must file a notice of appeal within 10 days after the date of the judgment or order;**
- **the Electoral Commission of Queensland is a party to any appeal;**
- **if the appellant is not the Commission, the Commission is empowered to apply to the appeals body seeking an order dismissing the appeal on the ground that there has been excessive delay by the person seeking an appeal, and that the appeals body is able to make such order on the application as it considers appropriate; and**
- **the appeals body, when dealing with an appeal to it from the Court of Disputed Returns, must use its best efforts to ensure that the proceedings begin, the appeal is heard, and the appeal body's final judgment or order is given, as quickly as is reasonable in the circumstances.**

  Whether the Act should specify actual time limits for the appeals body to begin its hearings and/or deliver its judgment is a matter that should be addressed by the Attorney-General, in consultation with the Chief Justice, if and when the Attorney-General decides to implement the recommendations in this report regarding appeals.

The committee further recommends that the proposed new division 4 also contain (or provide for through the making of Rules for the appeals body) such machinery provisions as appropriate—and as suggested by the *Uniform Civil Procedure Rules*, Chapter 18 (Appellate proceedings)—for example, provision for:

- **the contents of notices of appeal—the part(s) of the judgment or order appealed from, the grounds of appeal, the judgment or order now sought;**
- **filing of notices of appeal, security of costs to be deposited with notices and the signing of notices;**
- **serving of notices of appeal and parties to the appeal generally; and**
- **subsequent amendment of notices of appeal.**

These machinery provisions should be drafted in accordance with the principle that appeal proceedings run as expeditiously as possible.

Having recommended that appeals should be allowed from the Court of Disputed Returns, the committee makes it clear that it **does not wish that subsequent appeals become available from the appeals body that it recommends be created.** In the committee's opinion, to allow a *second* level of appeal would overly detract from the concurrent goal of resolving electoral disputes quickly.

The committee deals with this issue further in the next section.

The appropriate body to hear appeals from the Court of Disputed Returns

The perhaps obvious body upon which to confer jurisdiction to hear appeals from the Court of Disputed Returns (which is constituted by a single Judge of the Supreme Court[163]) is the Court of Appeal of the Supreme Court of Queensland. Under s 69 of the *Supreme Court of Queensland Act*, the Court of Appeal hears (by way of rehearing) appeals from any judgment or order of the Trial Division of the Supreme Court (also constituted by a single Judge of the Supreme Court[164]).

However, a potential problem arises in vesting the appeals jurisdiction in the Court of Appeal *as such*. For the reasons suggested in section 3.3.2 above, it might be the case that doing so would enable a *further* avenue of appeal; namely, to the High Court.

In *Webb v Hanlon*,[165] the High Court split in its consideration of whether the Full Court of the Supreme Court of Queensland hearing an appeal from the former Queensland Elections Tribunal was—in effect—a 'Supreme Court' within the meaning of s 73 of the *Commonwealth Constitution*.[166]

All of the Justices followed *Holmes v Angwin* in characterising the nature of the power exercised (at first instance) by the Elections Tribunal as non-judicial, holding that the power to resolve electoral disputes under the former *Elections Act 1915* (Qld) was conferred on the Judge of the Supreme Court in a separate, personal capacity and not on the Supreme Court itself.

Some of the Justices consequently held that, upon appeal, the Full Court was still part of the *overall machinery* created by Parliament to determine electoral disputes. Like the Elections Tribunal, from which the appeal came, the Full Court exercised non-judicial power and therefore was not a 'Supreme Court' subject to appeal to the High Court.

However, some Justices, despite agreeing that the Elections Tribunal itself could not be appealed from to the High Court, believed that the Full Court proceedings were another matter entirely. These Justices characterised the Full Court as exercising judicial power in determining questions of law on appeal from the Election Tribunal. The Full Court was thereby a 'Supreme Court' appealable (with the High Court's special leave) to the High Court under s 73 of the *Commonwealth Constitution*.

Webb suggests that a new provision allowing appeals from the Court of Disputed Returns to the Court of Appeal *as such* could be interpreted by the High Court as giving rise to a 'judgment, decree, order, or sentence' of the 'Supreme Court' within the meaning of s 73 of the *Commonwealth Constitution*. Such an interpretation would consequently allow for appeals to the High Court from the determination of the Court of Appeal. This means that any new appeals mechanism in the *Electoral Act* should be provided for with caution.

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163 Or, at least, has thus far (since the introduction of the *Electoral Act* in 1992) been constituted by one Judge of the Supreme Court, though see n 80 above.

164 *Supreme Court of Queensland Act 1991*, s 56.

165 (1939) 61 CLR 313, discussed above in section 3.3.2 of this report.

166 And under then s 35(1) of the *Judiciary Act 1903*(Cth), upon which the ability to bring an application for special leave was decided. Latham CJ (at 319-320), Dixon (at 328) and Evatt JJ (at 330-331) characterised the Full Court as a 'Supreme Court' within the meaning of s 73 of the *Constitution*, but those Justices (except Latham CJ) held that an appeal for special leave could not be brought because *other* requirements of the *Judiciary Act* had not been fulfilled. Starke (at 324) and McTiernan JJ (at 335) held, in effect, that the Full Court was not a 'Supreme Court' within the meaning of s 73 of the *Constitution*. Rich J did not give a definitive answer to the issue, but nevertheless refused to grant special leave.

Such caution is prudent despite it being the case that, should the High Court interpret any new appeals mechanism as enabling subsequent appeal to the High Court:

- such an interpretation would only give the relevant parties a right to seek the special leave of the High Court to bring an appeal.[167] It would not be an automatic right of appeal; and
- the likelihood of the High Court granting special leave would be very low. (Dixon J in *Webb* stated that, assuming an appeal did lie to the High Court from the Full Court, '*I think that only in an exceptional case ought we to grant special leave to appeal ...*'.[168]

Any such *application* for special leave to appeal to the High Court from a decision of the appeal body during an electoral dispute—even if rejected by the High Court—would nevertheless prolong the delay in resolving the dispute.[169]

To minimise this possibility, the committee recommends the creation of a new entity, the Appeals Division of the Court of Disputed Returns, to be constituted by three Judges of Appeal[170] but not sit as the Court of Appeal as such. It is not the committee's intention that the Court of Appeal or the Supreme Court be given the jurisdiction to hear electoral disputes or appeals from them.

RECOMMENDATION 4

The committee recommends that the body to hear appeals from decisions of the Court of Disputed Returns be a new entity: the Appeals Division of the Court of Disputed Returns.

Specifically, the committee recommends that the proposed new division 4 of the *Electoral Act 1992* (Qld) provide:

- **for the creation of the Appeals Division of the Court of Disputed Returns;**
- **that the Appeals Division of the Court of Disputed Returns is constituted by three Judges of Appeal, not including the Judge whose decision is being appealed from; and**
- **as proposed in recommendation 3 above, that an appeal lies from judgments or orders of the Court of Disputed Returns on questions of law (only) to the Appeals Division of the Court of Disputed Returns.**

Consequently, the committee recommends that the Attorney-General amend the *Electoral Act*, s 127(2) (Supreme Court to be Court of Disputed Returns) to provide that the Court of Disputed Returns (at first instance) is constituted by one, and only one, Judge. New subsection (2) would then read along the lines of: 'A single judge constitutes, and exercises all the jurisdiction and power of, the Court of Disputed Returns' (subject to recommendation 5 below).

In relation to the powers of, and requirements on, the Appeals Division of the Court of Disputed Returns, the committee further recommends that new division 4 additionally provide for—as desirable and modified as applicable—replications of:

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167 Pursuant to s 35 of the *Judiciary Act 1903* (Cth).

168 *Webb v Hanlon* (1939) 61 CLR 313 at p 328 per Dixon J.

169 See, for example, the events following the 1997 South Australian election described in n 122 above.

170 Judges of appeal are appointed under s 33 of the *Supreme Court of Queensland Act 1991*.

1. **the following provisions of the *Electoral Act* relating to how the Court of Disputed Returns deals with a petition:**
   - **subsections (1),(2),(6) and (7) of s 134 (How petition is to be dealt with by court);**
   - **s 136 (Powers of the court);**
   - **s 139 (Copy of final court orders to be sent to Clerk of Parliament); and**
   - **s 140 (Costs); and**
2. **such matters contained in the *Uniform Civil Procedure Rules*, chapter 18 (Appeals to the Court of Appeal), division 3 (Powers) that are not provided for in point 1 immediately above but would nevertheless be appropriate to the Appeals Division.**

In addition, the committee recommends that the following provision be inserted in new division 4 to prevent appeals from the Appeals Division of the Court of Disputed Returns:

> ***Decisions and orders to be final etc***
>
> ***A decision of, or order made by, the Appeals Division of the Court of Disputed Returns—***
>
> ***(a) is final and conclusive; and***
>
> ***(b) cannot be appealed against or otherwise called in question on any ground.***

Consequently, existing s 141 (Decisions and orders to be final etc) of the *Electoral Act* should be amended to operate subject to new division 4.

3.4.2 Providing for the Court of Disputed Returns

Above, the committee provides for appeals from the Court of Disputed Returns to a newly created Appeals Division of the Court of Disputed Returns. The committee created a new body to hear such appeals. It did not suggest that the existing Court of Appeal hear them. This is because—as indicated by *Webb*—the High Court might, in the future, characterise the Court of Appeal in such circumstances as a 'Supreme Court' within the meaning of s 73 of the *Commonwealth Constitution*, enabling subsequent appeal to the High Court. The committee reiterates that it wants to see one level of appeal in State electoral disputes, but no more.

However, the committee has an overriding concern.

In section 3.3 of this report, the committee suggested that the case law about the nature of the power to resolve electoral disputes is evolving. The committee suggested that there was a possibility, particularly in light of the recent *Sue v Hill* decision, of the *status quo* surrounding electoral disputes in this State changing; that there is arguably better grounds now to challenge the old *Holmes* and *Webb* precedents that say there is no appeal from a state Court of Disputed Returns.

The committee believes that the Assembly should try to arrest this evolution in the case law in order to decrease the likelihood of the *status quo* being successfully challenged. The Assembly should do so via legislative amendment. Such amendment should be directed towards ensuring—as far as is possible—that appeals to the High Court from the Queensland

Court of Disputed Returns are prevented (and towards ensuring that appeals from the proposed Appeals Division of the Court of Disputed Returns to the High Court are prevented).

The simplest solution is to revisit the provisions of the Queensland *Electoral Act* that establish and provide for the Court of Disputed Returns (at first instance). In *Sue v Hill*, the majority of the High Court came to the conclusion that the Commonwealth Court of Disputed Returns was in fact the High Court (and not a separate entity), and that the Court was exercising power that was judicial in nature. That conclusion was largely based on the majority's interpretation of the specific provisions of the *Commonwealth Electoral Act*.

Despite some important differences, the wording of many of the provisions of Queensland's *Electoral Act* is similar to the wording of the provisions of the *Commonwealth Electoral Act*. It is possible that the High Court in the future could decide that Queensland's *Electoral Act* confers the jurisdiction to resolve electoral disputes not on the Queensland Court of Disputed Returns as a separate entity, but instead on the 'Supreme Court' within the meaning of s 73 of the *Commonwealth Constitution*.

To the extent that the existing provisions in Queensland's *Electoral Act* support such an interpretation, they should be amended. The amendments should be directed to providing the contrary: that the Court of Disputed Returns is a body separate to the Supreme Court and/or that it is exercising non-judicial power.

The committee believes that the Attorney-General should address this matter and, should the Attorney-General receive advice that concurs with the committee's reasoning, review and amend the *Electoral Act* to ensure—as far as is possible—that no appeals lie from the Court of Disputed Returns (or, should it be created, the Appeals Division of the Court of Disputed Returns) to the High Court.

One of the most obvious amendments in this regard is to change existing s 127 of the *Electoral Act.* That section provides:

> ***Supreme Court to be Court of Disputed Returns***
>
> ***127.(1)*** *The Supreme Court is the Court of Disputed Returns for the purposes of this Act and the Referendums Act 1997.*
>
> ***(2)*** *A single judge may constitute, and exercise all the jurisdiction and powers of, the Court of Disputed Returns.*

In light of the above reasoning, the committee suggests that s 127 should be amended to read along the following lines:

> ***Establishment of court***
>
> ***127.(1)*** *A Court of Disputed Returns is established for this Act and the* Referendums Act 1997.
>
> ***(2)*** *The court is a court of record.*
>
> ***(3)*** *A single judge of the Supreme Court constitutes the court and may exercise all the jurisdiction and powers of, the court.*[171]
>
> ***(4)*** *Subsection (3) does not apply to the Appeals Division of the court.*[172]

[171] If indeed, in light of the above discussion, this is the most appropriate way to 'appoint' Judges to the Court.

[172] Should recommendations 3 and 4 of this report be implemented.

Further, the committee suggests that the Attorney-General address the matter of reviewing the appealability of the Court of Disputed Returns, as constituted by and provided for in the *Electoral Act*, regardless of whether recommendations 3 and 4 of this report (recommending appeals at State level from the Court of Disputed Returns) are implemented.

RECOMMENDATION 5

In order to minimise the possibility of any future appeal to the High Court from the Court of Disputed Returns (and/or the Appeals Division proposed for that Court in recommendation 4), the committee recommends that the Attorney-General review and amend the provisions of the *Electoral Act 1992* (Qld) pertaining to the Court of Disputed Returns to ensure that the Court of Disputed Returns is established and functions—and is interpreted to be established and function—as an entity separate from the Supreme Court.

The committee makes this recommendation regardless of recommendations 3 and 4 above.

The committee suggests that, should the Attorney-General introduce any bill to amend the *Electoral Act* in line with this recommendation, the Attorney-General make clear—either in the bill or the second reading speech to it—that the intention of the amending bill is to keep the resolution of electoral disputes expeditious and in-State by circumventing the possibility of appeals to the High Court from decisions of the Court of Disputed Returns.

The committee provides the following amended s 127 (Supreme Court to be Court of Disputed Returns) as a suggestion of the type of amendments that might need to be made:

> ***Establishment of court***
>
> ***127.(1)*** ***A Court of Disputed Returns is established for this Act and the* Referendums Act 1997.**
>
> ***(2)*** ***The court is a court of record.***
>
> ***(3)*** ***A single judge of the Supreme Court constitutes the court and may exercise all the jurisdiction and powers of, the court.***[173]
>
> ***(4)*** ***Subsection (3) does not apply to the Appeals Division of the court.***[174]

The types of amendments suggested in recommendation 5 would go a long way in ensuring that there are no appeals to the High Court from the Queensland Court of Disputed Returns. However, it might prove to be the case that such an attempt is ultimately futile, and that the High Court interprets the (substance of) the Queensland *Electoral Act*, even as amended as just suggested, as providing for a Court of Disputed Returns whose decisions are appealable under s 73 of the *Commonwealth Constitution.*

If that should become the case, the committee would urge the Queensland Attorney-General to look into the possibility of utilising the Standing Committee of Attorneys-General as a conduit for amending the Commonwealth *Judiciary Act 1903* to provide that s 73 of the *Commonwealth Constitution* does not apply to decisions of state Courts of Disputed Returns.

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[173] If, in light of the above discussion, this is the most appropriate way to 'appoint' Judges to the Court.

[174] Should recommendations 3 and 4 of this report be implemented.

Preliminary research by the committee suggests that such an amendment could well be validly undertaken.

3.4.3 The Court of Disputed Returns and special cases

The next issue for consideration is whether electoral dispute proceedings should be potentially prolonged by allowing for special cases to be stated or for questions of law to be referred for the consideration of a higher court. The background material outlined above notes that:

- currently, Queensland's *Electoral Act 1992* makes no provision for the Court of Disputed Returns to state a special case or reserve questions of law for determination by the Court of Appeal;
- previously, s 156 of the former *Elections Act 1983* had provided that, if a *Judge sitting as the then Elections Tribunal agreed with a submission that the case was a special case*, the Judge could refer the case as such to (what is now) the Court of Appeal. Under s 157 of the former Act, *the Judge* could also refer any question of law to the Court of Appeal for determination;
- during a proceeding of the Queensland Supreme Court, the Supreme Court can, under the *Uniform Civil Procedure Rules*, state a case for the opinion of the Court of Appeal; and
- the Electoral Acts of other Australian jurisdictions, the Commonwealth and of the other states and territories do not provide for the statement of cases from the relevant Court of Disputed Returns to a higher court, except for Tasmania (under its *Electoral Act*) and the Commonwealth (under the *High Court Rules*).

The committee endorses the following statement made by EARC when EARC reviewed (and supported) ss 156 and 157 of the former Act:

> *[T]hese provisions ultimately serve to minimise the possibility of a legal error occurring in the hearing of the case where complex questions of law are involved or at least the single Judge's decision being challenged on that ground. Furthermore, in such a case, a decision by the Full Court* [now the Court of Appeal] *carries more weight and it is important to maintain public confidence in the electoral system when there is an electoral dispute.*[175]

The committee believes that a Judge sitting as the Court of Disputed Returns should be able to state a case for the opinion of a higher entity. The Judge should be able to do so either on the application of the parties or on the Judge's own motion. The committee believes that such provision should be:

- made in the *Electoral Act*;
- provide for the case stated to be referred to the Appeals Division of the Court of Disputed Returns proposed in recommendation 4 above;
- be drafted in terms of rule 483(2) of the new *Uniform Civil Procedure Rules*; namely, enabling the Court of Disputed Returns to state a case for the opinion of the Appeals Division.

The committee recognises the potential mischief in political opponents who might wish to delay the resolution of an electoral dispute for ulterior motives by seeking to refer a special

[175] Ibid, para 13.119. EARC had recommended that '*the Act should retain the provisions allowing the Judge to refer to the Full Court special cases and questions of law*': EARC, Elections Act report, op cit, para 13.120. However, when introduced, the Electoral Bill 1992 contained no such provisions.

case to a higher body if such an option was available. However, if drafted as suggested above, the decision would ultimately be upon the Judge him or herself to refer the legal question to the Appeals Division (whether upon the Judge's own motion or following an application by one or more of the parties).

The committee makes recommendation 6 (below) contingent upon the Appeals Division of the Court of Disputed Returns being created (as proposed in recommendation 4). The committee does not believe that the Court of Disputed Returns should be able to state a case for the opinion of the *Court of Appeal*. This is because answers given by the Court of Appeal to questions referred to it may fall within the description 'judgments, decrees, orders or sentences' under s 73 of the *Commonwealth Constitution*.[176] Again, the committee does not want electoral disputes to become unduly delayed through parties making an application to the High Court for special leave to appeal the Court of Appeal's determination.

RECOMMENDATION 6

The committee recommends that the Attorney-General, as the Minister responsible for the *Electoral Act 1992* (Qld), amend part 8, division 2 (Disputing elections) of the Act to enable the Court of Disputed Returns to state a case for the opinion of (or reserve questions of law for) the proposed Appeals Division of the Court of Disputed Returns.

The committee makes this recommendation subject to the creation of the Appeals Division of the Court of Disputed Returns proposed in recommendation 4.

Again, the committee believes that the proposed Appeals Division of the Court of Disputed Returns would be convened expeditiously to determine any questions of law referred to it by the Court of Disputed Returns. The Appeals Division would clearly have in mind the s 134(3) requirement on the Court of the Disputed Returns to '*deal with the petition as quickly as is reasonable in the circumstances*' when it considered such matters—that is, if the s 134(3) requirement did not otherwise attach to the Appeals Division in law.

3.4.4 Consequences for the other functions of the Court of Disputed Returns

The committee is aware, and is indeed desirous of the fact, that its recommendation to allow appeals and cases stated from the Court of Disputed Returns to the proposed Appeals Division of the Court of Disputed Returns, on the grounds and in the manner stipulated above, would also apply to the Court of Disputed Returns when it functions as:

- referee of questions presented to it by the Legislative Assembly concerning a vacancy in the Assembly or the qualification or disqualification of a member under the *Electoral Act*, part 8 (Court of Disputed Returns), division 3 (Disputing qualifications and vacancies of members), ss 143-148; and
- arbiter of referendum results under s 127 of the *Electoral Act*.

[176] *Mellifont v A-G (Qld)* (1991) 173 CLR 289. This may be so even if such an answer is '*not finally determinative of the rights and obligations of the parties*' : at 325 per Toohey J.

4. CONCLUSION

The issues raised by Justice Mackenzie in the Mansfield decision indeed deserve the legislature's consideration.

How-to-vote cards

Clearly, the opportunity for electors to claim that they have been misled by how-to-vote cards should be minimised. After carefully considering various options for regulating how-to-vote cards, the committee believes that Justice Mackenzie's suggestion that such material be required to bear, in sufficiently sized print, the name of the party/candidate on whose behalf it is distributed should be implemented. Such a requirement will enable voters to better identify the source of how-to-vote material and exercise their judgment accordingly. Moreover, the committee believes that the requirement is inexpensive, practical and likely to minimise interference in the campaign process.

Appeals from the Court of Disputed Returns

As is evident from the discussion in this report, the issue of appeals from the Court of Disputed Returns raises a number of important policy considerations as well as complex legal issues. The committee has recommended the (re)introduction of appeals from the Court of Disputed Returns but on a number of very important conditions. Essentially, these conditions are designed to afford parties procedural justice but, at the same time, ensure the speedy resolution of electoral disputes. The latter is particularly important given Queensland's three-year parliamentary terms and recent experience which has shown that the fate of a government can be determined by such decisions.

Therefore, the provisos to the committee's recommendation regarding the introduction of appeals are that:

- strict time frames be adopted for instituting appeals and there be a requirement on the appeals body to hear and decide any appeal expeditiously;
- appeals lie on questions of law only; and
- there be only one layer of appeal, that it be to a state appeals body and that the legislation be drafted to preclude any possibility of (further) appeals to the High Court (to the extent achievable).

Relevant to this last proviso, is the possible implications of the recent High Court decision of *Sue v Hill* on Queensland's electoral jurisdiction. For the purposes of this inquiry, the committee has not sought detailed legal advice on the full implications of this decision, a matter which the committee leaves for the Attorney-General's discretion. However, from the committee's research, it seems that the decision has the potential to pave the way to overturn previous authority that decisions of state Courts of Disputed Returns are not appealable to the High Court. To safeguard against this possible and, in the committee's opinion, undesirable outcome, the committee has recommended that the Attorney-General review and amend as appropriate the current provisions establishing and providing for the Court of Disputed Returns (regardless of the other recommendations contained in this report).

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APPENDIX A: THE CARDS COMPLAINED ABOUT IN MANSFIELD

Note: These cards are not true to size and the Mansfield decision reveals that they were principally very bright fluorescent orange in colour with contrasting black writing, or black background colour where the writing was in fluorescent orange.

EXHIBIT 1

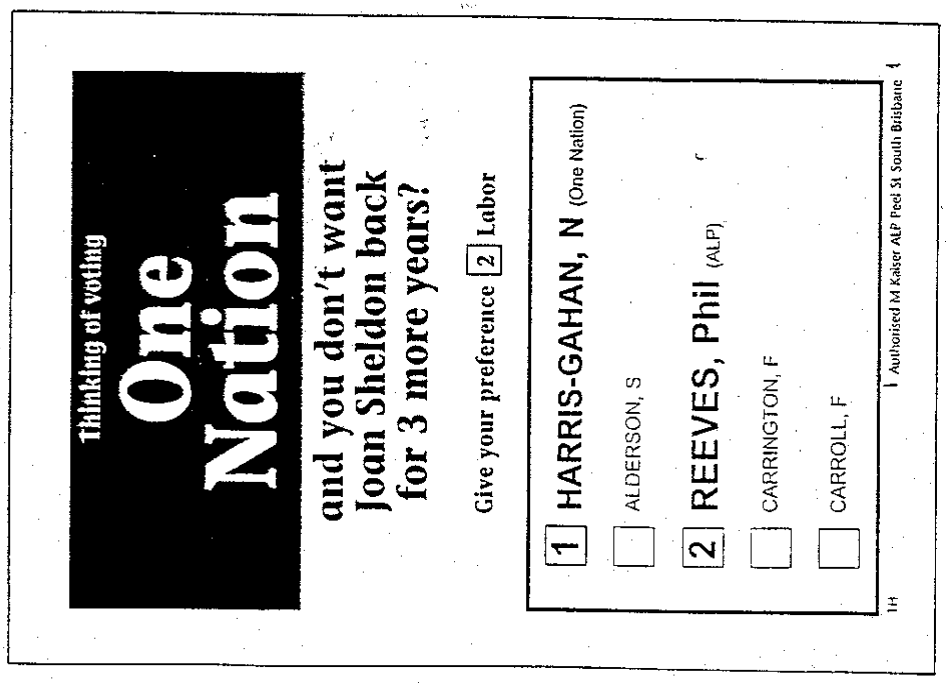
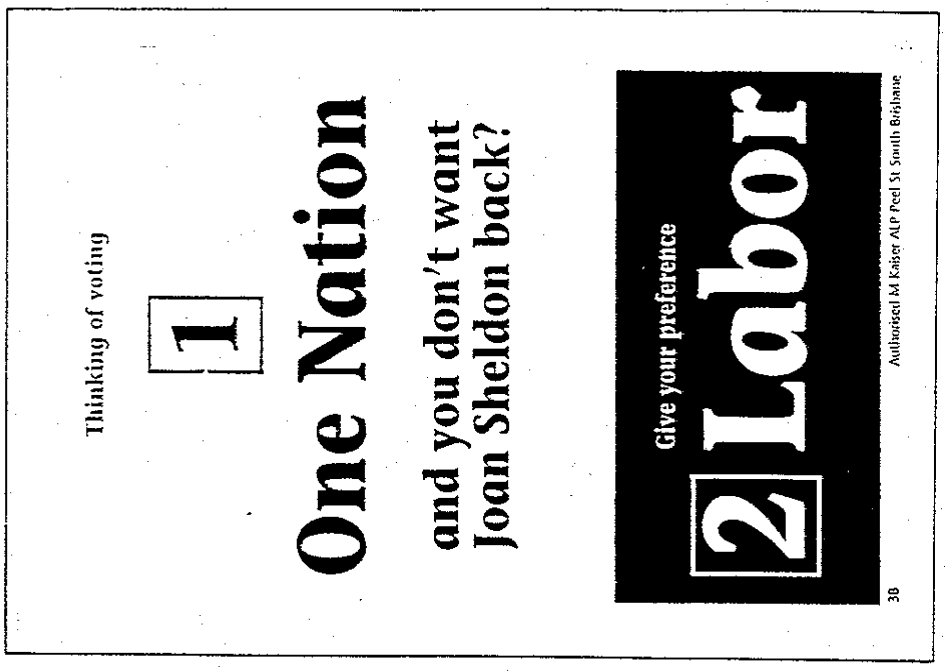


EXHIBIT 2



APPENDIX B: SUBMISSIONS RECEIVED

1. Mr J Wakely
2. Mrs M Morris
3. Hon Justice P de Jersey, Chief Justice, Supreme Court
4. A R Merucci
5. Mr A Sandell
6. Mrs D I Gabriel
7. P Svenson
8. Mr E Walker
9. W J Gabriel
10. Mr D Dalgleish MLA
11. J Calway
12. Murgon Community Association
13. Ms S Moles
14. Mrs M Johnston
15. C Gwin
16. Mr R Weber
17. Ms D Mahoney
18. Ms B Mason, Queensland Greens
19. Mr D O'Shea, Electoral Commissioner, Queensland
20. Professor C Hughes
21. Mr R C Sadler
22. Ms J Sharples
23. Mrs J Werner
24. Mr R Webber
25. Dr M J Macklin
26. Associate Professor N Preston
27. Ms M Johnston
28. Mrs L and Mr J Leatherbarrow
29. Dr E Connors
30. Dr P Reynolds
31. National Party of Australia (Queensland)
32. Mr F Brown
33. Australian Labor Party (Qld Division)
34. Mr F Carroll
35. Mr A J H Morris QC
36. Australian Democrats (Qld Division)
37. Liberal Party of Australia (Qld Division)
38. Queensland Law Society Inc.
39. Nimbin Environment Centre Inc.
40. Mr J Pyke