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Attorney-General and Minister for justice and Minister for The Arts

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Your reference:

Tabled 29/2/00

Mr R D Doyle
The Clerk of the Parliament
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Doyle

Please find enclosed the ministerial response to the Legal, Constitutional and Administrative Review Committee 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.

It would be appreciated if you would make the necessary arrangements for the response to be "tabled" on behalf of the Honourable Terry Mackenroth MLA, Minister for Communication and Information and Minister for Local Government, Planning, Regional and Rural Communities and myself.

Yours sincerely

[Original Signed]

Matt Foley
Attorney-General and
Minister for Justice and
Minister for The Arts

**THE HONOURABLE TERRY MACKENROTH MLA
MINISTER FOR COMMUNICATION AND INFORMATION AND
MINISTER FOR LOCAL GOVERNMENT, PLANNING, REGIONAL AND RURAL
COMMUNITIES**

**THE HONOURABLE MATT FOLEY MLA
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE
AND MINISTER FOR THE ARTS**

Response to Parliament

**LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW
COMMITTEE 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**

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 of 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 fact 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.’

This recommendation will be adopted.

It is intended that legislation giving effect to the recommendation will be introduced into the Legislative Assembly in 2000.

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.

This recommendation will be adopted.

It is intended that legislation giving effect to the recommendation will be introduced into the Legislative Assembly in 2000.

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.)

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 reasonably 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.

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

This recommendation will be substantially adopted. It is intended that legislation providing for appeals from judgments or orders of the Court of Disputed Returns on questions of law will be introduced into the Legislative Assembly in 2000.

It is, however, intended that the legislation will require an appellant to file a notice of appeal within seven days after the date of the judgment or order, rather than the 10 recommended by the Committee.

Following consultation with the Chief Justice it is not intended that the legislation will specify actual time limits for the appeals body to begin its hearings and/or deliver its judgment. The Attorney-General agrees with views expressed by the Chief Justice that the specifying of detailed time limits should be left to the judge hearing the case. The Attorney-General accepts that the judge constituting the Court of Disputed Returns will always be acutely conscious of the need for expeditious determination in such matters and should be left to give directions as to steps and times which are appropriate to the particular case.

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 Dispute 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* s127(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 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:

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 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.

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.***
- (4) Subsection (3) does not apply to the Appeals Division of the court.***

Recommendations 4 and 5 will not be adopted.

The Solicitor-General's advice on the legal implications of these Recommendations has been obtained.

The Solicitor-General's advice supports views expressed by the Chief Justice that legislation which purports to establish the Court of Disputed Returns as a entity separate from the Supreme Court and to establish an Appeals Division of the Court of Disputed Returns may involve constitutional risks.

Those risks arise from the implications of *Kable (1996) 189 CLR 51* which limits the power of State parliaments to interfere with the structure and function of State Supreme Courts.

The Solicitor-General has advised that there may be a problem in attempting to avoid the right of appeal conferred by s73 of the Constitution by legislation which deals

with what is in substance the Supreme Court by giving it the form of a different entity called the Court of Disputed Returns.

The Solicitor-General's advice supports the Committee's observations regarding the effect of *Sue v Hill*. He has advised that this decision tends to undermine the rationale of older cases in which the courts were content to accept that electoral officials were outside the s 73 structure because the jurisdiction being exercised was quasi-legislative rather than judicial.

The Solicitor-General has advised that, following *Sue v Hill*, "*there is considerable uncertainty as to whether the Committee's preference for one, but only one, level of appeal can be accommodated having regard to the High Court's determination particularly evident in Kable, to protect judicial institutions and in particular the Supreme Courts of the States from legislative interference with their place in the 'integrated judicial system' recognised by the Constitution*".

The Attorney-General is mindful of the fact that if the Committee's Recommendations 4 and 5 are adopted the first challenge to the validity is likely to be in a case on which government depends. The constitutional issue is, itself, likely to guarantee the grant of special leave from the High Court. This would be the very result which the Committee is seeking to avoid.

Accordingly, it is proposed to provide for appeals from the Court of Disputed Returns to the Court of Appeal. It is proposed that legislation giving effect to this will be introduced into the Legislative Assembly in 2000.

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.

This Recommendation will not be adopted.

This is because, for reasons stated above, it is not proposed to adopt Recommendation 4.

It is, however, proposed to enable the Court of Disputed Returns, as presently constituted, to state a case for (or reserve questions of law for) the Court of Appeal. It is intended that legislation, giving effect to this proposal, will be introduced into the Legislative Assembly in 2000.