LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

The Electoral (Fraudulent Actions) Amendment Bill 2001

March 2002

Report No 33

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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COMMITTEE CONTACT DETAILS

Copies of this report and other Legal, Constitutional and Administrative Review Committee publications are available on the Internet via the Queensland Parliament's home page at: <**http://www.parliament.qld.gov.au/committees/legalrev.htm>**.

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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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CHAIR'S FOREWORD

Members of LCARC whole-heartedly support measures to try and prevent electoral fraud. Whilst the Electoral (Fraudulent Actions) Amendment Bill 2001 aims to achieve this, we believe the 'catch all' electoral offence provision contained therein is flawed and will not achieve this aim.

As chapter 2 of our report reveals, there are a number of issues regarding the application of the proposed offence provision. There are also compelling arguments against a mandatory minimum sentence of three months imprisonment for enrolment fraud which the bill seeks to impose.

Some of these issues might be capable of being addressed by amendment to the bill. However, and more critically, there is a strong likelihood that a substantial portion of the bill is invalid under s 109 of the Commonwealth Constitution. This alone is sufficient for us to recommend that Parliament not proceed with the bill in any form.

On behalf of the committee I thank those who made submissions to the committee's inquiry, the committee's secretariat, and the Electoral Commissioner, Mr Bob Longland, and the Deputy Electoral Commissioner, Ms Trudy Aurisch, for meeting with us to discuss issues surrounding the bill.

I also thank my fellow committee members for their co-operation in preparing this report.

Karen Struthers MP
Chair

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1. INTRODUCTION

1.1 THE REFERENCE

The Legal, Constitutional and Administrative Review Committee ('LCARC' or 'the committee') is a multi-party committee of the Queensland Legislative Assembly with responsibilities including legal, constitutional, administrative review and electoral reform.[1] The committee's statutory area of responsibility about electoral reform includes monitoring generally the conduct of elections under the *Electoral Act 1992* (Qld) and the capacity of the Electoral Commission Queensland ('ECQ') to conduct elections. In addition, the committee is to 'deal with' issues referred to it by the Legislative Assembly or under another Act.[2]

On 28 November 2001, the Legislative Assembly referred the Electoral (Fraudulent Actions) Amendment Bill 2001 ('the bill') to the committee for consideration and report back to the House before 31 March 2002. The bill is a private member's bill which was introduced on 18 October 2001 by Mr Lawrence Springborg MP, Member for Southern Downs and Shadow Attorney-General and Shadow Minister for Justice, Shadow Minister for Innovation, Information Technology and Rural Technology, and Shadow Minister for Fair Trading.

1.2 THE INQUIRY PROCESS

In early December 2001, the committee decided to call for public submissions on the bill.

On 8 December 2001, the committee advertised this call for submissions in *The Courier-Mail*, the *Cairns Post*, the *Townsville Bulletin*, and the *Rockhampton Morning Bulletin*. In addition, the committee directly wrote to approximately 240 persons and organisations that it identified as having an interest in the bill. Organisations and persons directly approached by the committee included: members of the Legislative Assembly, Queensland members of the Commonwealth House of Representatives and Senate, state and federal ministers and shadow ministers responsible for electoral matters, academics, Australian electoral commissioners, persons who have previously made submissions to this committee regarding electoral matters, Queensland local governments including Aboriginal and Islander Councils, political parties registered in Queensland, Queensland courts, community legal centres and various other community groups and professional bodies.

Submissions closed on 15 February 2002, although the committee continued to accept submissions past that date. The committee received 13 submissions to its inquiry. A list of those who made submissions to the committee's inquiry appears as **Appendix A**.

The committee will table non-confidential submissions in the Legislative Assembly with this report. Copies of tabled submissions can be viewed at the Bills and Papers Office, Parliament House, Brisbane.

In addition, on 8 March 2002 the committee met with the Queensland Electoral Commissioner, Mr Bob Longland, and the Deputy Electoral Commissioner, Ms Trudy Aurisch, to discuss issues concerning the bill.

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1 *Parliamentary Committees Act 1995* (Qld), ss 9-13.

2 *Parliamentary Committees Act 1995* (Qld), s 8(2).

1.3 THE PURPOSE AND CONTEXT OF THE BILL

The bill seeks to amend the *Electoral Act* by inserting a new s 160A which provides:

> ***160A Fraudulently influencing election outcomes***
>
> *(1) A person must not do an act with intent to fraudulently influence the outcome of an election.*
>
> *Minimum penalty, if subsection (2) applies—3 months imprisonment.*
>
> *Maximum penalty—3 years imprisonment.*
>
> *(2) Without limiting subsection (1), a person is taken to have done an act with intent to fraudulently influence the outcome of an election if—*
>
> *(a) the person does an act with intent to have a person, whether the person or someone else, enrolled for an electoral district; and*
>
> *(b) the person doing the act is aware the person to be enrolled is not entitled to be enrolled for the electoral district.*

The explanatory notes state that the primary objective of the bill is:

> *…to ensure that those who do any fraudulent act with the intent to influence the outcome of an election held under the* Electoral Act *are punished for their actions.*
>
> *There are a number of acts that can serve to influence the outcome of an election, some of which are specifically punishable under Commonwealth laws due to the joint Electoral Rolls. However, the objective of this legislation is to ensure that any act is punishable, irrespective of the application of other offence provisions, under either State laws or the Commonwealth laws relating to joint the Electoral Rolls.*

The context in which this bill was introduced has changed given the introduction of the Electoral and Other Acts Amendment Bill 2002 on Wednesday, 6 March 2002. The explanatory notes to the Electoral and Other Acts Amendment Bill 2002 outline the history relevant to both bills.

> *In 2000, three separate inquiries were initiated into the issues of electoral fraud and the integrity of the electoral roll. These resulted in the following reports:*
>
> - *The Legal, Constitutional and Administrative Review Committee (LCARC) Report No 28:* The prevention of electoral fraud: Interim Report *which was tabled in the Queensland Parliament on 14 November 2000;*
> - *The* Shepherdson Inquiry: An Investigation Into Electoral Fraud *which was tabled in the Queensland Parliament on 1 May 2001; and*
> - *The Joint Standing Committee on Electoral Matters (JSCEM) report,* User friendly, not abuser friendly: Report of the Inquiry into the Integrity of the Electoral Roll *which was tabled in the Commonwealth Parliament on 18 June 2001.*
>
> *In response to the political and community concerns regarding these issues, the Premier, the Honourable Peter Beattie MP, in his Barcaldine Statement on 21 January 2001, committed the Government to a range of electoral reforms to eliminate electoral fraud and restore public faith in the electoral process.*

The key elements of this package were that:

- *registered political parties would have a community-based membership with the right to control their parties through proper democratic processes overseen by the Electoral Commission of Queensland (the Commission);*
- *registered political parties that breached the new requirements would be prohibited from receiving public funding;*
- *electoral rorters would be banned from running for political office and being members of political parties;*
- *the Commission would supervise the preselection process and conduct random audits of balloting and voting procedures;*
- *voting in preselections was to be restricted to Queensland electors;*
- *there would be new public disclosure requirements for parties and candidates in relation to preference arrangements and loans and gifts;*
- *there would be new measures to improve voter participation;*
- *the Commission would have responsibility to oversee the integrity of the electoral roll;*
- *provisions requiring cleansing of the special postal voter register would be strengthened; and*
- *penalties for electoral offences under the* Electoral Act *and the* Criminal Code *would be the toughest in Australia.*

1.4 THIS REPORT

This report summarises the committee's consideration of the bill.

In chapter 2 the committee discusses specific issues which the bill raises. In chapter 3 the committee comes to a position on the bill, and in chapter 4 the committee makes a recommendation to Parliament.

2. ISSUES RAISED BY THE BILL

2.1 'INTENT TO … INFLUENCE THE OUTCOME OF AN ELECTION'

Proposed s 160A(1) provides that a person must not do an act with intent to fraudulently influence the *outcome* of an election. However, it is not clear what constitutes an election outcome.

Elections for the Queensland Legislative Assembly are conducted on a district by district basis. Section 122 of the *Electoral Act* (Notifying the results of an election) provides that as soon as practicable after a candidate is elected, the returning officer for the electoral district must notify the ECQ of the name of the candidate elected for the electoral district. As soon as practicable after the ECQ has received copies of the notifications under s 122 from the returning officers for all electoral districts, the ECQ must write on the writ for the election the name of each candidate elected and return the writ to whichever of the Governor or the Speaker issued the writ: s 123.

Thus, the outcome of an election is arguably the result in each electoral district as stated in the returned writ.

On this basis, the conduct caught by the clause is limited. As Mr Graeme Orr stated in his submission to the committee: '*Someone may try to do something improper in the process of enrolment and balloting, that in reality is unlikely—and in any case is not intended—to affect the outcome of that process. This is especially the case when electorates of 20 to 30 thousand electors are involved*.'[3]

The Australian Electoral Commission made the following pertinent comment in a submission to the Commonwealth Parliament's Joint Standing Committee on Electoral Matters:

> *Since 1984, a parliamentary inquiry has been held into the conduct of every federal election. At each of these inquiries the possibility of fraudulent enrolment and voting has been investigated, and each time it has been concluded that no evidence was available to support allegations that widespread and organised electoral fraud had occurred to such an extent that the result of any of those elections was in doubt.*[4]

Professor Hughes also submitted that if the above reasoning as to what constitutes the result of an election is correct:

> *…then half a dozen shonky votes in a safe seat, which was the norm for the Shepherdson Inquiry, may not constitute the offence. If the intention is to stop improper interference with the rolls, then it is necessary to cover safe seats as well as the marginal, and … runaway preselections as well as the close ones'.*[5]

If, after applying the ordinary rules of construction, the language of a statute remains ambiguous the ambiguity may be resolved in favour of the subject.[6] As Mr Orr pointed out: '*Thus someone who deliberately enrolled in the wrong electorate under a false name, even assuming they voted in that electorate or name, could argue that they did so to support a*

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3 Mr G Orr (submission no 2).

4 Australian Electoral Commission submission to the Joint Standing Committee on Electoral Matters *Inquiry into the conduct of the 1998 Federal Election*, Canberra, March 1999 at 10.1.5.

5 Professor C Hughes (submission no 3).

6 *Beckwith v The Queen* (1976) 135 CLR 569 at 576.

candidate who was a friend, or to show allegiance to a particular party or district, without the intention (let alone likelihood) of affecting 'the outcome' of that election'.[7]

If the intention of the provision is to capture acts intended to affect an election in terms of the number of votes (including preferences) cast and counted in an electoral district, then arguably the provision needs to be more explicit. One option would be to remove the word 'outcome'. Another option would be that recommended by Professor Hughes, namely, insert a new definition in the *Electoral Act* along the lines of:

> *'result of an election' means:*
>
> *(a) the name of the candidate elected; or*
>
> *(b) the number of votes recorded for each and every candidate at the election.*[8]

2.2 'AN ACT WITH INTENT TO FRAUDULENTLY INFLUENCE'

A further issue regarding the bill concerns how a court will interpret the phrase '*an act with intent to fraudulently influence*' the outcome of an election.

Mr Graeme Orr submitted that on a literal reading—and in contrast to the argument above regarding the meaning of 'outcome' of an election—the bill might have a very wide application including deliberate misstatements made during an election campaign, a matter which Parliament has traditionally left to political discourse rather than legal regulation.

Mr Orr submitted:

> *A politician who knowingly publicised factual misrepresentations on a topic central to an election campaign would prima facie be guilty of 'an act with intent to fraudulently influence the outcome of an election'. Allegations were raised at the 2001 federal election that government ministers may have knowingly and for political advantage made incorrect claims about asylum seekers throwing their children into the water. The Senate is likely to inquire into these matters. Under a literal reading of sub-clause 160A(1), this sort of allegation would be a matter for police consideration and not just political discourse. This can hardly be the Bill's intention…*[9]

As Mr Orr goes on to point out, despite a recommendation by a former LCARC that there should be a general 'truth in political advertising' provision[10] and the government of the day's acceptance of that recommendation, events subsequent to that committee's report have shown that, in practice, drafting such a provision is difficult.

While there is no statutory or other unequivocal definition of fraud, it would appear that fraud is a broad concept. Carter's Criminal Law of Queensland states: '*In statutory offences, 'fraudulently' has a meaning often interchangeable with 'dishonestly', and is not confined necessarily to depriving someone of a right or advantage. It may mean no more than 'with moral opprobrium'*.[11]

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7 Mr G Orr (submission no 2).

8 Professor C Hughes (submission no 3).

9 Mr G Orr (submission no 2).

10 Queensland. Parliament. Legal, Constitutional and Administrative Review Committee, *Truth in Political Advertising*, report no 4, Goprint, Brisbane, December 1996.

11 *Carter's Criminal Law of Queensland*, volume no 1, Butterworths at s 391.15 at 3441.

Establishing fraud might be more difficult. The Joint Standing Committee on Electoral Matters noted in its electoral fraud report that the difficulty in all fraud work is the proof of criminal intent on the part of a suspected offender.[12] However, even if the offence is difficult to prove it might provide an opportunity for people to threaten prosecution under the provision as a means of intimidation.

2.3 THE EFFECT OF PROPOSED S 160A(2)

Proposed s 160A applies to an 'election'. 'Election' is defined in s 3 of the *Electoral Act* to mean '*an election of a member or members of the Legislative Assembly'*. However, Shepherdson reported that:

> *The information gathered during the inquiry clearly established that the practice of making consensual false enrolments to bolster the chances of specific candidates in preselections was regarded by some Party members as a legitimate campaign tactic. No evidence, however, was revealed indicating that the tactic had been generally used to influence the outcome of public elections. Where it was found to have been used in public elections, the practice appeared to be opportunistic or related to the family circumstances of particular candidates rather than systemic or widespread.*[13]

By itself, proposed s 160A(1) therefore does not address the conduct which was principally the subject of the Shepherdson inquiry.

Proposed s 160A(2) overcomes this by providing that a person is taken to have done an act with intent to fraudulently influence the outcome of an election if he or she does an act with intent to have a person enrolled for an electoral district, and is aware that the person to be enrolled is not entitled to be enrolled for that district.

However, a number of submitters pointed out that this sub-clause has the potential to capture enrolment offences that involve no intent to corrupt elections at all. As Mr Graeme Orr submitted,[14] the sub-clause might be breached by behaviour which, albeit affects the propriety of electoral administration, is less serious than conduct which involves politically motivated or concerted attempts at roll stacking. Examples he provided of less serious conduct were improper enrolments by a resident non-citizen as a means of assisting their assimilation, and a fraudster wishing to establish a false identity.

Chief Justice de Jersey also submitted:

> *It is quite conceivable that a person might procure an enrolment in the wrong district for reasons of convenience, or even for reasons of branch-stacking such as emerged in the Shepherdson inquiry; but for reasons that nonetheless have nothing to do with fraudulently influencing election outcomes. The provision would put a complexion on what might otherwise be naive or stupid activity which would far outstrip the actual intention involved.*[15]

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12 Commonwealth. Parliament. Joint Standing Committee on Electoral Matters, *User friendly, not abuser friendly: Report of the Inquiry into the Integrity of Electoral Roll*, Canberra, May 2001 at paras 1.14-1.18.

13 Queensland Criminal Justice Commission, *The Shepherdson inquiry: An investigation into electoral fraud*, Brisbane, April 2001 at xiv.

14 Mr G Orr (submission no 2).

15 Chief Justice de Jersey (submission no 7).

The Chief Justice went on to state that, at its highest, the sub-clause should provide for those acts to constitute *prima facie* evidence rather than be conclusive, as appears to be the current intent.

2.4 OVERLAP WITH OTHER OFFENCES

Part 9 of the *Electoral Act* contains a number of offence provisions including:

- making a false or misleading statement (s 153);
- giving a false, misleading or incomplete documents (s 154);
- forging or uttering electoral papers, etc (s 159);
- misleading voters (s 163); and
- voting if not entitled etc (s 170).

The Scrutiny of Legislation Committee noted that a number of the acts which these offence provisions prohibit would appear to fall within the scope of proposed s 160A. Although s 45 of the *Acts Interpretation Act 1954* (Offence punishable only once) might prevent a person being prosecuted under both s 160A and one of the other offence provisions, the bill provides no guidance as to which of the two options should be pursued.[16]

The explanatory notes to the bill provide:

> *This Bill could attempt to impose penalties for specific offences under either the Electoral Act or the Criminal Code. However, the preferred course of action is for the amendments contained in this bill to serve as 'catchall' provisions to ensure that, where there is no other specific offence provision, the fraudulent actions of those who, with intent to influence the outcome of an election are punished.*

In response to the Scrutiny of Legislation Committee's comments in this regard Mr Springborg MP commented:

> *... it is not inconsistent in law, when there is the absence of a specific offence to prosecute a matter, for a general offence provision can be used*.[17]

2.5 PENALTIES

The Scrutiny of Legislation Committee noted:

- *unlike the existing specific offence provisions, proposed s 160A provides only for imprisonment, and does not provide the option of a monetary penalty; and*
- *the maximum penalty (3 years imprisonment) is higher than that provided in relation to the existing specific offence provisions.*[18]

In response to the Scrutiny of Legislation Committee's comments in this regard Mr Springborg MP commented:

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16 Queensland. Parliament. Scrutiny of Legislation Committee, *Alert Digest Issue No 7 of 2001*, Brisbane, 30 October 2001 at 19.

17 Published in Scrutiny of Legislation Committee, *Alert Digest Issue No 8 of 2001*, Brisbane, 27 November 2001 at 50.

18 Scrutiny of Legislation Committee, *Alert Digest Issue No* 7, n 16 at 19. Although, this committee notes that s 153(2) of the *Penalties and Sentences Act 1992* provides that an offender liable to imprisonment may be sentenced to pay a fine not exceeding certain prescribed limits.

> *... I believe that the minimum jail provision in Subsection 2 and the potential for actual jail and suspended jail sentences and even community orders in Subsection 1 addresses this.*[19]

In chapter 3 the committee notes the steps government has taken in the Electoral and Other Acts Amendment Bill 2002 to review penalties for electoral offences.

The committee discusses the mandatory minimum sentence of three months imprisonment in section 2.7 below.

2.6 TIME LIMITS ON PROSECUTION

The Shepherdson Inquiry was extremely limited in what prosecution action it could recommend because of the time limits for prosecution applicable to the relevant offence provisions.

In his second reading speech Mr Springborg MP commented:

> *These provisions do not include any statute bar or time limitation, as such a person can be punished for an offence whenever committed.*[20]

Section 52 of the *Justices Act 1886* provides that:

> *In any case of a simple offence or breach of duty, unless some other time is limited for making complaint by the law relating to the particular case, complaint must be made within 1 year from the time when the matter of complaint arose.*

Pursuant to s 3 of Queensland's Criminal Code, the offence established by proposed s 160A would be a simple offence because it has not been specifically designated as another type of offence. Accordingly, the 1 year time limit would apply to offences under proposed s 160A.

In response to the Scrutiny of Legislation Committee's observation in this regard Mr Springborg MP advised:

> *I have drafted an amendment which clarifies that offences against Subsection 1 are misdemeanours and therefore will be prosecuted following the alleged offender's arrest on warrant.* [21]

2.7 MANDATORY MINIMUM SENTENCE

The penalty for breach of proposed s 160A is, in the case of enrolment fraud as described in ss (2), a *minimum* penalty of 3 months imprisonment and a maximum penalty of 3 years imprisonment. In all other cases, a person found guilty of an offence under the proposed section will be liable for a maximum penalty of 3 years imprisonment.

The Leader of the Opposition provided the following background as to why the bill includes a mandatory minimum sentence:

> *If we really believe in the democratic process, if we really believe that this is the absolute foundation of why we are all here, if we are really quite sincere and genuine about having a selection and election process that is as close to absolute, correct and*

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19 Published in Scrutiny of Legislation Committee, *Alert Digest Issue No 8*, n 17 at 50.

20 Mr L Springborg MP, Electoral (Fraudulent Actions) Amendment Bill, *Queensland Parliamentary Debates (Hansard),* 18 October 2001 at 3013.

21 Published in Scrutiny of Legislation Committee, *Alert Digest Issue No 8*, n 17 at 49.

> *honest as we can possibly make it, then we must see the need for a substantive penalty. People should know that this is one area where they do not transgress or the result will be very severe. This goes back to how people see the institution of parliament and our democracy. It is something that should never be tampered with. We cannot be soft when it comes to finding someone who has knowingly and willingly broken those principles and destroyed everybody's faith in democracy. Ultimately, the game is bigger than the individual. For that reason we have a very strong belief in this concept of a mandatory minimum sentence in this particular case.*[22]

Proponents of mandatory sentencing generally argue that it:

- is a democratic response to widespread public concern about certain crimes and inadequate sentences for such crimes;
- provides a deterrent to the commission of certain crimes both by the offender specifically and the community generally; and
- ensures greater consistency in sentences given by the courts.

However, the majority of submitters who addressed this issue opposed the imposition of a mandatory minimum sentence for various of the reasons discussed below.[23] Similarly, the majority of literature on this issue opposes the concept.

Impact on judicial independence and discretion: Mandatory sentences remove a court's discretion to determine a sentence appropriate for the unique circumstances of the crime and the offender. It is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime,[24] taking into account the interests of the community, the victim of the offence, and the offender.[25]

Proportionality: Removal of judicial discretion does not allow factors such an offender's cooperation, confession, intent, understanding of the implications of the action or youth to be taken into account. Further, it has the potential for an offender to receive punishment that is greatly disproportionate to the actual offence,[26] or to penalties imposed for other similar offences.[27]

The impact of the mandatory minimum sentence in the bill before the committee is exacerbated by the deeming provision in proposed s 160A(2). A sentence of imprisonment would be imposed if the criteria of s 160A(2) are met, even if there is no evidence that the defendant intended to corrupt the political process.[28]

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22 Mr M Horan MP, Electoral (Fraudulent Actions) Amendment Bill, *Queensland Parliamentary Debates (Hansard),* 28 November 2001 at 3995.

23 The following submitters expressed opposition to mandatory minimum sentences: Mr G Orr (submission no 2), Professor C Hughes (submission no 3), Queensland Council for Civil Liberties (submission no 5), Chief Justice de Jersey (submission no 7) and Dr G Carney, Associate Professor of Law (submission no 8).

24 Barwick CJ in *Palling v Corfield* (1970) 123 CLR 52 at 58.

25 Sir Gerard Brennan, former High Court Chief Justice reported by G Hughes, *The mandatory sentencing debate*, paper prepared for the Law Council of Australia, September 2001 at 12.

26 R White, '10 arguments against mandatory sentencing', *Youth Studies, Australia*, vol 19, no 2, June 2000 at 22.

27 Chief Justice de Jersey (submission no 7).

28 Mr G Orr (submission no 2).

International obligations: Mandatory minimum sentence regimes are criticised for being incompatible with Australia's treaty obligations.[29]

Crime reduction and deterrence: While it is argued that mandatory sentencing prevents crime through incapacitation and deterrence, there is no conclusive evidence that mandatory minimum sentences have a positive effect on the crime rate or a deterrent effect on an offender or members of the community generally.[30] Further, any crime reduction or deterrence effect must be balanced against the social costs of mandatory sentences of imprisonment. As former Chief Justice of the High Court, Sir Anthony Mason, stated:

> *A law which insists on the incarceration of a first offender, more especially a young offender, for theft, no matter how trivial the amount involved, regardless of alleviating circumstances, is inhuman in this day and age. Some might describe it as a cruel and unusual punishment, to adopt the language of a Bill of Rights. A moment's reflection on the conditions which prevail in our prisons and on the character of some of their inmates is enough to lead inevitably to the conclusion that to send a youthful first offender to prison for a trivial offence may well be a greater threat to humanity than the commission of the actual offence itself. There is no shortage of opinions from those experienced in the field of criminology who say that gaols are a fertile breeding ground of crime and that young offenders are at risk of becoming professional criminals as a result of imprisonment.*[31]

Adverse impact on the criminal justice system: Offenders charged with an offence that carries a mandatory minimum sentence might be more likely to plead not guilty as they have nothing to lose, resulting in more resources being required of the police, director of public prosecutions, courts and legal aid. Mandatory imprisonment also means an increase in the prison population and incarceration costs.

Consistency: One of argued benefits of mandatory minimum sentences is that they remove inconsistency in sentencing, essentially by removing judicial discretion. However, this aim might not be achieved in practice. Because offences defined in statute often apply in a very wide variety of situations very 'unequal offenders' stand to receive the same sentence.

Indeed, rather than eliminating discretion many argue that mandatory sentences simply shifts it from the courts to police and prosecutors who have a degree of control over what, if any, offences a person is charged with. The significance of this discretion is enhanced where one possible charge has a mandatory minimum sentence. There is less transparency in prosecutorial discretion than with judicial discretion.[32]

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29 Relevant international obligations include: prohibitions against arbitrary detention; requirements for an independent and impartial judiciary as an explicit attribute of the right to a fair trial; and a right of appeal for everyone convicted of a crime. See articles 9(1), 10 and 14(5) of the International Covenant on Civil and Political Rights. See Ryszard Piotrowics, 'Mandatory sentencing and international law: No logic and too many question marks', *International Focus*, June 2000 at 363 and Dato' Param Cumaraswamy, 'Mandatory sentencing: the individual and social costs', *Australian Journal of Human Rights*, vol 7, no 2, December 2001, Australian Human Rights Centre, 7 at 13.

30 Declan Roche, 'Mandatory sentencing'*, Trends and issues in crime and criminal justice*, no 138, December 1999, Australian Institute of Criminology at 2 and 4.

31 Sir Anthony Mason, 'Mandatory sentencing: implications for judicial independence', *Australian Journal of Human Rights*, vol 7, no 2, December 2001, Australian Human Rights Centre, 21 at 29.

32 Declan Roche, n 30 at 4 and Dato' Param Cumaraswamy, n 29 at 17.

Anomalous outcomes: Proposed s 160A(2) contains an anomaly in that the minimum sentence only applies in the circumstances set out in subsection (2). Therefore, a person who engages in some serious conduct designed to fraudulently influence the outcome of an election but which was not done in connection with an enrolment will avoid the mandatory minimum sentence. Further, other serious offences contained in the *Electoral Act* do not have mandatory minimum sentences.

Inconsistency with Queensland sentencing guidelines: The *Penalties and Sentences Act 1992* (Qld) sets out sentencing guidelines which require a court in sentencing an offender to have regard, not only to the maximum and any minimum penalty prescribed for the offence [s 9(2)(b)], but also to a range of other factors including:

- the principle that a sentence of imprisonment should only be imposed as a last resort: s 9(2)(a)(i);
- the principle that a sentence that allows the offender to stay in the community is preferable: s 9(2)(a)(ii);
- the nature of the offence and how serious the offence was, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the defendant: s 9(2)(c) and (e);
- the extent to which the offender is to blame for the offence: s 9(2)(d);
- the offender's character, age and intellectual capacity: s 9(2)(f);
- the presence of any aggravating or mitigating factor concerning the offender: s 9(2)(g);
- the prevalence of the offence: s 9(2)(h);
- how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences: s 9(2)(i); and
- time spent in custody and other sentences imposed on the offender: s 9(2)(k)-(m).

2.8 CONSTITUTIONAL VALIDITY

Currently, offences covering fraudulent electoral activity are contained in the *Commonwealth Electoral Act* (Part XXI), Queensland's *Electoral Act* (Part 9), the Commonwealth Criminal Code[33] and Queensland's Criminal Code (Chapter 14).[34]

Commonwealth legislation applies in Queensland because since 1 January 1992 Queensland has had a joint electoral roll with the Commonwealth. Thus, any offences committed with respect to the roll since that date are offences against commonwealth law.

Enrolment fraud offences are now covered by the general offence provisions found in the following parts of chapter 7 of the Commonwealth Criminal Code:

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33 The Commonwealth Criminal Code is a schedule to the *Criminal Code Act 1995* (Cth).

34 The Criminal Code is in a schedule to the *Criminal Code Act 1899* (Qld). Currently, s 98A of the Criminal Code provides that chapter 14 does not apply to an election for the Legislative Assembly or a local government. However, the Electoral and Other Acts Amendment Bill 2002 (Qld), clause 51 seeks to amend this section so that certain electoral offences apply to Legislative Assembly and Brisbane City Council elections.

- Part 7.4 (False or misleading statements) which prescribes offences for false or misleading statements in applications (s 136.1); false or misleading information (s 137.1); and false or misleading documents (s 137.2); and
- Part 7.7 (Forgery and related offences).

Proposed s 160A by its nature as a 'catch-all' provision has the potential to apply to a wide range of behaviour concerning elections, including behaviour which is already covered by the current electoral offence provisions.

In debate on the bill, the Attorney-General raised concerns that the proposed offence in s 160A might be inconsistent with commonwealth electoral offences and hence be inoperative by virtue of s 109 of the Commonwealth Constitution. Section 109 provides that when a state law is inconsistent with a commonwealth law, the commonwealth law shall prevail and the state law shall, to the extent of the inconsistency, be invalid.[35]

Section 109 is self-executing—an inconsistent state law is automatically inoperative to the extent of the inconsistency.

Inconsistency under s 109 can be direct or indirect.[36] A *direct* inconsistency arises where there is a direct conflict between state and commonwealth provisions either such that compliance with both laws is impossible or where one law takes away a right or privilege conferred by the other law.

An *indirect* inconsistency arises where a state has legislated regarding a matter on which the commonwealth intends that its law will 'cover the field', that is, be the only law on the matter. Thus, the two laws do not need to be in conflict for the state law to be inoperative on the basis of s 109.

Significantly, no issue of *indirect* inconsistency can arise between the chapter 7 offences and the proposed s 160A since, by s 261.1 of the Commonwealth Criminal Code, the commonwealth has indicated its intention not to 'cover the field' in respect of any of the offences in chapter 7. Such a statutory declaration is effective to remove an indirect inconsistency.[37]

However, such a declaration does not preclude a state law being inoperative on the basis of s 109 of the Commonwealth Constitution due to a *direct* inconsistency with a commonwealth law.[38] Accordingly, the only difficulty which could arise between the proposed s 160A and any of the chapter 7 offences identified above is with a *direct* inconsistency and, then, only in so far as the conduct in question involves the joint electoral roll.

Associate Professor Gerard Carney submitted the following in relation to any direct consistency which might arise because of proposed s 160A(1):

> *Given the breadth of [proposed] s 160A(1), it is very likely that certain conduct caught by the offences under Chapter 7 of the Commonwealth's Criminal Code would also be*

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35 Section 109 reinforces the sentiment of s 5 of the *Commonwealth of Australia Constitution Act 1900* (UK) which provides that '*all laws made by the Parliament of the Commonwealth ... shall be binding ... notwithstanding anything in the laws of any State*'.

36 Although a law can be inoperative based on both direct and indirect inconsistency.

37 *R v Credit Tribunal; Ex parte General Motors Acceptance Corp* (1977) 137 CLR 545.

38 *R v Credit Tribunal: Ex parte General Motors Acceptance Corp* (1977) 137 CLR 545.

> *caught by s 160A. However, this does not necessarily mean a direct inconsistency arises to oust a prosecution for the State offence.*
>
> *A direct inconsistency can arise where the elements for each offence are the same but different penalties are prescribed:* Ex parte McLean *(1930) 43 CLR 472 at 483. But even in that situation, no direct inconsistency arises if each offence is seen to be concerned with a different subject-matter. For example, in* McWaters v Day *(1989) 168 CLR 289, where a soldier was charged under the Qld* Traffic Act *with driving under the influence of liquor, no inconsistency arose because the Commonwealth offence was a military offence under the* Defence Force Discipline Act *1982 whereas the State offence was a general criminal law offence.*
>
> *Similarly, in* R v Winneke; Ex parte Gallagher *(1982) 152 CLR 211 a witness was charged under State law for failing to answer questions before a royal commission which was authorised by both Commonwealth and State law. Although the corresponding Commonwealth offences imposed different penalties, no s 109 inconsistency arose because the offences dealt with different subjects: "The Commonwealth Act deals with inquiries conducted under Commonwealth authority and the State Act deals with inquiries conducted under State authority." (per Gibbs CJ at 219)*
>
> *An analogy might be drawn from* Winneke's Case*, to argue that the proposed s 160A and the offences in Chapter 7 deal with different subject-matters: s 160A is specifically concerned with a State election, while Chapter 7 is concerned with any fraudulent activity against the Commonwealth. In any event, both are only going to apply to the same conduct when that involves fraudulent activity in relation to the joint electoral roll. In such cases, the more specific Commonwealth offences ought to be applied. Apart from this possibility, each possess far wider fields of operation.*[39]

In relation to proposed s 160A(2) Associate Professor Carney made the following comments:

> *As for s 160A(2), this creates in effect a specific offence within the general offence of subs (1), namely, to do an act with intent to have a person enrolled for an electoral district knowing that the person is not entitled to be enrolled. Such conduct would also constitute an offence under Chapter 7 of the Commonwealth Criminal Code if it involved the making of a false statement (s 136) or forgery (s 144). The penalties differ: under s 160A(2) it is a minimum of three months and a maximum of three years imprisonment, whereas under the Commonwealth offences it is 12 months and 10 years respectively. It is certainly arguable on the basis of* McLeans Case *above, that s 160A(2) is rendered ineffective by s 109 for direct inconsistency in so far as the conduct concerned satisfies the elements of both s 160A(2) and one of the Commonwealth offences. There seems little basis for arguing, to avoid that conclusion, that they deal with different subject-matters since both are directed to protecting the joint electoral roll. There may still be conduct which falls within subs (2) but outside these more specific Commonwealth offences because no false statements or forgery occurred. To that extent, no inconsistency is likely.*[40]

Thus, Associate Professor Carney concludes that while the general offence in proposed s 160A(1) is not wholly inoperative by s 109, a substantial part of the operation of subs (2) suffers that fate.

It might also be that certain electoral offences which remain in the *Commonwealth Electoral Act* raise questions of both direct and indirect inconsistency under s 109. For example, s 342

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39 Associate Professor G Carney (submission no 8).

40 Associate Professor G Carney (submission no 8).

of the *Commonwealth Electoral Act* makes it an offence for a person to fail to, as a witness for a claim for enrolment or transfer of enrolment, satisfy himself or herself that the statements in the claim are true.

3. THE COMMITTEE'S POSITION ON THE BILL

The committee agrees wholeheartedly with the sentiment of the bill that electoral fraud is totally unacceptable and that measures must be in place to ensure that, to the greatest extent possible, people are discouraged from engaging in such practices. The integrity of the electoral process is fundamental to our democratic system of government. There needs to be a high level of community confidence that elections are conducted in a free, honest and fair manner using a true and accurate electorate roll.[41]

However, the committee has some fundamental concerns with the bill. These concerns include:

- in the absence of statutory clarification of what constitutes an election outcome, the current wording of proposed s 160A might make the offence very narrow in its application;
- conversely, the phrase 'an act with intent to fraudulently influence' might be subject to such wide interpretation as to give rise to prosecutions (or at least threatened prosecutions) in circumstances which would not normally be the subject of a criminal offence;
- the effect of proposed s 160A(2) is inherently unfair in that it has the potential to capture enrolment offences that involve no intent to corrupt elections at all; and
- the time limitation of one year which will apply to prosecuting offences under the proposed provision.

The committee also believes that the arguments against a mandatory minimum sentence in the case of conduct falling within proposed s 160A(2) are compelling, regardless of the level of that mandatory minimum sentence and whether that mandatory sentence applies in the case of a first, second or subsequent offence.[42]

Some of these concerns might be addressed by amendment to the bill. For example, the concerns regarding the difficulties with establishing what is an election outcome might, as some submitters suggested, be addressed by inserting appropriate definitions. Proposed s160A(2) might be amended so that the acts described in that sub-clause constitute *prima facie* rather than conclusive evidence. The mandatory minimum sentence could also be removed.

The committee also notes that Mr Springborg intends to introduce an amendment to overcome the time limitation of one year on prosecuting offences under the proposed provision: see section 2.6.

Yet even if these matters were addressed, insurmountable issues remain as to the practical application of the provision and, more critically, the constitutional validity of the bill. The potential that a substantial portion of the bill is invalid due to s 109 of the Commonwealth

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41 In this regard see EARC's 'principles underlying the electoral system' which the ECQ has adopted as its ongoing charter: EARC, *Report on review of the Elections Act 1983-1991 and related matters*, Goprint, Brisbane, December 1991 at 7-10, as paraphrased in ECQ, *Annual Report 1999-2000*, Goprint, Brisbane, October 2000 at 4.

42 Mr R Sadler (submission no 4) suggested to the committee that the mandatory minimum sentence could be increased to one year but only for any second or subsequent offence.

Constitution is sufficient alone for the committee to recommend that Parliament not proceed with the bill in any form.

The committee believes that rather than a catch-all provision such as the bill proposes, the preferable approach is specific measures designed to address issues relevant to electoral offence provisions. Some such issues were raised by Shepherdson and submitters to the committee's inquiry.

A number of these issues have been addressed in the Electoral and Other Acts Amendment Bill 2002, which was introduced by the Attorney-General and Minister for Justice into the Legislative Assembly on 6 March 2002. For example, the bill provides for:

- tougher penalties for the most serious electoral offences;
- no time limitations for prosecuting the most serious electoral offences; and
- increased political consequences for those people convicted of 'disqualifying electoral offences', namely, a ban on such persons from: (a) becoming a member of a registered political party for ten years following the conviction; and (b) nominating as candidates for state or local government elections for ten years following the conviction. A member's seat will also become vacant if the member is convicted of a 'disqualifying electoral offence'.

The committee makes three observations regarding the 2002 bill.

Firstly, due to the joint roll arrangement between Queensland and the Commonwealth, any offences committed with respect to the electoral roll will still be offences against commonwealth law. In this regard, the committee notes that the Australian Electoral Commission is currently undertaking a comprehensive review of the electoral fraud offences and penalties in the *Commonwealth Electoral Act* and will report its findings to the Joint Standing Committee on Electoral Matters.[43]

Secondly, the committee notes that the increase in penalties for the most serious electoral offences only applies to Legislative Assembly and Brisbane City Council elections and referendums.[44] The penalties for equivalent offences in the *Local Government Act 1993* (which deals with local government elections apart from those relating to the Brisbane City Council) have not been likewise increased. Shepherdson suggested that steps should be taken to try and prevent conduct the type of which the inquiry heard affecting not only elections covered by the *Electoral Act* but elections for local government including the Brisbane City Council.[45]

Thirdly, the committee supports a 'tough' stand on electoral offences and recognises that increased penalties might not only have a greater deterrent effect but also raise the priority that police services give to the investigation of electoral offences.[46] However, the committee

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43 See the Government's response to recommendation 12 of the Joint Standing Committee on Electoral Matters' electoral fraud report, n 12.

44 While the *Electoral Act 1992* defines 'election' to mean an election of a member or members of the Legislative Assembly, s 17(5) of the *City of Brisbane Act 1924* (Qld) applies the *Electoral Act* to the conduct of elections for the Brisbane City Council.

45 Shepherdson report, n 13 at 165.

46 Queensland. Parliament. Legal, Constitutional and Administrative Review Committee, *The prevention of Electoral fraud: Interim report*, report no 28, Goprint, Brisbane, November 2000 at 56-59.

has some reservations about the reliance on substantial jail terms for offences such as voting if not entitled, and false or misleading information. As the discussion in section 2.7 on mandatory minimum sentences reflects, imprisonment is not always the most appropriate or constructive sentencing option.

Substantial fines and periods of community service might often be more useful and appropriate sentences than substantial jail terms for offenders convicted of the electoral offences which the bill purports to include in the Criminal Code. This accords with the principles in the *Penalties and Sentences Act*, s 9(2) that imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable. That Act also recognises the courts' general discretion to impose such alternative sentences.[47]

The committee supports the use of alternative sentencing options such as substantial fines and community based orders in offences such as this where the offender does not impose a serious and violent threat to the community.

4. RECOMMENDATION

The committee recommends that the Legislative Assembly not proceed further with the Electoral (Fraudulent Actions) Amendment Bill 2001 in any form.

[47] See the *Penalties and Sentences Act 1992* (Qld), part 4 (Fines), part 5 (Intermediate orders), part 6 (Intensive correction orders) and part 9 (Imprisonment).

Appendix A: Submissions Received

1 Mr P Schuback

2 Mr G Orr

3 Professor C Hughes

4 Mr R C Sadler

5 Queensland Council for Civil Liberties

6 Mr A Sandell

7 The Hon P de Jersey AC, Chief Justice

8 Dr G Carney

9 National Party of Australia (Queensland)

10 Electoral Commission, Queensland

11 Confidential

12 Confidential

13 Crime and Misconduct Commission

DISSENTING REPORT

(Miss F Simpson MP, Mrs L Cunningham MP and Mrs D Pratt MP)

At the outset, we must express our extreme disappointment that the Attorney-General has introduced a bill implementing the electoral reforms announced by the Premier in Barcaldine in January 2001 (namely, the Electoral and Other Acts Amendment Bill 2002) prior to the committee reporting on the Electoral (Fraudulent Actions) Amendment Bill 2001. This was contrary to the Attorney's express statement in the House that he was aiming to introduce his electoral reform bill as soon as possible after this committee reported.[48] The Attorney's statement was, in the event, misleading. Moreover, his actions have been contemptuous of the committee's inquiry process.

Further, we must express our disagreement with the report of the majority of the committee members.

Electoral fraud is an affront to our democratic system of government. There must be a high level of community confidence that elections are conducted in a free, honest and fair manner using a true and accurate electoral roll. Those who do any fraudulent act with the intent to influence the outcome of an election held under the *Electoral Act* must be punished for their actions.

The Electoral (Fraudulent Actions) Amendment Bill 2001 seeks to achieve this objective. By inserting a 'catch all' offence provision in the *Electoral Act,* the bill will ensure that, where there is no other specific offence provision, the fraudulent actions of those who intend to influence the outcome of an election are punished. In other words, the proposed provision provides an important 'safety net' to underpin free and fair elections.

As the majority recognises, some of the issues raised in the report regarding the bill are in the nature of minor drafting issues which can be attended to by amendment. An amendment should be moved to clarify what constitutes an election outcome, that is, to reflect that the proposed offence provision is intended to capture acts intended to affect an election in terms of the number of votes (including preferences) cast and counted in an electoral district. Proposed s 160A(2) should be amended so that the acts described in that sub-clause constitute *prima facie* rather than conclusive evidence.

The member who introduced the bill has also stated that he intends to introduce an amendment to overcome the time limitation of one year on prosecuting offences under the proposed offence provision.

The majority recognises that such amendments would overcome many of its concerns but considers the issue of *potential* constitutional validity as the critical factor in recommending that Parliament not proceed with the bill. We do not believe that the risk of the bill being challenged and found to be invalid is such that Parliament should not proceed with the bill.

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[48] Hon R J Welford MP, Ministerial Statement: Electoral reforms, *Queensland Parliamentary Debates (Hansard)*, 13 December 2001 at 4593.

The High Court is the adjudicator of constitutional validity. The Parliament should not presuppose the court's decision on this issue.

We commend the bill to the House as a useful adjunct to other specific measures designed to prevent electoral fraud in Queensland.

Miss Fiona Simpson MP
Member for Maroochydore
Shadow Minister for Health;
Shadow Minister for Tourism; and
Shadow Minister for Women's Policy

Mrs Liz Cunningham MP
Member for Gladstone

Mrs Dorothy Pratt MP
Member for Nanango