AUSTRALIAN ELECTORAL COMMISSION

SUPPLEMENTARY SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

FURTHER AEC RESPONSES TO OTHER SUBMISSIONS AND TO HEARINGS

Canberra

23 July 1999

CONTENTS

CONTENTS (cont.)

1 Introduction

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the Joint Standing Committee on Electoral Matters (JSCEM) in response to its "Inquiry into the 1998 Federal Election", as advertised on 23 January 1999 in all major national newspapers, and is supplementary to submission No 88, entitled "The Conduct of the 1998 Federal Election", of 12 March 1999 (volume 3); submission No 159, entitled "The Admissibility of Provisional Votes", of 23 March 1999 (volume 4), and submission No 176, entitled "AEC Responses to other Submissions and to Hearings", of 4 May 1999 (volume 7).

1.2 The AEC now provides responses to written submissions Nos 164 to 208 from other organisations and individuals, and to issues raised by other witnesses and by JSCEM members at the public hearings of 11, 14 and 21 May, and 22 and 29 June 1999. The JSCEM Secretariat has advised that there are no submissions Nos 168 or 178.

1.3 The AEC makes three recommendations in this submission, two of which involve amendments to the *Commonwealth Electoral Act 1918* ("the Electoral Act") and the *Referendum (Machinery Provisions) Act 1984* ("the Referendum Act"). These recommendations are in addition to the 29 recommendations in submission No 88, the one recommendation in submission No 159, and the five recommendations in submission No 176.

2 Summary of Recommendations

Recommendation 1: that section 222 of the Electoral Act (and section 46 of the Referendum Act, as applicable) be amended to provide a heading "Absent Voting", and to include the detailed procedures relating to the handling of ballot papers similar to those provided in sections 200E and 235; to delete section 233(2); and to delete the unnecessary reference to multiple voting in section 222(4).

Recommendation 2: that the relevant provisions of the Electoral Act and the Referendum Act be amended so that:

> (a) Australian citizens overseas applying for enrolment may, as an alternative to having their enrolment application witnessed, attach to their enrolment application a photocopy of the page of their passport which confirms their personal details; and
>
> (b) Australian electors overseas applying for a postal vote or completing a postal vote certificate may, as an alternative to having those forms witnessed by an authorised witness, attach to their forms a photocopy of the page of their passport which confirms their personal details.

Recommendation 3: that the JSCEM recommend to the Government that funding be provided to enable the re-establishment of the Aboriginal and Torres Strait Islander Electoral Information Service (ATSIEIS).

3 Submission No 164 – Dr Amy McGrath

3.1 The complaints and allegations over the past decade about electoral fraud, raised by Dr McGrath, the H S Chapman Society, and associated individuals, are well known to the AEC and should be familiar to the JSCEM. The promotion by the H S Chapman Society of 'limited vote tracing', as it operates in the United Kingdom, was addressed by the AEC in part 10 of submission No 88, and submission No 161 from Dr McGrath, has already been responded to at part 40 of submission No 176.

3.2 A former Electoral Commissioner, Dr Colin Hughes, has published an article entitled *"The Illusive Phenomenon of Fraudulent Voting Practices"*, in response to Dr McGrath's publication, *"Corrupt Elections"*, which is copied as Attachment 27 to submission No 88. Another former Electoral Commissioner, Mr Brian Cox, has voiced similar criticisms of Dr McGrath's submissions in his oral evidence to the JSCEM on 14 May 1999. Reference might also be made to AEC submission 97 of 23 October 1996, entitled *"Allegations of Electoral Fraud"*, to the previous JSCEM, in response to many of the issues raised by Dr McGrath at the inquiry into the conduct of the 1996 federal election, which are recycled in her submissions to this inquiry into the conduct of the 1998 federal election.

3.3 The AEC has not responded directly to many of the complaints and allegations raised by Dr McGrath in her written submissions because these have been dealt with at length before previous JSCEMs. However, the AEC is prepared to provide further written responses to any of the complaints and allegations in Dr McGrath's written and oral submissions to this inquiry, if the JSCEM is prepared to particularise any matters of interest. Dr McGrath also provided oral evidence to the JSCEM on 14 May 1999, during which she elaborated on the themes raised in her two written submissions to date to this inquiry, and the AEC has responded to this oral evidence later in this submission at part 46.

3.4 Dr McGrath's first recommendation is:

> That the JSCEM consider inclusion of acceptable definitions of fraud and irregularities in the Electoral Act.

3.5 Dr McGrath's recommendation overlooks the fact that the Electoral Act already contains an array of specific offences in Part XXI, such as forgery, misleading statements in electoral forms, multiple voting, impersonation etc, which have functioned quite adequately over the past century for the purposes of detecting, investigating and, where appropriate, prosecuting examples of "electoral fraud". Dr McGrath may also not be aware that the Australian Federal Police (AFP) conducts formal investigations into possible offences referred by the AEC, and that Commonwealth Director of Public Prosecutions

(DPP) advises the AEC on the prosecution of electoral offences in accordance with the *"Prosecution Policy of the Commonwealth"*.

3.6 The mere fact that these offences are referred to colloquially and collectively as "electoral fraud", by Dr McGrath herself, as frequently as by the AEC and the JSCEM, does not imply that a separately defined offence of "electoral fraud" is required in the Electoral Act. The AEC has no indication that either AEC staff, the AFP, the DPP, or the courts, have found the current offences in the Act difficult to interpret or administer at a general level.

3.7 Further, for the purposes of disputed elections under Part XXII of the Electoral Act, section 352 defines "illegal practice" as any contravention of the Act or regulations, a definition broad enough to encompass every offence listed in the Electoral Act, including multiple voting and impersonation. Finally, sections 360(3) and 362 of Part XXII of the Act make it clear that any contravention of the Act can result in the voiding of an election.

3.8 However, if the JSCEM is minded to pursue Dr McGrath's suggestion that the Electoral Act should contain definitions of "fraud" and "irregularity", then the Director of Public Prosecutions and the Criminal Justice Branch of the Attorney-General's Department would be important sources of professional advice on how such (unspecified) definitions would mesh with the present framework of civil and criminal law at the federal level.

3.9 Dr McGrath's second recommendation is that:

> The AEC should prepare a manual of procedures for investigating fraud and irregularities, available to all who seek access to it so that an electoral 'neighbourhood' watch can be pursued whereby the system can become 'user-friendly' in the only way that it is not 'abuser-friendly', and the secrecy, which has given undue mastery to the AEC, and destroyed scrutineering, will be opened up.

3.10 This recommendation, that a manual be provided by the AEC for all those who wish to independently police the electoral rolls in their 'neighbourhood watch', fails to acknowledge the procedures already advertised by the AEC in its "Objections to the Roll" pamphlet copied at **Attachment 1**. This pamphlet is based on Part IX of the Electoral Act, which is specifically designed to allow any elector to object to the enrolment of any other elector in the same Division. Dr McGrath also fails to acknowledge the many developments and enhancements to AEC roll maintenance procedures already reported to the JSCEM at part 4 of submission No 88.

3.11 In the context of Dr McGrath's repeated claims that widespread and organised electoral fraud is endemic in the federal electoral system, and that a legal definition of "electoral fraud" and a manual for "neighbourhood watch" are required, it is not surprising that the same dubious examples of alleged electoral fraud at past elections are recycled in support of her latest recommendations. These alleged examples, from the 1993 election in the Divisions of Dickson and Macquarie in particular, are dealt with in further

detail in part 46 below in response to Dr McGrath's oral evidence of 14 May 1999.

3.12 Dr McGrath's third recommendation is:

> That the JSCEM should take note of the fact that the AEC and Australia Post are both involved with all three tiers of government – Commonwealth, States and Councils. The integrity and experience of one is integral with the other. And if any stage of their operations is as corrupt as 'insiders' have said it to be, the JSCEM should not accept such unsatisfactory assurances from Australia Post and the AEC that all is well.

3.13 The implication behind this recommendation is that the AEC and Australia Post are politically corrupt organisations colluding to destroy democracy in Australia by taking advantage of their apparent close involvement with all levels of government (see also submission No 185 from Mr Allan Viney). Apart from the gratuitous attack on the professional integrity of the many thousands of ordinary Australians who work for both organisations, this "recommendation" assumes a political conspiracy of gigantic proportions. If the JSCEM believes there is anything worth pursuing in this matter, then it is suggested that the respective Ministers responsible be given an opportunity to respond.

3.14 Dr McGrath's fourth and final recommendation is:

> That a Commonwealth Ombudsman to develop a data base of electoral law and judicial decisions and of justifiable complaints and grievances of those directly involved or the public at large. It should be charged with bringing any reasonable matters to the attention of the Parliament or the Australian Electoral Commission.

3.15 Dr McGrath has concluded that complainants should be able to by-pass the judicial consideration of election disputes by the Court of Disputed Returns, and that an electoral Ombudsman should be established, with undefined non-judicial powers, presumably on the assumption that any AEC investigation or judicial consideration of the same complaints might be tainted by political bias.

3.16 Apart from the costs involved in establishing an entirely new office with powers that would essentially duplicate those of the AEC in many respects, this recommendation fails to acknowledge the present availability of the formal review of administrative decisions that affect the rights of citizens (through the Ombudsman or the Administrative Appeals Tribunal, for example), and the consideration of complaints such as her own by parliamentary committees such as the JSCEM.

3.17 Further, Dr McGrath has failed to mention in this context that she has approached the Commonwealth Ombudsman recently with complaints about the performance of the AEC and its administration of elections, and has had these complaints duly investigated within the powers already available to the Ombudsman (see paragraphs 40.4 and 40.5 of submission No 176).

3.18 Finally, Dr McGrath may not be aware that the AEC publishes a series of Electoral Backgrounders, which discuss many of the important judicial decisions in electoral matters over the last century. These Backgrounders are available to the public in either hard copy or on the AEC Internet site at www.aec.gov.au.

3.19 In conclusion, if the many written and oral submissions made to this parliamentary committee by Dr McGrath and her colleagues over the past decade are looked at collectively, it would appear that there is a desire by this group to effectively dismantle the electoral reforms made in an overwhelmingly bipartisan manner by the Australian Parliament in 1983, based on the recommendations of the Joint Select Committee on Electoral Reform. Further, it appears that the preference would be a "return" to an electoral system based on an essentially dated and irrelevant "English village" model, where personal knowledge of the local neighbourhood was thought to be the only effective guardian against electoral fraud.

3.20 At best, the AEC regards this long-running campaign by Dr McGrath and her associates as misguided. It fails to acknowledge, at the very least, the operational complexities involved in the administration of compulsory enrolment and voting in a country as geographically large and culturally diverse as Australia, and the high regard in which the capacity of the modern Australian electoral system to deliver the franchise to all citizens is held internationally. Further, to the extent that the electoral system in the United Kingdom is held up by Dr McGrath and her associates as a model to which Australians should aspire, they appear to disregard the substantial electoral reform movement now underway in that country.

3.21 For the purposes of informing the JSCEM on the electoral reforms now actively under consideration in the United Kingdom, **Attachment 2** copies the September 1998 Report of the Home Affairs Committee of the House of Commons. This Report recommends, amongst other things, introducing a rolling enrolment register, allowing electors to cast an ordinary vote anywhere in an electorate, introducing pre-poll voting, rejecting voter identification, and establishing a permanent and independent Electoral Commission.

3.22 Further, in October 1998, the United Kingdom Independent Commission on the Voting System recommended the replacement of first-past-the-post voting with preferential voting, and the recommendations and conclusions of the Commission are copied at **Attachment 3**, for the information of the JSCEM.

3.23 That is, it would appear that those who have the most immediate interest in reform of the electoral system in the United Kingdom are moving in the direction of the Australian way of administering and conducting elections, which is in itself a testament to the strength of the underlying framework of the Australian electoral legislation.

4 Submission No 165 – Peter Cork

4.1 In his submission, Mr Cork suggests that:

> the committee not only investigate voting practice at a Federal level, but also at a State level as well. I note that in the information packs presented by the AEC that there are instances of indiscretions or breaches of law, which have been committed during State elections, and which are cited as examples in the Federal information packs (eg Electoral backgrounder No 6). In addition, I believe that an investigation should be carried out into voting practices regarding local council candidate campaigns and elections, possibly by this committee, or instigated by its recommendation…

4.2 Mr Cork may not be aware that on 10 December 1998, the Special Minister of State, Senator the Hon Chris Ellison, made the following reference to the JSCEM:

> That the Joint Standing Committee on Electoral Matters inquire into and report on all aspects of the conduct of the 1998 federal election and matters related thereto.

4.3 That is, as the AEC understands it, the JSCEM has been given no reference to inquire into the conduct of State or Territory elections, or into the conduct of local government elections. Indeed, it would be most unusual for a committee of the Federal Parliament to inquire into electoral matters that are properly the domain of separate committees of State/Territory Parliaments under their own electoral legislation.

4.4 However, it might be noted that the AEC does conduct some local government elections, on a fee-for-service basis with State Governments, within the terms of section 7A of the Electoral Act. These local government elections are conducted under State legislation, and the ultimate responsibility for the legislation and the procedures as expressed in contractual arrangements with the Commonwealth remains properly with the State Parliaments, and not with the Federal Parliament, except to the extent that the conduct of such elections reflects on the corporate performance of the AEC.

4.5 In relation to Mr Cork's mention of references made in AEC publications to judicial decisions on electoral matters made by State/Territory Supreme Courts, there is nothing untoward in this. The decisions of the courts in other jurisdictions provide important guidance in the interpretation of similar laws, in electoral matters, as in any other.

4.6 Mr Cork refers to:

> a constant flow of extraordinarily concerning reports on suspicious practices and serious abuses concerning the honesty and integrity of the voting system in this country.

4.7 It may well be that Mr Cork is referring to the publications and submissions of Dr Amy McGrath, and other members or associates of the H S

Chapman Society, who have for some time promoted such views about the federal electoral system. The AEC has already addressed these issues in general terms in part 10 of submission 88, in part 40 of submission No 176 in response to submission No 161 from Dr McGrath, and in this submission in part 3 above in response to submission No 164 from Dr McGrath, and in part 46 below in response to the public hearings of 14 May 1999.

4.8 In relation to Mr Cork's complaint about the marking of ballot papers with pencil, section 206 of the Electoral Act requires that:

> each voting compartment shall be furnished with a pencil for the use of voters.

4.9 Although there is nothing to prevent voters from marking their ballot papers with their own ink pens, experience has shown that pencils are more universally reliable than pens for marking ballot papers. Polling officials check and sharpen pencils as necessary throughout polling day, and spare pencils are kept by the officers-in-charge of each polling place.

4.10 The 1993 JSCEM considered the issue of pencils in polling booths, and the November 1994 JSCEM Report concluded at page 45 that:

> 4.3.44 No improvement in security would be achieved by marking a ballot paper in an indelible substance. Regardless of the writing implement used, a voter can cross out or alter a mark and replace it without rendering the vote informal. Also, security of ballot papers is guaranteed by all handling of ballot papers being open to scrutineers, and the secure storage of ballot papers in sealed parcels. Allegations of tampering are virtually unheard of, and certainly no evidence of this was received during the inquiry.

4.11 To put the issue of the possible fraudulent alteration of pencil marks on ballot papers in context, the following extract from pages 478-480 of the article by the former Electoral Commissioner, Dr Colin Hughes, at Attachment 27 to submission No 88, might be of interest:

> Use of pencils goes back to the beginning (s.128 in 1902, now s. 206); the perceived threat is that entries can be erased (though erasing is a fairly conspicuous activity) or that corrupt polling officials with bits of lead pencil under their fingernails can alter marks whilst handling ballot papers (which is more discreet)…two matters [are raised].
>
> The first is that it is undeniable that the integrity of elections depends on some 60,000 polling officials…[many] are ordinary citizens, federal and state public servants, school teachers, bank officers, and the like, and often their spouses and grown-up children. They are chosen entirely at the divisional level, and in many electoral divisions constitute a fairly stable workforce as a new returning officer inherits his predecessor's list. Any of them with doubts about their colleagues, and any returning officer, has access to the media, the police and the JSCEM as well as to more senior electoral officials….
>
> Scrutineers do not handle ballot papers so polling officials are the only people who would "change the markings" if that were to happen during the initial

> count at 6 pm or subsequently in transit to the divisional office. Once there only the regular divisional staff or the temporaries hired for a few weeks would have the opportunity, but if it were done then there would be a disparity between the preliminary count figures held at divisional, state and national levels and eventually published…..
>
> The second point concerns the idea that someone could "change the markings". Such a fear has a long history in the United States, where it depends on the nature of ballot papers in that country. If there are several offices being voted for on the same ballot paper, and a voter has not offered a choice for some of the contests, then malpractice might fill in vote for those. Or a vote could be rendered invalid by adding one vote or deducting one vote; "change" implies a net gain of two with one deducted and one added, like converting a voter by argument.
>
> Altering numbers on a ballot paper where every box must be filled…, and almost all are, is another matter. Whilst there is no reason why it could not be done as effectively in ink as in pencil, the consequences would be as apparent. Rubbing out one series of numbers (the average now is about five for the House) and writing in a different set is time-consuming and could not be done during the count unless all officials and scrutineers present were part of the conspiracy….

4.12 Mr Cork recommends the introduction of a national computerised voter identification system for polling day, and possibly, computerised voting. The June 1997 JSCEM Report considered various proposals for enrolment and voter identification, and made a number of recommendations to tighten up enrolment procedures, which have been taken up in the Electoral and Referendum Amendment Bill [No 2] 1998, currently before the Parliament.

4.13 The prospects for computerised voting were addressed by the AEC as part of submission No 90 of 20 September 1996 to the previous JSCEM. This discussion has been extracted for the information of this JSCEM at Attachment 9 to submission No 176. Mr Cork suggests that one of the benefits of a computerised voting system would be that the result of the election would be known within minutes of the poll closing. In fact, as the AEC has already indicated in part 9 of submission No 88, the result in the House of Representatives was clear by 8 pm on election night, a mere two hours after the close of the poll for the 1998 federal election.

5 Submission No 166 – Tony Lawler MP

5.1 The submission provided to the JSCEM by Mr Lawler is, with a few minor amendments, the same as a ministerial representation to the Special Minister of State on the same date. The Minister replied on 23 July 1999 in the following terms, on advice from the AEC:

> In 1995, the *Commonwealth Electoral Act 1918* was amended to enable Divisional Returning Officers to dispatch ballot papers to electors on the list of General Postal Voters (GPVs) immediately they are available after the close of nominations for an election. That is, GPVs do not have to apply for a postal vote. This automatic dispatch of ballot papers commences approximately 20

days before polling day. For the 1998 federal election the dispatch was on 14 September 1998. In the case of electors with weekly Saturday postal services, this meant that ballot papers were delivered two Saturdays before polling day and, depending on the situation of the mail contractor, could be completed and returned on that mail run or picked up by the contractor on one of the two following runs.

The AEC appreciates that electors in situations such as Mrs Nesbit do not have the same access advantages as those that live in urban areas, and must be put at some inconvenience in order to cast their vote. In fact many electors who utilise mobile polling facilities face similar and sometimes worse situations than GPVs, for they only have one opportunity to cast their vote. The mobile polling schedule is advertised and electors may have to travel considerable distances to get to the mobile polling booth and then wait if the mobile team has been delayed at a previous location. While the AEC goes to great lengths to ensure that all electors cast a vote, it is often not possible to give every remote elector the same access as urban voters.

In relation to your suggestion that remote electors receive the same consideration as overseas voters to enable their vote to be returned and counted, the timing provisions are the same. All postal ballot papers must be completed and the return envelope postmarked before the close of polls. A period of 13 days is then allowed for all postal votes to be received and included in the count. The only solution to electors in Mrs Nesbit's situation would be to allow them to complete and post their ballot papers after the close of polls. This would mean that they would be voting in the knowledge of which party had claimed victory in the election. It would also mean a further delay in the declaration of some seats. For these reasons, in addition to the fact that these electors have the opportunity to cast a ballot before the close of polls, the Government would be unlikely to change the legislation to allow this….

In her letter, Mrs Nesbit also inquires whether it would be permissible for her to fax completed ballot papers to the Divisional Returning Office. There are no legislative provisions that would allow this. Should Mrs Nesbit wish to pursue this matter further, she could write to the JSCEM. However, it is worth noting that with faxed completed ballot papers, the secrecy of the ballot would be undermined….

6 Submission No 167 – E Farrer

6.1 It appears from his submission that Mr Farrer favours first-past-the-post voting instead of full preferential voting. The defects of such voting systems are well known. In particular, under a first-past-the-post voting system, a candidate can be elected even if a majority of voters regard that candidate the worst in the ballot. Full preferential voting, which many regard as an advance on first-past-the-post, rather than a retrograde step as suggested by Mr Farrer, does not have this defect.

7 Submission No 169 – Joe Pilarcik

7.1 The issues raised by Mr Pilarcik have been addressed by the AEC in part 3 of submission No 176.

8 Submission No 170 – Brian P McDermott

8.1 In his submission, Mr McDermott says that:

> It has long been known that the practice of bussing voters around certain marginal electorates has been carried out now for many years. There is considerable and well-known evidence that the main offenders in this area are the socialists, and the left-wing section of the Australian Labor Party.

8.2 According to Mr McDermott this is done for the purposes of (a) voting a number of times in the same name, (b) voting in the name of a person who has died, (c) voting in fictitious names, or (d) voting in the names of people who do not vote because they are conscientious objectors. The only material provided by Mr McDermott to support these generalised allegations of electoral fraud is:

> One of the most blatant examples of this practice was the time some years ago when Michael Lavarch was "elected" here in Queensland. One group of concerned citizens carried out extensive research after this by-election, to find that illegal votes were as high as fifteen (15) per cent! Thus Michael Lavarch was put into parliament, and took his place in parliament illegally.

8.3 Mr Lavarch did not take his place in Parliament illegally after the 1993 federal election. Mr McDermott's allegations are similar to those made to the 1993 JSCEM, in submission No 135 of 1 December 1993, by Mr Geoff Moss, Secretary of the Queensland-based "Enterprise Council". After receiving a report of extensive investigations made by the AEC into these allegations, the November 1994 JSCEM concluded at pages 64-65 that:

> 4.6.5 Having examined both submissions, the Committee is satisfied that the evidence put forward by the Enterprise Council fails to substantiate its allegations. This view would appear to be shared by the Liberal candidate in Dickson, Dr Bruce Flegg…
>
> 4.6.6 The AEC did not act unreasonably in declining to challenge the Dickson result in the Court of Disputed Returns. The Committee therefore finds the Enterprise Council's accusation of political interference or improper collusion between the Commonwealth Government and the AEC to be unfounded.

8.4 Mr McDermott's allegations are also similar to those made to this JSCEM in submission No 68 from Mr E H Vaughan, in submission No 86 from Mr Arthur Tuck, and in submission No 164 and oral evidence of 14 May 1999 from Dr Amy McGrath. The AEC has responded to these submissions in parts 23 and 29 and Attachment 10 of submission No 176, and in part 3 above and part 46 below in this submission.

8.5 Mr McDermott goes on to say that:

> There is little doubt that the abolition of precinct voting has been the main cause of the practice and abuse of both bussing, and multiple voting.

8.6 Putting to one side the reference to “bussing”, for which there is no supporting information provided, the issue of precinct (and subdivisional) voting has been addressed by the AEC in part 14 of submission No 176. There is no evidence to support the suggestion that the abolition of subdivisions over a decade ago has given rise to organised and widespread multiple voting. As explained in Electoral Backgrounder No 9, entitled *“Multiple Voting”*, any individual instances of multiple voting are routinely detected, investigated and prosecuted by the AEC after every election.

8.7 In relation to Mr McDermott’s statements about the two-candidate preferred (TCP) provisional count, conducted under section 276 of the Electoral Act, it is apparent that Mr McDermott misunderstands both the purpose and the process involved, as discussed in part 9.4 of submission No 88. Mr McDermott claims that:

> We have had legal opinion from the highest authorities on these practices, and the unanimous opinion is that they are both unlawful, and unconstitutional.

8.8 The JSCEM might consider asking Mr McDermott for further detail on this legal opinion.

9 Submission No 171 – Maurice Horsburgh

9.1 The issues raised by Mr Horsburgh in relation to full preferential voting have been addressed by the AEC in part 3 of submission No 176. The AEC has no comment to make on the other issues raised by Mr Horsburgh.

10 Submission No 172 – Kym A Hall

10.1 The AEC has addressed the first part of Ms Hall’s submission in part 3 of submission No 176. In relation to the Liberal Party how-to-vote material attached to the submission, which Ms Hall describes as “lies”, the AEC responded to a similar complaint about this material during the election period. The Office of the Commonwealth Director of Public Prosecutions (DPP) advised the AEC that the material did not appear to be in breach of section 329(1) of the Electoral Act, particularly given that Pauline Hanson’s One Nation Party lodged a three-way (ALP, Liberal Party, National Party) group voting ticket for the South Australian Senate election, under the relevant provisions of the Electoral Act.

11 Submission No 173 – Rodney Johnstone

11.1 This submission does not directly raise any specific allegations in relation to the administration by the AEC of the provisions of the Electoral Act relating to party registration. While the “Australian Family Party” may have succeeded in registering in some States, it has not yet been able to meet the legislative criteria for federal registration.

12 Submission No 174 – Jay Knoss

12.1 The AEC has addressed the issues raised by Mr Knoss in part 3 of submission No 176.

13 Submission No 175 – Bruce Ingle

13.1 The AEC has addressed the issues raised by Mr Ingle in part 3 of submission No 176.

14 Submission No 177 – Graham F Smith

14.1 Mr Smith is an employee of the Australian Electoral Commission and is the Divisional Returning Officer (DRO) for the Queensland Division of Forde. It is noted that Mr Smith is the only one out of 148 DROs nationwide who has provided a personal submission to the JSCEM. On 22 January 1999, the Australian Electoral Officer for Queensland (AEO Qld), Mr Bob Longland, invited all Queensland DROs to contribute possible items for inclusion in the major AEC submission No 88 of 12 March 1999. Mr Smith made no input to this standard corporate process, and the AEC was not aware of the existence of his personal submission until it was released for publication by the JSCEM in May 1999.

14.2 The JSCEM should be aware at the outset that Mr Smith's personal recommendations for amendments to the Electoral Act were made without the benefit of the usual legal and strategic evaluations by AEC Management Board, and apparently without any reference to the recommendations made by the AEC in submissions No 88 and 159 filed with the JSCEM on 12 March and 23 March 1999.

14.3 *The Objection Process*: Mr Smith's recommendations for amendment to sections 114 and 115 of the Electoral Act could backfire and result in significant cost increases, elector inconvenience, and complications and delays in the election process.

14.4 Mr Smith claims that in applying the enrolment objection criteria the Divisional Returning Officer (DRO): "has to be sure that … the elector no longer lives anywhere in the same Subdivision". In fact, section 114(2) of the Electoral Act only requires the DRO to have "reasonable grounds for believing that the person is not entitled to be enrolled for that Subdivision". In case those "reasonable grounds" turn out to be incorrect, and electors are wrongly removed from the roll, the Act provides for reinstatement to the roll of the names of any electors whose names were removed in error, either independently of the preliminary scrutiny under section 105(1)(f), or in conjunction with it, under sections105(4) and (5).

14.5 While many of the enrolment objections initiated by DROs under the periodic Electoral Roll Reviews (or doorknocks) conducted in the past by the AEC under section 92 of the Electoral Act may have been based on advice from others about electors whose whereabouts were unknown, enrolment

objections based on the recently implemented Continuous Roll Update (CRU) process are likely to result in far fewer objections of this type (see part 4.4 of submission No 88).

14.6 Under the CRU process, information obtained from other government agencies (such as Australia Post for example) will be used to stimulate reviews of the roll at particular addresses where the AEC receives advice that a change in occupancy has occurred. This information typically includes advice from the electors themselves about their former and new residences. This assists the AEC in targeting its objection action against those electors who are known to have left the relevant (sub)division, without affecting those who have moved within that (sub)division.

14.7 This means that there will be far fewer provisional votes (and other declaration votes) issued to electors whose names were wrongly removed by objection and, as a result, even fewer enrolment reinstatements under sections 105(4) and (5) of the Act. If the recommendation made by the AEC in part 9.12 of submission No 88, to break the nexus between the admission of provisional votes and reinstatements to the roll, is adopted, the problems highlighted in this area will diminish to the point of insignificance.

14.8 Mr Smith proposes that electors be required to re-enrol for any change in address or, alternatively, to limit the area within which one may move without re-enrolling to the same suburb or locality. The AEC has already recommended at paragraph 2.10 of submission No 159 that the elector's address, rather than (sub)division of residence, be made the basis of enrolment, and that the basis for objection action become non-residence at the place of enrolment.

14.9 Mr Smith's recommendation to limit the area within which electors may move without re-enrolling to the same suburb or locality, is analogous in some respects to proposals for the reintroduction of subdivisional boundaries, which were not supported by the Government following the 1996 JSCEM inquiry. The frequent changes to the true boundaries of many suburbs and localities, combined with the creation of informal localities, suburb creep and gentrification, already leads to a situation in which many electors do not know the correct names of the suburbs and localities in which they live. When these electors move to a nearby residence they would therefore not necessarily know whether their new address is in the same suburb or locality, and in any event the suburb or locality name could change after the move.

14.10 To implement Mr Smith's recommendation would require the AEC to track all suburb and locality name changes (over which it has no control) as they occur and, before deciding on the admissibility of the declaration votes of the electors whose names have been removed by objection action as a result of a move to a 'nearby' address, to ascertain whether the electors moved before or after the name change. This would complicate and delay the preliminary scrutiny process immeasurably.

14.11 *Schedule 3 Preliminary Scrutiny*: Adopting tighter admissibility criteria (that is, checking for previous enrolments at only one previous election instead of two) during the RMANS-based enrolment eligibility checks, as recommended by the AEC at paragraph 2.5 in submission No 159, and as also recommended by Mr Smith, will not of itself reduce the time taken to complete the preliminary scrutiny. The reason for this is simple: the time taken by staff to input electors' details into the RMANS preliminary scrutiny sub-system, and to assess the matched records retrieved by that system, would not change.

14.12 Mr Smith's other recommendation, to introduce a check that the elector has lived at the claimed enrolled address at some time within the three months before polling day, before conducting the RMANS-based enrolment checks, would be likely to increase, not decrease, the time needed to complete the preliminary scrutiny. At the 1998 election, at least 20% of declaration votes (that is, all those that required the RMANS-based checks) would have required this additional checking, and it is doubtful that this would have resulted in any greater reduction in the time required for the RMANS-based checks. As it is, declaration voters are already asked for the date on which they changed address (if applicable), so that this can be taken into account *during* the RMANS-based checks, if necessary.

14.13 Mr Smith's recommendation would disenfranchise those electors who are temporarily living at addresses they do not regard as their permanent place of living. This would affect students studying in another city where they are only temporarily resident, or electors travelling interstate or overseas for extended periods, for example. Further, electors whose names were actually on the certified lists of voters at the polling booth, but were not found by the polling official (some 20-25% of provisional voters representing about 0.2% of ordinary voters) would also be disenfranchised.

14.14 For reasons of efficiency and economy, these particular provisional votes are usually checked through RMANS immediately, rather than repeating the certified list checks. Absent, pre-poll and postal votes are subject to the same uncertainties when it comes to being found on the certified lists when checked by scrutiny staff, and some of these votes would probably be wrongly rejected, and the electors wrongly disenfranchised.

14.15 Mr Smith's recommendation for the introduction of a three-month test of enrolment eligibility for declaration voters (only) would effectively mean a return to the unworkable situation that existed over a decade ago, and indicates an unfortunate lack of appreciation of the historical record. In the December 1986 Report of the Joint Select Committee on Electoral Reform it was recommended that the requirement for an elector to have lived in the Division for three months be repealed, for the following reasons.

> …. the 3 month rule is … in practical terms incapable of across the board enforcement. More seriously, however, its operation is anomalous in that it only works to disenfranchise those electors who have not correctly maintained their enrolments, but are honest enough to admit it. This clearly

> raises the general question of whether the rule continues to serve any useful purpose….
>
> ….The rule, it should be emphasised, is not an obstacle to fraud or impersonation. Very few electors were ever asked the complex pre 1983 prescribed questions (one of the reasons for their repeal) and there is nothing to suggest that any more were asked the sub-section 229(3) question regarding places of living during the previous 3 months.
>
> Any person contemplating fraudulent voting can, without difficulty state addresses or make declarations which will not of themselves prevent the admission of the vote. It must be emphasised that the ordinary voter's answer to the question, whether true or false, is for all practical purposes - as far as the vote being recorded and placed in the ballot box (and hence 'irretrievable') - conclusive.

14.16 The May 1989 JSCEM Report revisited the issue of the three-month test and concluded that it should not be re-introduced. Instead, the May 1989 JSCEM Report made recommendations 22 and 23 to limit the automatic re-enrolment of voters once they had been removed from the Roll by habitation review. However, the Government Response to these recommendations, on 30 April 1992 (Senate Hansard p 1931), was as follows:

> Recommendations 22-23 propose that electors should be only once restored automatically to the electoral roll after they have been removed by objection action and subsequently cast a declaration vote. The proposal is based on the perception that large numbers of people are maintaining incorrect enrolment addresses by the process of declaration voting.
>
> Subsequent to the Committee's deliberations the Australian Electoral Commission has introduced a revised declaration form which the Government believes will largely resolve the problem. It should also be noted that the Committee's proposal is likely to result in the disenfranchising of a significant number of voters who do in fact reside at the enrolled address.

14.17 In summary, Mr Smith's recommendations in relation to the objection process and the preliminary scrutiny would not reduce the time required for its completion, and would not only complicate procedures but also effectively disenfranchise many electors. The AEC opposes these recommendations and suggests that the JSCEM follow the more considered recommendations already made by the AEC in part 9.12 of submission No 88 and in submission No 159, in the context of such recent enhancements as the Address Register and Continuous Roll Update, discussed at parts 4.3 and 4.4 of submission No 88.

14.18 *Pre-Poll Ordinary Voting*: The AEC has already addressed this issue in part 8.3 and recommendation 14 of submission No 88. The AEC opposes any extension of such a system to neighbouring Divisions, as recommended by Mr Smith. In metropolitan areas there can be as many as nine adjoining Divisions (for example, Macquarie in NSW), and in rural areas there can be as many as twelve adjoining Divisions (for example, McEwen, Victoria). The consequent complications could lead to increases in sorting, transfer and storage

problems within these Divisions, which in turn could lead to security concerns, and possible disenfranchisement.

14.19 *Referendum Ballot Paper*: Mr Smith's recommendation that the referendum ballot paper be amended so as to require a voter to mark a tick and/or a cross in two already labelled "Yes" and "No" boxes beside each question, is supported by no rationale beyond Mr Smith's personal opinion that it might be easier, quicker and less prone to error. In any case, Mr Smith appears not to appreciate that the JSCEM recommendations from this inquiry are unlikely to be tabled and translated into legislation before the 1999 Referendum on the Republic. The AEC opposes this recommendation on the simple grounds that it is in fact *more* complicated than the current system and could increase the informality rate for referendums.

14.20 The current system, which requires the voter to write "Yes" or "No" in a single blank box beside each question, has been in operation since the 1967 referendum. Inclusive of this 1967 referendum, there have been six national referendums to amend the Constitution in a 30 year period, with no relevant research demonstrating that the current system for marking referendum ballot papers has raised any more problems than existed under the previous system.

14.21 From Federation up until the 1951 referendum, voters were required to write the number "1" in the box marked "Yes" beside each question, *and* the number "2" in the box marked "No" beside the same question (or *vice versa* depending on the voter's preference). The opportunities for confusion in such a system should be apparent, and Mr Smith's recommendation would appear to raise similar problems. Further, there is the possibility that Mr Smith's system could inadvertently skew the outcome, depending on whether the "Yes" or the "No" box was printed first on the ballot paper. No such possibility is available in the current system.

14.22 *Senate Ballot Paper:* Mr Smith's recommendation that the Electoral Act be amended to provide for two Senate ballot papers is a novel one, and has not been suggested by any other group or organisation concerned with the size of the Senate ballot paper. Mr Smith's further suggestion, that after its introduction the new system be evaluated by exit polls at polling booths, is also a novel form of policy development. In relation to how "user-friendly" the current system is, it might also be noted that the informality rate for the Senate is very low, suggesting that there is no need for such a radical departure from current practice. The AEC has already addressed the issue of the size of the Senate ballot paper at parts 5.2, 7.3, 8.4 and recommendation 11 of submission No 88, and at paragraphs 43.42 to 43.43 of submission No 176.

14.23 The AEC opposes Mr Smith's recommendation, on the basis that it would seriously infringe on the rights of independent, ungrouped candidates, whose names would only appear on one ballot paper. It would mean that voters who selected the "GVT only" ballot paper would not be able to see names of the candidates in each group as they cast their vote (unless they had previously consulted, and remembered the details of, the GVT poster,

which voters rarely do). Further, such a system could compromise the secrecy of the ballot, particularly in small polling booths. Any voter who chose the "GVT only" ballot paper would be effectively announcing that they were not voting for an independent candidate. Finally, such a system would introduce operational complications and increase pressure on costs and resources.

14.24 For example, Mr Smith's proposed new system for two Senate ballot papers would produce delays at issuing points in polling booths, and consequential cost increases for the provision of extra issuing points, as issuing officers try to explain the new system and obtain a decision from electors as to which ballot paper they require; increase the cost and complexity of the scrutiny, as the AEC would be required to sort and balance two Senate papers instead of the present one; and require a redesign of the computerised scrutiny process, adding further costs and complications.

14.25 *Canvassing at Pre-Poll Voting Centres and Divisional Offices*: It is noted that Mr Smith's recommendation in relation to canvassing is a repeat of the same recommendation made by him to the 1996 JSCEM inquiry. At pages 97-98 of the June 1997 JSCEM Report, his recommendation was rejected in the following terms:

> 7.85 Section 340(1) fo the Electoral Act prohibits, on polling day, canvassing with six metres of the entrance to a polling booth. Mrs Ricky Johnston MP and Mr Graham Smith submitted that the "six metre rule" should also apply to pre-poll voting centres.
>
> 7.86 However, application of the six-metre rule would be impractical at many of the locations used for pre-poll voting. Presiding officers and candidates' representatives should have the discretion to come to sensible arrangements at individual polling places.

14.26 It is also noted that Mr Smith's recommendation appears to be in opposition to the submissions Nos 162 and 163, by the Liberal Party and the ALP Secretariats respectively, who have sought guarantees that electors can receive how-to-vote material at such locations.

14.27 As indicated in paragraphs 41.13 and 42.23 of submission No 176, the AEC agrees that voters should not be prevented from receiving how-to-vote material as they enter pre-poll voting centres and Divisional offices, particularly in crowded shopping centres. It is standard practice for most DROs to seek the cooperation of private or public owners of such premises, to ensure that all parties are accommodated, and entry and exit is not impeded.

14.28 That is, the AEC opposes Mr Smith's recommendation on the grounds that it would reduce opportunities for negotiations between interested parties to occur, and for flexible responses to be agreed according to whatever difficulties the local conditions present. (These considerations do not apply to ordinary polling booths, where boundaries are more clearly apparent, and where polling staff may be less experienced or confident than Divisional staff in negotiation and compromise with party workers.)

15 Submission No 179 – Angus C Bedford

15.1 In his submission Mr Bedford recommends the weighting of later voting preferences, but his proposal is essentially arbitrary. A comparable case could be made for weights which decline geometrically or exponentially rather than linearly.

16 Submission No 180 – Tony Abbott MP

16.1 The AEC addressed the issue of democratic party structures at part 11.7 of submission No 88, and the issue of profiteering on election funding at part 11.5 of the same submission. Essentially, it is not possible to prevent profits of some description being made on election funding and the reintroduction of direct reimbursement would be ineffectual as a solution.

17 Submission No 181 – Kitty O'Gorman

17.1 The submission from Ms Kitty O'Gorman and Mr Michael Strutt of Justice Action recommend that the AEC design and print posters specifically aimed at encouraging prisoners to vote, and that all prisoners be enrolled to vote at the time of reception as a matter of administrative course.

17.2 At the time of the 1998 federal election, the AEC was aware of 90 correctional institutions in Australia (including prisons, detention centres and remand centres), holding some 21,217 prisoners. Of the 90 correctional institutions, 578 votes were taken from 10 prisons where mobile polling took place, under section 226A of the Electoral Act. The number of postal votes cast from prisons is not known as there is no prisoner-specific application form.

17.3 All Australian Electoral Officers in the States and Territories are responsible for liaising with correctional authorities when an election is announced, and where mobile polling is to be conducted in correctional institutions, the relevant Divisional Returning Officers make direct contact to make the necessary arrangements. DROs also write to all correctional institutions in their Division enclosing postal vote application forms and a list of prisoners who are registered General Postal Voters and who will be automatically sent ballot papers. Prisoners should also have access to the print, television and radio advertisements that encourage all eligible electors to enrol and vote.

17.4 For the 1998 federal election the AEC produced a poster to be used in all correctional institutions as appropriate (this did not occur in all States but it is expected that improved uptake will occur at the next federal electoral event). Posters were provided to the eight prisons and one training centre in South Australia. In addition, in New South Wales and the Australian Capital Territory, where there are 23 prisons, 9 detention centres, and one remand centre in total, all correctional institutions were supplied with information kits containing the following materials:

- Posters encouraging enrolment and voting
- Enrolment Forms
- 20 Questions pamphlet in various languages
- Reply-paid cards addressed to the AEC for requesting information
- Postal Vote Applications and reply-paid envelopes
- Pamphlets entitled “How to fill out Ballot Papers”

17.5 Justice Action has also suggested that prisoners be enrolled to vote at the time of reception as a matter of administrative course. It is assumed that Justice Action intends that enrolment facilities be provided at the time of reception into the prison for prisoners to use as appropriate, rather than prisoners being required under compulsion from the prison authorities to complete an enrolment form at the time of reception.

17.6 Whilst it would be possible for the AEC to provide correctional institutions with pamphlets containing relevant enrolment information and contact details, for the purposes of enrolment at admission to a correctional institution at any time, this would have to be separately negotiated with each correctional institution. It should also be noted that many prisoners may need assistance with first-time enrolment; be unsure of their citizenship status and its effect on their entitlement to enrolment; or need informed advice about an appropriate address for enrolment.

17.7 Prisoners are admitted to correctional institutions for a variety of terms of imprisonment and from a variety of personal circumstances. The AEC understands that many prisoners, particularly those with short to medium terms of imprisonment, are admitted from their home addresses and expect to return to those addresses after their imprisonment. Such prisoners should properly retain their home address enrolments, rather than re-enrolling for the prison address during their imprisonment.

17.8 If an election is called during their term of imprisonment, such prisoners can either cast a postal vote after making a postal vote application, or use the mobile polling facilities in the prison. Longer-term prisoners may register as General Postal Voters and receive their ballot materials automatically when election is announced.

17.9 In summary, the AEC does not support the suggestion that prisoners be enrolled to vote as a matter of administrative course at the time of reception at a correctional institution. It would be inappropriate for prison authorities to attempt to routinely administer the terms of the legislation and there is a real risk that they might be applied inconsistently across the nation.

18 Submission No 182 – Rex Hore

18.1 Mr Hore’s submission rests on the proposition that federal elections must be conducted according to the same laws and procedures that apply in industrial elections under the *Workplace Relations Act 1996*, and the same laws and procedures that applied in the 1997 election of delegates under the *Constitutional Convention (Election) Act 1997*. This is clearly a misconceived

proposition. Further, and as obviously, the decisions of the Federal Court in relation to industrial elections conducted by the AEC under the Workplace Relations Act have no direct bearing on the conduct of parliamentary elections by the AEC under the law provided by the Parliament in the Electoral Act, for which the High Court is the final arbiter.

18.2 The AEC has addressed the legislative and administrative history of enveloping for postal ballots at federal elections at part 8.4 of submission No 88. Following recent amendments to the Electoral Act, double enveloping was used for the first time at the 1998 federal election. This did result in some problems in ballot papers being returned outside the declaration envelope, but it is suggested that these problems may be transitional, or specific to the circumstances of the 1998 federal election.

18.3 In his letter of 13 November 1998 to the JSCEM Secretariat, Mr Hore says that "a person who shall remain nameless…" attended the "Bayswater Vic office on 1 October 1998 to complete an Absentee Vote for the Federal Election". Mr Hore makes a number of complaints about this hearsay incident, including the fact that the polling official handled the marked ballot paper.

18.4 Under the provisions of the Electoral Act, absent votes can only be cast on polling day, which for the last federal election was 3 October 1998. It may be that Mr Hore's informant was casting a pre-poll vote under section 200E of the Electoral Act, which clearly provides for the issuing officer to handle the ballot papers as follows:

> (5) The elector shall then, in the presence of the issuing officer but so that the officer cannot see the vote, mark his or her vote on the ballot-paper, fold the ballot-paper and return it to the issuing officer.
>
> (6) The issuing officer shall immediately place the ballot paper in the envelope bearing the pre-poll vote certificate, fasten the envelope and …. keep the envelope in a ballot box.

18.5 Similar provisions, that require polling officials to handle ballot papers in order to ensure that they do not go astray during the voting process, apply in relation to another form of declaration voting, that is, provisional voting under section 235(6) and (7). However, whilst Mr Hore's complaint is generally misconceived, his submission does open up a technical problem that exists in the Electoral Act in relation to the legislative provisions for another form of declaration voting, namely absent voting.

18.6 The index to the Electoral Act shows no section heading for "absent voting', but the relevant provisions are to be found in section 222, entitled "Where a person may vote". This is clearly a section which has not been revised for many years, as it does not give any detail on procedures for the handling of ballot papers, such as may be found in sections 200E and 235. However, similar provisions on the handling of ballot papers for absent voting are to be found in section 233(2) of the Act, under the heading "Votes to be marked in private". On a final matter unrelated to the handling of ballot papers,

section 222(4) duplicates the offence of multiple voting already provided for in section 339(1A)(1B).

18.7 The JSCEM might consider whether section 222 of the Act should be redrafted with a clear heading to assist readers looking for the absent voting provisions; to include the detailed procedures relating to the handling of absent ballot materials similar to those as provided in sections 200E and 235; to delete section 233(2); and to delete the unnecessary reference to multiple voting.

> **Recommendation 1: that section 222 of the Electoral Act (and section 46 of the Referendum Act, as applicable) be amended to provide a heading "Absent Voting", and to include the detailed procedures relating to the handling of ballot papers similar to those provided in sections 200E and 235; to delete section 233(2); and to delete the unnecessary reference to multiple voting in section 222(4)**.

18.8 Mr Hore also complains that only pencils were provided for him to mark his ballot paper. The AEC has addressed the issue of pencils above in this submission at part 4.

19 Submission No 183 – Noel James

19.1 See response to submission No 180 above.

20 Submission No 184 – Peter Hinchliffe

20.1 This submission, which conveys a motion passed by the Kalgoorlie North Divisional Annual Conference of the Liberal Party (WA Division) Inc, is similar to a letter from Senator Eggleston, Liberal Senator for Western Australia, to the Chairman of the AEC on 5 October 1998, requesting the abolition of the House of Representatives Division of Kalgoorlie. In his reply of 27 October 1998, the Electoral Commissioner said the following:

> The redistribution of Australian States and Territories is determined pursuant to the provisions of the *Commonwealth Electoral Act 1918*. …The last redistribution of federal electorate boundaries in Western Australia was completed in March 1997. Determinations of State and Territory representation in the House of Representatives occur approximately one year after the commencement of each new Parliament (probably at the end of 1999 and again one year after the next election). It is possible that one of those determinations might trigger a redistribution by increasing Western Australia's entitlement to fifteen members in the House of Representatives. If not, the next redistribution would be undertaken in 2004.
>
> The next Redistribution Committee appointed for Western Australia is the body that can consider your suggestion in relation to the electorate of Kalgoorlie. Accordingly, you should lodge your suggestion with that Committee when the next redistribution is announced.

21 Submission No 185 – Allan Viney

21.1 Mr Viney has made submissions to previous JSCEMs which are invariably critical of the management of the Commonwealth Electoral Roll by the AEC, although unsupported by any evidence of electoral fraud (see submission No 73 of 29 August 1990, submission No 92 of 3 August 1993, submission No 23 of 15 July 1996, and oral evidence provided at the same time as Dr Amy McGrath on 23 September 1996).

21.2 In this submission, Mr Viney now raises doubts about the corporate probity of Australia Post operations:

> Of course it may be that persons within Australia Post have taken steps to hold back much of the return mail thus prejudicing the effectiveness of any cleaning exercise. I am sure the Committee is well aware of how factions within Australia Post have committed criminal acts in regard to tampering with union electoral mail and there is no reason not to suspect the same would not prevail on Parliamentary election matters.

21.3 If the JSCEM wishes to explore Mr Viney's suspicions further, it might consider seeking comment from Australia Post, as was done during the 1996 JSCEM inquiry in response to similar complaints from Dr Amy McGrath (see submission No 93 of 23 October 1996). Mr Viney shares the views of Dr McGrath in her submission No 164, which the AEC has responded to above (see in particular paragraphs 3.12 to 3.13).

21.4 Mr Viney asks the JSCEM for information on progress on the implementation of the Address Register. The AEC has reported on the Address Register and Continuous Roll Update in parts 4.3 and 4.4 of submission No 88.

21.5 Mr Viney also suggests an increase in penalties for "fraudulent enrolment and other malpractices". Increased penalties for electoral offences were broadly recommended as far back as the May 1989 JSCEM Report (see paragraphs 6.71 to 6.79), but no progress has so far been made in amending the Electoral Act, under advice from the Attorney-General's Department, in the wider context of the introduction of the penalty units system which is gradually being incorporated into the Electoral Act (see for example, section 339(1A)).

21.6 However, if the JSCEM wishes to give further consideration to increased penalties for offences in the Electoral Act, then it is suggested that the policy implications of penalty increases for each particular offence be given consideration by the JSCEM, and that any recommendations address each of the offences individually. The AEC can provide an extract of all offences in the Act to facilitate such detailed consideration should the JSCEM so request.

21.7 Finally, Mr Viney appears to be of the view that return-to-sender mail is somehow tampered with by Australia Post in order to prevent proper maintenance of the Commonwealth Electoral Roll by the AEC, a conspiracy

that assumes an extraordinary level of organisation and secrecy. The AEC has addressed the issue of return-to-sender mail at part 9 of submission No 176 (see also paragraph 45.14 and **Attachment 9** to this submission).

21.7 Mr Viney's recommendation that before the forthcoming referendum either the Parliament or the AEC send every elector in Australia a letter, containing some very dubious content matter, and that any return-to-sender mail be somehow routed through AEC offices rather than Australia Post, is without any merit whatsoever, either in terms of roll-cleansing, raising community awareness, or detecting enrolment fraud.

21.8 However, in this context it might be noted that prior to the 1999 referendum, under section 11(1) of the Referendum Act, the AEC will be distributing to every elector in Australia a "Yes"/"No" pamphlet, enclosing a "Change of Address" notice which can be mailed back to the AEC as reply paid post.

22 Submission No 186 – Ted Briggs

22.1 While Mr Briggs advocates an inquiry into the AEC, which is to include the "establishment of a proper coordinating authority for registration of political parties", he does not set out his particular concerns.

23 Submission No 187 – C V Turner

23.1 In his submission, Mr Turner alleges that the counts in the Divisions of Blair and Bennelong were conducted in breach of the law. This allegation is based on a misreading of the Electoral Act, specifically a belief that the test set out in section 274(7AA)(b)(ii) has to be applied after every count. It does not. The Electoral Act requires it to be applied only after the count of first preferences; and, in fact, to apply it at any other stage of the scrutiny would be inconsistent with the Act.

23.2 The issues raised by Mr Turner in relation to full preferential voting and Langer-style voting have been addressed by the AEC at part 3 of submission No 176. Mr Turner also appears to have misunderstood the outcome of the Bryant application just before the 1998 federal election, which is discussed in part 12.2 of submission No 88 and in paragraph 3.8 of submission No 176.

24 Submission No 188 – Ken Lawson

24.1 The issues raised by Mr Lawson in relation to full preferential voting and Langer-style voting have been addressed by the AEC at part 3 of submission No 176. The issue of pencils for marking ballot papers has been addressed above, in part 4 of this submission. The AEC has addressed the size of the Senate ballot paper at parts 5.2, 7.3, 8.4 and recommendation 11 of submission No 88, and at paragraphs 43.42 to 43.43 of submission No 176.

24.2 The issue of 'front' political parties registering with the AEC has been addressed in part 11 of submission No 88, and in paragraphs 43.21 to 43.33

and recommendations 1 to 4 of submission No 176. The issues raised by Mr Lawson in relation to election funding and disclosure have been addressed by the AEC in part 11 of submission No 88 and parts 42 and 43 of submission No 176.

24.3 Mr Lawson relates a series of anecdotes about possible malpractices in relation to scrutineering which the AEC is unable to comment on without any further information. In most cases these anecdotes appear to relate to State elections some time in the past. For federal elections, all scrutineers are provided with a "Scrutineers Handbook" which clearly sets out their rights and responsibilities under the Electoral Act.

24.4 Mr Lawson also advocates computerised voting (in NSW schools), which has been addressed above in part 4 of this submission. Mr Lawson also advocates the use of bar coding as a form of voter identification, apparently based on the fallacious assumption that bar coding was used by the NSW State Electoral Commission for voter identification at the polling booth at the recent NSW State election.

25 Submission No 189 – Lex Martin

25.1 In his submission, Mr Martin says that:

> I feel that the Country Liberal Party gained an unfair advantage because the AEC refused to vigorously pursue and correct a breach of the Australian Electoral Act after we had brought it to their attention.

25.2 Mr Martin does not elaborate on the particular issue, but it may be related to complaints received by the AEC from the Northern Territory Greens about a "Statehood" bumper sticker. The bumper sticker at issue contained the words: "Its our right – Statehood – January 1 2001", but did not contain proper authorisation as required by section 328(1)(a) and (b) of the Electoral Act. (Note that the AEC concluded that any advertising material relating to the Territory referendum on Statehood, which was being conducted by the AEC concurrently with the federal election in the Territory, could be defined as "electoral matter" under section 4(9)(f) of the Electoral Act.)

25.3 The bumper sticker was distributed by the Northern Territory Government as part of a Statehood Referendum information kit, comprising various other documents which contained the words: "written and authorised by Shane Stone, Parliament House, Darwin. Printed by the Government Printing Office, 203 Railway Street, Parap". The sticker was also distributed as a supplement to the "Sunday Territorian" newspaper of 6 September 1998. There was clearly no doubt as to where and with whom the bumper sticker originated.

25.4 In accordance with AEC/DPP policy on electoral advertising that is not anonymous, as outlined in paragraphs 64 to 65 of the Electoral Backgrounder No 5 entitled *"Electoral Advertising"*, the AEC wrote to the then Chief Minister of the Northern Territory, Mr Shane Stone, requesting that he immediately

take steps to cease distribution of the sticker, and to ensure that future such advertising was in compliance with the requirements of the Electoral Act. The AEC was satisfied with Mr Stone's response, and took no further action. The fact that some of these stickers remained in circulation was unavoidable, but in the circumstances, they could not have been regarded as anonymous advertising, the real mischief to which the legislative provisions are directed.

25.5 Mr Martin also raised this matter at the public hearings of the JSCEM in Darwin on 21 May 1999 (see paragraph 47.1).

26 Submission No 190 – Edith Knight

26.1 The AEC has no comment to make on this submission.

27 Submission No 191 – Matthew Coffey

27.1 The AEC has responded to the issues raised in this submission at paragraphs 42.30 to 42.31 of submission No 176.

28 Submission No 192 – C Thomas

28.1 The proposal in this submission, that Members of Parliament who change their political allegiance should be punished by forced resignation, the forfeiting of financial privileges, and the payment of the costs of the ensuing by-election, was addressed by the AEC, in response to a similar submission to the previous JSCEM, in paragraphs 2.3.3 to 2.3.8 of submission No 90 of 20 September 1996, and at pages 115-116 of the June 1997 Report of the previous JSCEM, as follows:

> 9.47 A Mr CGW Hughes (not the former Electoral Commissioner) suggested that Members who resign should be obliged to fund the subsequent by-elections. The Committee does not support this proposal, for reasons put forward by the AEC:
>
> > The proposal that retiring Members of the House of Representatives should meet the costs of a by-election consequent on their resignation, essentially applies a penalty to retirement, and raises issues of equity in relation to the smaller political parties and Independent Members who do not have a political party machinery behind them to support the payment of a penalty of the magnitude of $285,000.
> >
> > Further, questions of definition must arise, such as whether there is some threshold set of reasons for resignation that should trigger the penalty. For example, resignation for reasons of ill-health or family problems would presumably have to constitute penalty exclusions. Once it is accepted that some exclusions are necessary, the further question arises as to how such cases should be arbitrated….
>
> 9.48 Also, the view is often expressed that for cost reasons by-elections should be scrapped altogether. However, a by-election is a more democratic means of filling a vacancy than a party appointment (which would require a

referendum on the constitutional requirement that Members be "directly chosen by the people") or a countback for the relevant division. By-elections serve as a barometer of public sentiment, which can only enhance the effective functioning of government.

29 Submission No 193 – Mohammad Ali Maleki

29.1 Mr Maleki proposes computerisation of the voting process, which was addressed in general terms in submission No 90 of 20 September 1996 to the previous JSCEM, and is extracted at Attachment 9 to submission No 176 to this JSCEM. At page 2 of his submission he says the following: "There could be the same number of Standard Computers at each polling booth as there has been booths previously." Mr Maleki's cost calculation for "Standard Computers" is given at page 5 of his submission as $2,000 x 93,300, that is, $186.6 million.

29.2 However, if there is to be one computer replacing each voting screen, this figure might well be an underestimate. For the 1998 federal election, 136,000 cardboard voting screens were used for voters to mark their ballot papers in private. On this basis, the cost of "Standard Computers" would be $272 million. The overall cost of such a system could be as high as $300 million, and given the rate at which computer equipment depreciates, such a cost would not just be "one-off", but would have to be incurred periodically as equipment became obsolete. The result of the 1998 federal election was known within two hours of the close of polling, so it must be asked whether the level of public expenditure suggested by Mr Maleki could be justified.

30 Submission No 194 – NT Country Liberal Party

30.1 The general issues raised in submission No 194 from the Northern Territory Country Liberal Party (NTCLP) have been addressed by the AEC at parts 7.5 and 7.6 of submission No 88, in parts 30 and 38 of submission No 176, and later in this submission at parts 37, 47 and 49.

30.2 Submission No 194 contains a series of statements by various members of the NTCLP which were tabled at the JSCEM public hearings in Darwin on 21 May 1999. The AEC was not able to sight this submission until it was released to the AEC in bound form as part of volume 8 of the JSCEM submissions in early July. (A request to the JSCEM Secretariat on 9 June for early copy of any submission numbered No 194 resulted in the provision of the submission now numbered No 201 from Mr Charlie Taylor.)

30.3 As a consequence, the Australian Electoral Officer for the Northern Territory, Mr Heisner, was not able to provide written responses prior to his departure from the AEC. However, at the public hearing in Canberra on 29 June, at which Mr Heisner presented as a witness on the special request of the JSCEM, members of the JSCEM would themselves have had available to them copies of the statements now issued as submission No 194, and had the opportunity at that time to question Mr Heisner about any issues raised therein (see paragraph 49.4 below).

31 Submission No 195 – Peter Carroll-Held

31.1 In relation to Mr Carroll-Held's submission that his enrolment as a British subject under section 93(1)(b)(ii) of the Electoral Act should be nullified because he is an Irish citizen and not a British subject, the AEC obtained legal advice from the Department of Immigration and Multicultural Affairs and from the Australian Government Solicitor to the effect that the AEC cannot and should not nullify Mr Carroll-Held's franchise. If it had been intended that enrolled Irish citizens should lose their electoral rights on the passage of amendments to the citizenship legislation and related legislation over time, it is to be assumed the Parliament would have made express provision in the Electoral Act for the removal of their names from the Commonwealth Electoral Roll.

31.2 In relation to Mr Carroll-Held's comments about compulsory voting, it is noted that these comments are made in the context of the recent NSW State election, for which the AEC has no statutory responsibility. However, for federal elections, section 245(1) of the Electoral Act reads, "It shall be the duty of every voter to vote at each election", sections 229 to 233 of the Act describe the procedures for casting a vote in mandatory terms, and section 245(15) makes it an offence to fail to vote without a valid and sufficient reason. It might also be noted that section 339 provides for other offences in relation to the handling of ballot papers.

32 Submission No 196 – Jonathan Polke

32.1 The matter raised by Mr Polke is currently before the Court of Disputed Returns in a petition filed by him on 2 December 1998 in Darwin disputing the election of Senators for the Northern Territory, and is mentioned in part 12.3 of submission No 88 and in part 5 of submission No 176.

33 Submission No 197 – Ted Briggs

33.1 The AEC has addressed the issues raised in this submission in response to submission No 186 above.

34 Submission No 198 – Norma Jamieson

34.1 The issue of parliamentary terms was addressed by the AEC in the context of electoral legislation in part 2.1 of submission No 88, and was considered by the previous JSCEM, in response to similar submissions, at page 114 of the June 1997 Report, as follows:

> 9.42 …the Committee has no difficulty in giving its unanimous support to four-year terms for the House of Representatives. Parliamentary terms would appear to be a logical topic for examination in any future discussions on constitutional reform.

34.2 The issue of independent Senate candidates and the group voting ticket system is currently before the Court of Disputed Returns in a number of identical submissions, as mentioned by the AEC in part 12.3 of submission No 88, in part 5 of submission No 176, and above, in part 32 in this submission. A later submission from the AEC will address the outcomes in these petitions. The issue of 'front' political parties was addressed by the AEC in paragraphs 43.21 to 43.23 of submission No 176.

34.3 In her submission, Ms Jamieson also suggests:

> deleting all leaflet letter-boxing, bill-boards and commercial media coverage. Instead a booklet created by the electoral commission, delivered to each household and/or eligible voter by Australia Post, which contains one page with the candidate's personal profile and one page of policies and goals.

34.4 A similar proposal for a 'candidates information handbook' was inserted as section 386A of the Electoral Act by the *Political Broadcasts and Political Disclosures Act 1991* (on a motion by the Australian Democrats, supported by the Government of the day). The candidates information handbook was to be sent to the approximately 6.5 million households in Australia and was to contain a photograph, personal profile, and a brief policy statement for every candidate for the House of Representatives and the Senate (at the 1998 federal election there were 1,438 candidates).

34.5 Before the legislative requirement to produce the candidates information booklet could be tested at an actual federal election, it became apparent that there were a number of serious political, financial and logistical problems involved, including the following:

- the estimated cost (then) of some $3 million;
- the potential for political mischief available to persons, with no hope of gaining election, who could nominate for election simply in order to take advantage of tax-payer-funded 'free' advertising for themselves and their causes;
- the limited time frame for the production, printing and distribution of the booklet to all households, between the close of nominations and polling day (generally about 22 days);
- at least 14 different booklets would have been required in order to keep them to a manageable size and to take into account State and Divisional borders.

34.6 The Government of the day originally supported the Democrat amendment to the Electoral Act as a mechanism to compensate for the ban on political advertising introduced by the *Political Broadcasts and Political Disclosures Act 1991*, but with the striking down of the political ad ban by the High Court (see paragraphs 47-63 of Electoral Backgrounder No 5 on *"Electoral Advertising"*), the Government moved in the *Electoral and Referendum Amendment Act 1992* to repeal section 386A of the Electoral Act.

34.7 Finally, Ms Jamieson recommends the adoption of the "Robson Rotation" system on ballot papers, which was considered and rejected by the previous JSCEM, at page 94 of the June 1997 JSCEM Report, as follows:

7.69 The provision of effective how-to-vote material is the reason why the Committee is not enthusiastic about rotation of names on ballot papers, often put forward as a means of minimising the effects of "donkey" voting (whereby uninterested voters simply mark "1,2,3,4…" straight down the ballot paper)…

35 Submission No 199 – Charlie Bell

35.1 Mr Bell, the President and Deputy Campaign Manager of the Australian Democrats, ACT Division, raises concerns about certain how-to-vote (HTV) cards printed published and distributed by the Liberal Party of the ACT at the 1998 federal election. The two-sided Liberal Party HTV card, for the ACT Divisions of Canberra and Fraser, and the ACT Senate, is included in the attachments to Mr Bell's submission. Mr Bell's complaint to the AEC about this HTV card was dealt with in the following way.

35.2 At about 2.30 pm on 2 October 1999, the day before polling day, the AEC received a fax, "for information", from Mr Rick Farley, the Democrat candidate for the ACT Senate election, attaching a copy of the Liberal Party two-sided HTV card, and copy of correspondence between Mr Tom Brennan (solicitor acting for Mr Farley) and Mr John Ryan of the ACT Liberal Party, demanding withdrawal of the Liberal Party HTV cards by 1 pm that day on the grounds that they were likely to mislead or deceive electors in relation to the casting of a vote, in breach of section 329(1) of the Electoral Act (misleading and deceptive advertising).

35.3 In addition, Mr Farley's fax to the AEC "for information" attached a letter of the same date from Mr Justin Stanwix (solicitor acting for Mr Ryan) denying any breach of section 329(1), but agreeing not to distribute the HTV cards after 1 pm that day. Finally, Mr Farley's fax attached a letter of the same date from Mr Tom Brennan to Mr Stanwix advising that at 1.30 pm on that day Liberal Party workers had been handing out the HTV cards at Pilgrim House, and inviting Mr Stanwix to take the necessary steps to comply with the undertakings earlier provided.

35.4 At around 5 pm on 2 October 1998, the AEC received by fax a formal complaint from Mr Charlie Bell of the ACT Democrats, attaching the correspondence already provided to the AEC by Mr Farley. At 5.45 pm the AEC faxed Mr Bell a response advising that the AEC would seek advice from the office of the Commonwealth Director of Public Prosecutions (DPP) on whether a breach of section 329(1) was disclosed and whether prosecution was warranted, but noting that the undertakings demanded by the ACT Democrats from the ACT Liberal Party appeared to have been complied with, having the effect of remedying the alleged breach as and from 1 pm that day.

35.5 The AEC took no further action on the matter the next day, polling day, on the basis that (a) no further distribution of the HTV card in question was reported, (b) the ACT Democrats had already obtained the remedy they had sought from the ACT Liberal Party, and (c) in the preliminary view of the AEC, a prosecution was not sustainable under section 329(1) of the Act. The AEC subsequently received legal advice from the DPP to the effect that, "the

chances of an elector being mislead as to the casting of a vote by the document *considered as a whole* are slight" (emphasis added), and accordingly, there was no breach of section 329(1) of the Act.

35.6 In his submission, Mr Bell recommends that the JSCEM consider:

> a method by which the Electoral Commission or the relevant courts can redress any unfairness resulting from such mistakes, or, more preferably, to consider abolishing the present How to Vote system in favour of having party How to Vote information displayed by the Electoral Commission on a poster within each polling booth. There is a clear role in having the electoral commission vetting how to vote cards before distribution…The Australian Democrats (ACT division) supports the strengthening of penalties for misleading and deceptive material being distributed during election campaigns.

35.7 As the above account of the circumstances involved in the distribution and withdrawal of the ACT Liberal Party HTV card demonstrates, the remedy sought by the ACT Democrats was obtained even though, in the view of the AEC and the DPP, a successful prosecution for a breach of section 329(1) of the Electoral Act was unlikely. However, if the ACT Democrats were of the view that a section 329(1) breach had occurred, and the remedy sought by them directly from the ACT Liberal Party had not been agreed to, then they could have sought an injunction under section 383 of the Electoral Act to stop distribution of the ACT Liberal Party HTV cards. Further, if the ACT Democrats considered that the result of the election was likely to have been affected, then they could have filed a petition with the Court of Disputed Returns challenging the election under Part XXII of the Electoral Act.

35.8 In relation to Mr Bell's recommendations that the present HTV card system be abolished, to be substituted by the display of HTV cards in polling booths and the vetting of HTV cards by the AEC, such submissions to previous JSCEMs, which have included recommendations to ban HTV cards entirely, have been consistently opposed by the AEC (see for example, part 8 and Attachment 3 to submission No 176).

35.9 The June 1997 JSCEM Report rejected proposals for the banning or restriction of HTV material (page 94). This conclusion was subsequent to recommendation 55 of the November 1994 JSCEM Report which was, "that the AEC investigate means by which how-to-vote material could be displayed inside polling places at future federal elections", and the Government Response of 21 September 1995 (at page 1261 of the Senate Hansard), as follows:

> Supported. The AEC will investigate the feasibility of the display of HTV cards in polling booths with the following reservations. The priority for the AEC is the display of its own voter assistance material. The AEC cannot become involved in policing delivery or specifying the size, spacing or coverage of voter assistance by political parties. There may be problems with the size of the Senate ballot paper where space is restricted in polling booths. Trialling at by-elections should be conducted.

35.10 At an even earlier JSCEM inquiry, at pages 42 to 43 of the December 1990 JSCEM Report, detailed consideration was given to the possibility of the AEC 'vetting' HTV cards, in the following terms:

> 5.18 One means of overcoming the problem is to require all how-to-vote cards and other material circulated on polling day to be registered with the AEC so that if the material is not registered it cannot be circulated. The Committee noted that this system has been introduced in both New South Wales and Victorian State elections….
>
> 5.21 The Committee considers that while such an approach may overcome the difficult problem of misleading and deceptive publications it would not support such a system because it would be almost impossible to enforce. In addition, registration would represent bureaucratic interference in the 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.
>
> 5.22 The Committee considers that a more appropriate solution would be the introduction of harsher penalties…

35.11 Mr Bell's concerns about "Dear Neighbour" letters distributed by the ACT Liberal Party have been addressed by the AEC at paragraphs 6.5.1 to 6.5.4 of submission No 88. The production and distribution of such "Dear Neighbour" letters might be regarded by some as similar to the voluntary activities of party workers involved in handing out HTV cards at polling booths, and in this case, there is no evidence to suggest that the disclosure provisions of the Electoral Act, as they relate to third parties and associated entities, should have been invoked.

35.12 In relation to the leaflet that Mr Bell says was distributed by a local member of the Young Liberal Movement "containing nothing but personal attacks on the integrity of Rick Farley", section 350 of the Electoral Act allows any aggrieved candidate to take legal action for defamation.

36 Submission No 200 – A Fiske

36.1 This submission raises a problem with the legislation, relating to authorised witnesses for overseas postal voting under section 193 of the Electoral Act, which the AEC was intending to bring to the attention of the JSCEM as a separate submission. The matter will now be dealt with here in response to Ms Fiske's submission, which demonstrates the problem at a practical and personal level.

36.2 In making an application for a postal vote, the postal vote application form must be signed by the applicant in the presence of an authorised witness, under section 184(1)(b) of the Electoral Act. Further, in declaring eligibility, the postal vote certificate signed by the postal voter must be witnessed by an authorised witness under section 194 of the Act. Section 193

provides that the authorised witness must be either an elector whose name appears on a Roll, or if outside Australia, one of the following:

> (a) an officer of the Defence Force or of the naval, military or air forces of a Commonwealth country;
> (b) a member of the Australian Public Service;
> (c) a member of the civil or public service of a Territory or of a Commonwealth country;
> (d) a Justice of the Peace for a State or Territory or a Commonwealth country;
> (e) a minister of religion or medical practitioner resident in a State or Territory or a Commonwealth country;
> (f) an Australian citizen.

36.3 Prior to 1949, there were no special provisions to accommodate Australian citizens who wished to cast a postal vote overseas (given the forms of transport then available, it was probably considered unlikely that most such votes could be returned to Australia in time). Essentially, like any other postal voter in Australia, they were required to find any one of a group of specified persons, such as electoral officials, postal officials, railway officials, surveyors, medical practitioners, telegraph line repairers, and Justices of the Peace, to act as an authorised witness.

36.4 In 1949, the *Commonwealth Electoral Act 1949* amended the then section 91B of the Electoral Act to provide, in addition to an elector whose name appears on a Roll, the following set of authorised witnesses for postal voters outside Australia:

> any officer of the Naval, Military or Air Forces of the Commonwealth or of some other part of the King's dominions or any person employed in the Public Service of the Commonwealth or of a Territory of the Commonwealth.

36.5 In 1990, the *Electoral and Referendum Amendment Act 1990* amended section 193 (as renumbered in 1984) to provide, in addition to an elector whose name appears on a Roll, the following set of authorised witnesses for postal voters outside Australia:

> (a) an officer of the Defence Force or of the naval, military or air forces of another part of the Queen's Dominions;
> (b) a member of the Australian Public Service;
> (c) a member of the civil or public service of a Territory or of another part of the Queen's Dominions;
> (d) a Justice of the Peace for a State or Territory or of another part of the Queen's Dominions;
> (e) a minister of religion or medical practitioner resident in a State or Territory or another part of the Queen's Dominions;
> (f) an Australian citizen.

36.6 The *Electoral and Referendum Amendment Act 1998* then amended the list of authorised witnesses in section 193 by replacing the phrase "another part of the Queen's Dominions" with "a Commonwealth country", and defining "Commonwealth country" in section 193(4) as "a political entity, or

part of a political entity, that is a member of the international organisation known as the Commonwealth of Nations".

36.7 On the related matter of enrolment from overseas, under section 98(2)(c) of the Electoral Act, a claim for enrolment must "be attested by an elector or a person entitled to enrolment, who shall sign the claim as witness in his or her own handwriting". This requirement was inserted in the Electoral Act by the *Commonwealth Electoral Legislation Amendment Act 1984*. Prior to 1984 the witness was required to be a "prescribed person".

36.8 The Electoral and Referendum Amendment Bill [No 2] 1998, currently before the Parliament, and which arose out of the recommendations of the June 1997 JSCEM relating to the prevention of possible electoral fraud, contains proposed amendments which in general terms would provide a more restricted set of witnesses for enrolment applicants.

36.9 As Ms Fiske has highlighted in her submission, Australian citizens overseas who wish to cast a postal vote in a non-Commonwealth country, particularly away from the capital city, can face an impossible task in locating an authorised witness unless the elector is travelling or staying with another Australian elector. Several postal voters have forwarded photocopies of their passports and visas to the AEC as evidence of the authenticity of their names and addresses. However, in the absence of any discretion in such matters, the AEC was unable to accept such evidence, and as a consequence these electors were selectively disenfranchised, on the basis of the country which they happen to be visiting, or in which they happen to be working, at the time of the federal election.

36.10 Similarly, Australian citizens entitled to claim enrolment from outside Australia, may be disenfranchised if they are not in the company of another elector or person entitled to be on the electoral roll, or are not in a city with an Australian overseas mission post where there might be an appropriate witness.

36.11 During the 1998 federal election period, the AEC telephone enquiry service received around ten to twenty calls per week from electors overseas who had obtained either a postal vote application or an enrolment form from the AEC Internet site. While these electors had printed and completed forms from the Internet site without any trouble, they were unable to find anyone qualified to witness their signatures on the forms. As a consequence, they were unable to vote in the election. Many of Australia's overseas mission posts also commented to the AEC that they received many complaints from electors who were unable to find an authorised witness for postal vote applications posted to the elector by the Embassy or Consulate.

36.12 In order to ensure that Australian electors travelling or staying in non-Commonwealth, and well as Commonwealth, countries are able to cast a postal vote with equal convenience, and in order to ensure that Australian citizens overseas are able to enrol without too many unfair obstacles, the

JSCEM might consider certain amendments to the Electoral Act to save the franchise for such individuals.

36.13 In relation to authorised witnesses for overseas postal voting, a simple threshold amendment would be to remove any reference to "Commonwealth country" in section 193, so that the same list of authorised witnesses would be available to a postal voter in Commonwealth and in non-Commonwealth countries. However, this would not be sufficient to meet the problems experienced by many postal voters in locating authorised witnesses wherever they are overseas at the time of an election.

36.14 Another approach might be to amend the list of authorised witnesses for postal voting in section 193, and the list of witnesses for enrolment applications in section 98(2)(c), to include local (not Australian) officials such as public/civil servants, in any overseas country. However, in some countries this might involve Australian citizens having to pay a fee (official or unofficial) in order to access such a service. That would again result in differential treatment/penalties for Australian citizens overseas attempting to exercise their franchise.

36.15 A more effective and practical amendment to the witnessing provisions in the Electoral Act for enrolment and postal voting would be to permit Australian citizens enrolling from outside Australia, and electors exercising their right to a postal vote while overseas, to attach a photocopy of the page of their passport which contains their personal details, in place of having the relevant form witnessed.

Recommendation 2: that the relevant provisions of the Electoral Act and the Referendum Act be amended so that:

(a) Australian citizens overseas applying for enrolment may, as an alternative to having their enrolment application witnessed, attach to their enrolment application a photocopy of the page of their passport which confirms their personal details; and

(b) Australian electors overseas applying for a postal vote or completing a postal vote certificate may, as an alternative to having those forms witnessed by an authorised witness, attach to their forms a photocopy of the page of their passport which confirms their personal details.

37 Submission No 201 – Charlie Taylor

37.1 This submission of 1 June 1999, from Mr Charlie Taylor of the Northern Territory Country Liberal Party (NTCLP), is supplementary to the NTCLP written submissions No 92, No 157, and No 194, and the oral evidence provided by NTCLP representatives, Mr Charlie Taylor, Ms Suzanne Cavanagh, and Ms Jenny Sinclair, in Darwin on 21 May 1999. The AEC has responded to the issues raised in the NTCLP submissions at parts 7.5 and 7.6 of submission No 88, in 30 and 38 of submission No 176; to the issues raised

in the NTCLP oral evidence of 21 May in part 47 below; and in oral evidence from the Australian Electoral Officer for the Northern Territory (AEO NT), Mr Kerry Heisner, at a public hearing in Canberra on 29 June (see part 49 below).

37.2 *Assisted Voting:* On page 1 of his submission Mr Taylor says that:

> The CLP suggests that there has been credible evidence in the past that assisted voting has not been conducted properly or in the spirit of the Act. We may have been remiss ourselves because although we believed that the system was being abused we also did not make an official complaint. This will not happen again. Nothing was done to prevent problems continuing because the AEC believes that some aspects about which we complain fall within their interpretation of the Act. We are now hopeful that this interpretation will change and as previously discussed we would prefer to see the Act changed.

37.3 This statement is somewhat cryptic, but if Mr Taylor is referring to paragraphs 30.60 and 30.61 of AEC submission No 176, then Mr Taylor and the NTCLP should not assume that the AEC will interpret the relevant provisions any differently at the next electoral event. However, if the JSCEM recommends an amendment to the Electoral Act to expressly prohibit any scrutineer from assisting in the casting of a vote, and this is passed into law, then the AEC will of course apply the legislation as given.

37.4 *Court of Disputed Returns:* On page 2 of his submission, Mr Taylor says that the NTCLP has "ample evidence of illegal practice", but not enough to have affected the result of the election, as required by section 362 of the Electoral Act. Mr Taylor would be aware that such "illegal practices" are open to prosecution in the courts if an offence under the Electoral Act is disclosed. However, in all the submissions so far filed by the NTCLP with this inquiry, the AEC has been unable to find any evidence of "illegal practices", let alone "ample" evidence.

37.5 *Preliminary Scrutiny:* On page 2 of his submission Mr Taylor says that

> The system of establishing the identity of provisional voters and whether their votes are eligible to be counted as demonstrated by AEC is quite satisfactory. Again the difficulties are personal, human resources problems associated with the framework inside which the program is run, and the attitude of those running it.

37.6 It is assumed that Mr Taylor's changed view on the satisfactory nature of the preliminary scrutiny of provisional declaration envelopes is the consequence of the special demonstration of the computerised processes provided by AEC staff to members of the NTCLP in Darwin on 21 May, prior to the public hearings by the JSCEM on that day. However, it is noted that Mr Taylor still appears to have difficulties with the "attitude" of AEC staff during the preliminary scrutiny at the 1998 federal election.

37.7 In this context it is worth quoting an extract from pages EM223 to EM224 of the transcript of the oral evidence provided by the AEO NT, Mr Kerry Heisner, at a public hearing of the JSCEM on 29 June in Canberra.

> *Chair:* ….One particular incident was highlighted by the CLP to explain the way in which they felt that they were not being treated fairly. That was in relation to one of the scrutineers who, the CLP were told by the AEC, was hassling one of your employees. The evidence given was that the employee said she did not complain about the scrutineer at all but there was a complaint issued to the CLP by the AEC.
>
> *Mr Heisner:* I was actually there at the time. The situation, as the AEC read it, was that the young lady, an election casual, was sitting in her chair doing her job. There was a CLP gentleman sitting in the chair next to her, extremely close. During a natural break in the proceedings, the young lady was asked whether she felt comfortable with that situation. To the supervisors it appeared that she did not feel comfortable with it and would prefer if he could move slightly to the side or slightly back. The CLP are correct when they say that she did not complain. I have yet to see an election casual, who needs the money, complain about anything. They just do not do that, because they want their employment to continue.
>
> We drew the attention of the CLP to the situation, and asked if the gentleman could move back or to the side slightly. He could still do his job, but he would not crowd the young lady. That is how it happened, and I was actually there at the time.
>
> *Chair:* The other comment was about not providing chairs – there was a 'let them stand' attitude.
>
> *Mr Heisner:* I have been a divisional returning officer since 1972, and I have yet to see many divisions where chairs are provided. The reason is that in the scrutiny room we had 12 AEC officials; therefore, each of the candidates could have 12. At any one time, we had between 24 and 36 scrutineers standing around these 12 people. Unless we went out and hired chairs, we simply did not have the chairs. There has never been a policy within the AEC to go out and hire chairs for this purpose. If the committee thinks that the AEC should spend money doing that, so be it, but certainly there is no policy, and we do not have the chairs.
>
> *Chair:* The incident was raised not so much to say that chairs should be provided to all scrutineers. It was in relation to one person who was apparently not feeling well, and a chair was refused.
>
> *Mr Heisner:* The chair was given –
>
> *Chair:* So it was not refused?
>
> *Mr Heisner:* It was, I understand, initially. I came in on the end of this one. Chairs were requested and the statement was made that no-one has chairs except the workers – and people can come and go, mingle and whatever else. It was drawn to my attention rather strongly – I think it was by Susan or one of the CLPs, I cannot be sure it was Susan – that this person had been in

> hospital and was ill, and we obviously then allowed a chair. A lot of things seem to be blown up out of proportion.

37.8 Mr Taylor goes on to say in his written submission, in relation to the preliminary scrutiny of provisional declaration envelopes, that

> …if the process got a bit tricky the envelope was put into a different basket for further checking. The aspects of the process with which we took exception were the reprocessing of envelopes from the 'follow-up' and 'certified list' baskets at a later time and the intense effort being made to find any person with an aboriginal name.

37.9 The procedures for the preliminary scrutiny, which it is apparent many NTCLP scrutineers did not understand at the time, have been described in detail at paragraphs 30.45 to 30.56 of submission No 176, and were in accordance with the provisions of the Electoral Act and the Divisional Office Procedures Manual (Elections). Declaration envelopes were not put aside for further investigation when the process "got a bit tricky". They were put aside, in accordance with normal procedures, when there appeared to be a possible match with a current or deleted enrolment record, that indicated a possible entitlement for admission of the vote. They were then taken to the "Canofile" computer screen (in the same office) so that checks could be made against an image of the original enrolment application, to allow a final decision to be made.

37.10 In relation to Mr Taylor's comment about "the intense effort being made to find any person with an aboriginal name" during the preliminary scrutiny, and the suggestions made in previous NTCLP submissions that this betrays a racial bias in AEC procedures, this has been addressed already at paragraphs 30.44 to 30.45 of submission No 176. Reference might also be made to the comment from Mr Heisner, AEO NT, at page EM 225 of the transcript of 29 June.

> *Mr Heisner:* I think that must be coming from a total misreading and misunderstanding of the whole system. Every declaration vote goes through the same process….Certainly there is no distinction at all between the processing of Aboriginal votes and any other votes. There are two issues. First of all, I do not know how you tell an Aboriginal declaration from a mainstream declaration, unless you are specifically domiciled in a remote community. Certainly in Alice Springs it would be difficult.
>
> Secondly, Aboriginal people do not live at 31 Brolga Street, Wulagi, Darwin; they live in a community in Maningrida where there might be 1,800 people on the roll. There are no streets, it is a community. They use several names, depending on what is happening in their lives and, just by the fact of the beast, it does take longer to try and legitimately include as many of the declarations that should be included as possible. There is no difference in policy at all between any declaration envelopes.

37.11 On page 2 of his written submission, and in relation to the access provided to scrutineers to all stages of the preliminary scrutiny of declaration votes, Mr Taylor says the following:

> *Mr Taylor:* The DRO, Kerry Heisner, through Mr Bill Gray, has given you assurances that the reprocessing did not happen without scrutineers present and if that were the only comment he made it would have been a stalemate. As an added boost to his credibility he noted that signs directing scrutineers to certain places at certain times for certain areas of the processing were posted on the doors to the areas used. This only makes us more certain that we are being deceived as there was a great deal of confusion as to what was happening and the placing of signs would have been the last thing on the minds of AEC staff at the time…The more difficult problems were handled by more experienced staff in another place probably their own office. This was done outside normal office hours with the envelopes reappearing the next morning in either the accepted or rejected basket. Scrutineers were not able to be present at the time the decision to accept or reject was being made and this is not in accordance with the Act.

37.12 This passage demonstrates the problems that the NTCLP scrutineers had, firstly, in understanding the legal obligations of the AEC in posting information about the time and place of the preliminary scrutiny, and secondly, in understanding the procedures that were taking place around them at the time. The AEC cannot be held responsible for the inexperience and lack of knowledge of the scrutineers employed by the NTCLP at the preliminary scrutiny.

37.13 Under section 266(2) of the Electoral Act the DRO must give notice of the commencement of a preliminary scrutiny as follows: (a) a notice specifying the date, time and place of commencement shall be displayed in a prominent place in the DRO's office; (b) the notice shall be displayed not later than 4 pm on the day before the day of commencement. The DRO NT complied with the legal requirements of the Act in placing notices, and there is no complaint in the NTCLP submissions that this did not occur.

37.14 As to the layout of the various computer screens in the AEC office, which is not required to be notified under the Electoral Act, it is the personal responsibility of scrutineers to make themselves aware of the flow of materials through these screens, by asking questions of AEC staff if necessary. However, it should be apparent from the confused series of complaints in the NTCLP submissions that they did not properly inform themselves about their responsibilities and instead have sought to blame AEC staff.

37.15 Apart from the written response already made by the AEC at paragraphs 30.44 to 30.56 of submission No 176, the comments on this issue made by Mr Heisner, AEO NT, at pages EM208 and EM209 of the transcript of 29 June are instructive.

> *Mr Heisner:* ….There is a room on the ninth floor of our office which is used each election for this process. That room has four computers in it. Four of our staff are there and there are four trays of the processed documents. The first tray is the one that says our staff have found on the screen a deleted record and we should not have deleted that person. So they go in that accepted tray. We have the tray which has the rejects in it. There is a tray which is the grey area – the one you are talking about – which means that the person operating

the screen cannot be sure that that is the declaration belonging to that elector. They are put into a separate tray.

Depending on the workload of the office during the day, the declaration envelopes are then taken, still on the ninth floor and still within our office, to other terminals and to a machine called a Canofile. The Canofile stores the enrolment forms. A print-out is actually taken from the microfilm, or from the CD discs now, of the original enrolment form. The signatures are checked on the declaration to try to verify it.

That process is totally open. At no stage did anyone, whether it was the CLP or the ALP, ever ask to view it. People walk past it the whole time to the room. If the CLP or the ALP had stopped or had wanted to watch it, they were quite free to. If the CLP say that they have been prevented, I can only dispute that in the sense that, if they, on the first day, had said to us, 'You are preventing us', we would have said, 'No we are not, go in'. There was no prevention of anyone or any scrutineer observing that process.

Mr Somlyay: Do you have obligations under the Act to advise scrutineers of what they can and cannot do?

Mr Heisner: Under the Act we are required to put a notice up of preliminary scrutiny, which details the commencement of the scrutiny – and we did of course.

Mr Somlyay: And that covered the procedure you were talking about?

Mr Heisner: Yes. As I said, if I followed this as a CLP scrutineer and I see a trail to be verified going somewhere, the first thing I would have said is, 'Where is it going? Can I come?' The process was totally free and open. There has been no attempt by my staff at all to not include people.

37.16 *Remote Mobile Polling Team 16:* In the view of the AEC the complaints made by the NTCLP in relation to Remote Mobile Polling Team 16 exaggerate the significance of various changes made to the itinerary to accommodate local circumstances; fail to acknowledge the need for procedural flexibility within the terms of the Electoral Act in remote mobile polling; exaggerate the significance of incorrect voting statistics provided on demand to the NTCLP despite warnings given by the AEC that such statistics were not final; and falsely allege illegal practices under the Electoral Act, and political bias amongst polling officials, when the facts do not support such conclusions.

37.17 Most experienced observers are aware that remote mobile polling sometimes does not always run exactly according to plan because of the essentially unpredictable nature of variables such as weather, communications, road conditions, and human behaviour. To put the NTCLP complaints about Remote Mobile Polling Team 16 in proper perspective, the AEC ran 21 remote mobile polling teams in the Northern Territory, employing 70 polling officials visiting 241 communities in a six-day period, and in their submissions, the NTCLP has made allegations, which in themselves are highly contestable, about only two of these teams. As at previous elections in the Northern Territory, the mobile polling process was an overwhelming

success, delivering the franchise to many Aboriginal electors in very difficult circumstances.

37.18 The AEC provided a detailed breakdown of the itinerary of Remote Mobile Polling Team 16 at paragraphs 30.18 to 30.24 of submission No 176. In response, Mr Taylor claims on page 3 of his submission that this "endorses most of what was alleged" by the NTCLP, and that the NTCLP allegations "are now freely admitted by the AEC". Mr Taylor is deliberately misrepresenting the position of the AEC. In describing the various necessary changes that were made to the itinerary of Remote Mobile Polling Team 16, the AEC is not in any way conceding that illegalities or improprieties occurred. To the contrary, in the view of the AEC these changes were made properly in response to difficult local conditions in order to ensure delivery of the franchise to as many electors as possible. These itinerary changes may be described for convenience as "irregularities" because they did represent alterations to the planned itinerary, but they were not illegal, they were not improper, they were not unusual, and they do not signify corruption or political bias, as alleged.

37.19 In this context it is worth quoting the exact terms of section 227(6) and (7) of the Electoral Act:

> (6) A team shall make a visit or visits as notified under paragraph (4)(b), but, if, for reasonable cause, the team is unable, or the leader considers it inappropriate, to make such a visit, the leader may substitute another place, day or time for the visit, and, in that event, shall:
>
> > (a) take such steps as he or she thinks fit to give public notice of the substituted place, day or time; and
> >
> > (b) inform the Divisional Returning Officer.
>
> (7) Any failure by a team to make a visit in accordance with this section does not invalidate the result of the election.

37.20 It should be clear from the terms of these provisions, that the Parliament recognised that unexpected changes may have to be made to remote mobile polling runs ("for reasonable cause", "unable", "inappropriate") and that such changes may have unavoidable consequences that should not be used to ground an attack on the election. Further, the terms of these provisions make it clear that the team is only required to give public notice of such changes, and notify the DRO, when a place is being "substituted", and not when a place is being revisited or passed by. The AEC understands well the Parliament's careful intent in making these provisions, but it appears that NTCLP scrutineers did not.

37.21 That is, Mr Taylor's assertions on page 3 of his submission concerning the "unlawful reopening of the Hermannsburg booth" are totally without foundation. It was not "unlawful" and did not depend on a "forgiving interpretation of the Act". Further, Mr Taylor repeats the NTCLP allegation about an individual being disenfranchised as a consequence of the change in itinerary at Hermannsburg, and now adds the name of another individual. The

AEC is also accused of being “cute” in suppressing the name of one of the individuals involved, when responding to this allegation in paragraphs 30.18 to 30.24 in submission No 176. The AEC was merely attempting to protect the personal privacy of the elector involved, given that there is no suggestion that they committed any offences under the Electoral Act.

37.22 This allegation about disenfranchisement would have to be grounded in more consistent evidence than has so far been presented in the NTCLP submissions. It is understood that the JSCEM will be conducting public hearings in Alice Springs on 16 August, and if the persons named by the NTCLP can be located, then presumably the material so far presented in NTCLP and AEC submissions can be confirmed or denied by those persons. Whatever the outcome, the terms of section 227(6) and (7) of the Electoral Act should be noted in any conclusions drawn.

37.23 Mr Taylor then continues in his submission to revisit the referral by the NTCLP of their allegations concerning the conduct of the poll by Remote Mobile Polling Team 16 to the Australian Federal Police, and their subsequent withdrawal of the complaint, which he now disavows. In this context, reference should be made to paragraph 38.10 of submission No 176 (in response to Senator Tambling’s submission No 157), which is reproduced here for the convenience of the JSCEM:

> 38.10 Irregularities were discovered in the manual record of votes cast at several small sites along the route taken by Remote Mobile Polling Team 16. However, these irregularities in the manual record had no effective relationship to the transport and security of the ballot papers, or the official scrutinies and counts of those ballot papers, which were conducted with scrutineers in attendance. Nevertheless, and without making any inquiries of the AEC, the NTCLP chose to refer this matter directly to the AFP for investigation. When the AEC became aware of the AFP investigation, a meeting was held with the NTCLP to explain the problem. The NTCLP then withdrew the complaint to the AFP.

37.24 The AEO NT, Mr Kerry Heisner, was questioned by the JSCEM at a public hearing in Canberra on 29 June, on the complaints by the NTCLP that incorrect voting statistics were released by the AEC for Remote Mobile Polling Team 16. In fact, those unofficial statistics were only released under considerable pressure from the NTCLP, and carried the clear statement “These figures are not final and may be subject to adjustment”. As Mr Heisner explained in his oral evidence at pages EM211 to EM212 of the transcript of 29 June:

> *Mr Heisner:* I will just cover the situation of the provision of statistics. The Electoral Commission has a suite of statistics which are generated out of the ELM system, the election management system. That system generates figures which are team based figures. They are the result of the count. They are static polling places and team results, and we have 21 teams so it is actually 21 results.
>
> The AEC in the Northern Territory has informally, over each election, extracted from the OIC’s returns the number of votes issued at each polling

place. We do that after the event and we do it simply as a record we have historically kept. It gives us a picture each election, election by election, for each of these communities, and we can see trends – whether the votes are up, down or whatever. In recent elections the political parties, both the ALP and CLP, have asked for access to that, which we have given. As I said, it is not part of our official statistics; it is a process we do in the Northern Territory for our own internal workings.

In this particular election Senator Tambling requesting that information rather quickly after polling day; I am not sure of the exact timing. The AEC in the Northern Territory at that stage is really heavily involved in the scrutinies. We have more declaration votes than most other division. There are 105,000 on the roll and we have 900 polling officials to pay. My priority for my staff has always been that the scrutinies must be first and then the payment of the polling officials.

Senator Tambling wanted those figures and, as I said, we initially said, 'Look, they will be produced but we do have other things we must do'. I came to Canberra for several days for a meeting and Senator Tambling then approached our central office and our central office rang our divisional returning officer and said, 'Produce those figures'. My divisional returning officer stopped doing his other duties and produced those figures. They are informal figures which have printed at the bottom" 'These are not final figures and are subject to adjustment.' During the production of those –

Mr Somlyay: That is why they were altered later?

Mr Heisner: That is exactly why. I will explain the problem that is central to some of the complaints. When the divisional returning officer was actually producing the results of team 16, the OIC of team 16 had not fully completed her election return. The votes were in the ballot box, we had all the signatures on the seals – which we will cover a little bit later, I presume – everything was totally legal; it was in the box. He was unsure how many votes were issued in some of those places. These votes have historically been used by us – and presumably the parties – as information. Obviously, the CLP this time used them for other purposes to try to verify what their scrutineers had probably recorded.

The divisional returning officer in the process, when it got to team 16, basically averaged out or apportioned those votes amongst the polling places, roughly according to the number of people enrolled there for our statistical purposes. For us it made no difference. To us it is only a guide. However, when the CLP got the figures, obviously they did not agree with what the scrutineers had told it. The complaints that the ballot boxes had been stuffed and the AFP complaint have all revolved around that simple process. My divisional returning officer now thinks it is the worst thing he has ever done in his life. It was an apportionment of figures on an informal basis for our use, which the CLP and the ALP are entitled to get and which we gave to them. Unfortunately, when they compared them with their figures, they did not match and they then presumed that we – or the OIC in particular – had in fact done something illegal with the ballot boxes.

….

> *Mr Heisner:* …The CLP took it to the Australian Federal Police directly, and then the federal police came to see me to discuss the accusation. I then went to Charlie Taylor. Charlie Taylor came to my office and we explained to him what had actually happened. At that stage, Charlie Taylor went away quite happy. I now read in 201 that they are not happy and have now resurrected it as part of another scenario. It was a mistake in our office to apportion those votes – probably not realising that the political parties would compare back. But they are not published in the sense of "published"; they are, as I said, produced by us as an internal guide for the AEC Northern Territory for our future planning.

37.25 In his submission, Mr Taylor alleges, most intemperately, that Mr Kerry Heisner, the AEO NT, was "far from honest with me in an effort to cover up the illegal practices"; that "valuable witnesses" might be "harassed and intimidated by the AEC"; that "the AEC are in damage control mode"; that the AEC "rorted the system" and "stuffed" the ballot box at Hermannsburg; that the events were "sinister" and "misleading"; and that the AEC submission No 176 by "Bill Gray" (the Electoral Commissioner) is a "fabricated story" that "we" (the NTCLP) "have just destroyed".

37.26 Mr Taylor then moves on from personal attacks on Mr Bill Gray, (Electoral Commissioner), Mr Kerry Heisner (AEO NT) and Mr Jim Stuart (DRO NT), to a personal attack on Ms Elena Williams, the Team Leader for Remote Mobile Polling Team 16, and the Presiding Officer at Tangentyere polling booth in Alice Springs. Mr Taylor concludes "with a great deal of certainty" that part 40 of the AEC submission No 176 is "concocted" and "flawed", and asserts that

> there is no way that all the information contained in the AEC account was written by Elna Williams herself and the majority seems to have come from Kerry Heisner. It may prove interesting to actually see the report referred to in submission 88 at page 389.

37.27 Mr Taylor sees a conspiracy where there is none. The AEC has not claimed that either Mr Heisner or Ms Williams wrote either part 7.6 of submission No 88 or part 40 of submission No 176. In fact, the submissions were written on the basis of detailed reports provided by both Mr Heisner and Ms Williams to AEC Central Office in Canberra, and quotations marks are used as appropriate. There is no mystery about the report from Ms Elena Williams, referred to at paragraph 7.6.21 of submission No 88; it was not included in the original submission because it made some strongly negative comments about certain NTCLP individuals, but it is now reproduced in its entirety at **Attachment 4** for the further information of the JSCEM. In addition, the Team Leader of Remote Mobile Polling Team 16, Ms Elena Williams, has now read Mr Taylor's submission and has provided a statement in response at **Attachment 5.**

37.28 *Formality of ballot papers:* In relation to Mr Taylor's complaints about the photocopying and initialling of ballot papers, on pages 7 and 8 of his submission, he refers to paragraph 30.57 of AEC submission No 176, which reads as follows:

> 30.57 Finally, Ms Cavanagh complains that the AEC illegally admitted to the count certain ballot papers that were not initialled as required by section 215 of the Electoral Act, and/or were not of the colour required by section 209(3) of the Electoral Act. Ms Cavanagh may be unaware that section 268(2) of the Electoral Act provides the DRO with the necessary authority to admit the ballot papers in question to the count, as the NTCLP scrutineers were advised at the time.

37.29 Mr Taylor provides his own interpretation of the Electoral Act, asserting that section 209(3) is in imperative terms, and therefore a House of Representatives ballot paper that is not green cannot be a formal ballot paper, and an A4 white photocopy of a ballot paper cannot be admitted as formal, despite the terms of section 268(2) of the Act, as follows:

> (2) A ballot-paper to which paragraph (1)(a) applies shall not be informal by virtue of that paragraph if the Divisional Returning Officer responsible for considering the question of the formality of the ballot-paper is satisfied that it is an authentic ballot-paper on which a voter has marked a vote.

37.30 For a wider perspective on the subject of photocopied ballot papers at the 1998 federal election it is suggested that reference be made to part 7.2 and Attachment 14 in submission No 88. As explained by Mr Heisner, AEO NT, in his oral evidence to the JSCEM in Canberra on 29 June, at pages EM212 to EM213:

> *Mr Heisner:* On the informal ballot paper question, the legislation actually allows photocopies or whatever of ballot papers as long as the divisional returning officer is satisfied that they are in fact legitimate ballot papers. In other words, if there is a static polling place, for example, and they run out, they do photocopy and sometimes they do not initial them in the rush of the matter because there is probably a backlog of electors. The legislation allows for the divisional returning officer to be satisfied, by looking at the circumstances in which those ballot papers are received, whether he or she considers them to be formal. The divisional returning officer deemed the photocopies that were not initialled to be formal ballot papers in accordance with the legislation…..
>
> *Chair:* The photocopying was quite widespread. But my understanding was that the AEC's procedures were that those photocopied ballot papers were to be initialled, whether it is in the Act or not. From what I remember of some of the evidence provided, that was generally the circumstances.
>
> *Mr Heisner:* I agree. I have been a divisional returning officer. I have worked in the AEC for 27 years in Queensland and been a divisional returning officer in probably 10 divisions and ran in every federal election since 1972. I have seen photocopied ballot papers at every election. Some are initialled; some are not initialled. It is really the luck of the draw in that sense….OICs keep records of photocopies. They have to do a balance of the ballot papers they receive in their returns back to what remains unissued…

37.31 Of further relevance is the statement from Mr Joe Beath, the Assistant Divisional Returning Officer for Alice Springs, who was present at the scrutiny

in Darwin. Mr Beath recalls that, contrary to Mr Taylor's assertion that "no satisfactory explanation was ever given" to the NTCLP scrutineers, the attention of both ALP and NTCLP scrutineers was drawn to the photocopied ballot papers:

> During the further scrutinies of pre polls in Darwin it was discovered that some ballot papers contained in the pre poll declaration envelopes were not all green ballot papers with official watermarks. It was obvious some pre poll centres had run out of original ballot papers and had photocopied some ballot papers. They even photocopied declaration envelopes in some cases. Scrutineers from both parties queried the fact that some ballot papers were photocopies. I referred to the Divisional Office Procedures Elections manual and read the relevant section in Part 27 section 2.3. All parties were satisfied with this. I did point out to the scrutineers present that some of the photocopied ballot papers were votes for both the ALP and CLP.

37.32 Finally, in his submission, Mr Taylor generalises his allegations against the AEC in the following terms: "bad management, "insufficient control over staff, "gross bias in some areas", "contempt for the Electoral Act', "an electoral process gone mad", and concludes that "the AEC with lies and deceit have firstly been in charge of maladministration and secondly have determined to cover it up". The AEC does not propose to respond directly to such intemperate language. The facts speak for themselves.

38 Submission No 202 – Phillip Barresi MP

38.1 The AEC has no comment to make on the issues raised by Mr Barresi in this submission.

39 Submission No 203 – F S Salter

39.1 The legislation governing the registration of political parties is contained in Part XI of the Electoral Act, and section 129 of the Act is relevant to the issue raised.

40 Submission No 204 – Raphael Mills

40.1 It has never been an offence under the Electoral Act to cast an informal vote in the privacy of the voting compartment. Whether the vote is cast formally or informally, the action involved can be regarded as "voting" for the purposes of the Act.

41 Submission No 205 – M G Woolnough

41.1 In her submission Ms Woolnough states that "The Government has legislated to sell the Electoral Roll to anyone." Under section 90 of the Electoral Act, the Commonwealth Electoral Roll, containing names and addresses only, is made available for public inspection and sale by the AEC in the public interest. The public availability of the rolls has long been recognised as an important means of ensuring the integrity of electoral process. It is also understood that it is not reasonably possible to control or police the use of

such publicly available information as electoral rolls and telephone books for other purposes.

41.2 However, private elector information provided to the AEC as a statutory obligation, such as gender and date of birth, is not publicly available, and there are significant penalties for the misuse of such information. Section 91A(1) of the Electoral Act provides a $1,000 penalty for misuse of tapes or disks of the rolls, and section 91B provides a penalty of $1,000 for the disclosure or commercial use of protected roll information.

41.2 Further, recommendation 52 of the June 1997 JSCEM Report was as follows:

> that the enrolment form be amended to provide for electors' salutation details, and that section 91 of the Electoral Act be amended so that electors' gender, age and salutation details are provided to Members of Parliament and registered political parties, subject to (a) sections 91A(1A)(c) and 91A(2)(c) of the Act being amended to make clear that the "permitted purposes" in relation to MPs and registered parties include research purposes, and (b) the penalties for misuse specified in sections 91A and 91B of the Act being increased from $1000 to $10 000 (the outcome of the review of penalties provided for in Recommendation 51 should not delay the proposed increase).

41.3 The Electoral and Referendum Amendment Bill [No 2] 1998, currently before the Parliament, proposes increases to the penalties for misuse of roll information to 1000 penalty units. In relation to the proposed provision of Commonwealth Electoral Roll on the Internet, containing names and addresses only, reference should be made to part 4.7 of submission No 88.

42 Submission No 206 – Lynton Crosby

42.1 The AEC has no comment to make on this submission, but has made related comments on the oral evidence of Mr Crosby later in this submission at part 48.

43 Submission No 207 – Sam Hudson

43.1 The submission from Mr Sam Hudson, National Secretary, and Senator Andrew Bartlett, National Campaign Director, Australian Democrats, makes a number of proposals in relation to the registration of political parties and the internal affairs of political parties. The AEC has addressed these issues in parts 11.6, 11.7, and 11.8 of submission No 88, and in paragraphs 43.21 to 43.33 and recommendations 1 to 4 of submission No 176.

43.2 The Democrats have once again recommended the introduction of a form of "truth in political advertising". This issue has been raised before parliamentary committees following every federal election since the early 1980s, and has repeatedly failed to obtain the support of either the AEC or the Parliament. For the information of this JSCEM, **Attachment 6** reproduces the following:

- AEC submission No 115 of 19 October 1993;
- extract from part 8.1 of the November 1994 JSCEM Report;
- part 6.3 of AEC submission No 30 of 29 July 1996;
- AEC submission No 109 of 14 November 1996;
- extract from part 7 of the June 1997 JSCEM Report; and
- extract from the Government Response of April 1998.
- part 6.9 of AEC submission No 88 of 12 March 1999

43.3 In relation to the rights of prisoners to the franchise, the AEC notes that this is also an issue that has been raised a number of times in the past before previous JSCEMs. Related issues are addressed in the response to submission No 181 above, and reference should be made to **Attachment 7**, which reproduces:

- paragraphs 4.10.1-4.10.11 of submission No 90 of 20 Sept 1996;
- part 2.8 of submission No 135 of 7 May 1997;
- extract from part 4 of the June 1997 JSCEM Report;
- extract from Government Response of 8 April 1998.

43.4 The Electoral and Referendum Amendment Bill [No 2] 1998, currently before the Parliament, originally contained a proposal to abolish the franchise for prisoners, but this was defeated in the Senate on 17 February 1999, and has now been deleted from the Bill.

43.5 It might be of interest in this context to consider the fate of electoral legislation limiting the franchise of prisoners in Canada. Prior to 1995, section 51(e) of the Canada Elections Act provided that "every person undergoing punishment as an inmate in any penal institution for the commission of any offence" was disqualified from voting in a federal election. On 27 May 1993, in *Sauve v Canada (Attorney-General) [1993] 2 S.C.R. 438,* the Supreme Court of Canada found that this provision contravened section 3 of the Canadian Charter of Rights and Freedoms (the Charter). The Charter forms part of the Constitution of Canada, and section 3 of the Charter provides that every citizen shall have the right to vote.

43.6 On 27 December 1995, the Trial Division of the Canadian Federal Court held that an amended section 51(e) of the Canada Elections Act, which now disqualifies a person serving a sentence of two years or more from voting in a federal election, also violated section 3 of the Charter.

43.7 During proceedings in this case, the Canadian Government conceded that section 51(e) of the Act *prima facie* breaches section 3 of the Charter, but argued that having regard to the objectives of the legislation, section 51(e) could be justified as a reasonable limitation under section 1 of the Charter. Section 1 permits certain limitations on rights and freedoms as can be justified in a free and democratic society. The objectives of section 51(e) were stated to be, first, the enhancement of civic responsibility and respect for rule of law, and second, the enhancement of the general purpose of the criminal sanction.

43.8 The Court did not accept the arguments put by the Canadian Government and found the law restricting the right to vote of prisoners to be unconstitutional. The Court held that the proportionality between the effects of the impugned legislation and its objectives, and the proportionality between the salutary effects and its deleterious effects, were not satisfied. The Court took the view that section 51(e) of the Act hinders the rehabilitation of offenders and their successful reintegration into the community and was incapable of producing salutary effects. The Court also found that the provision failed to meet the minimum impairment test, on the grounds that it did not distinguish between different types of offenders, and that Parliament could have adopted a less intrusive but equally effective means of infringing the right to vote.

43.9 For example, the Canadian Parliament could have legislated to enable a sentencing judge to order an offender's disenfranchisement having taken into account the nature of the crime and the personal circumstances of the accused in conjunction with principles of sentencing. The Court therefore concluded that section 51(e) of the Act infringes section 3 of the Canadian Charter and is not justified under section 1 of the Charter.

43.10 The Canadian Government was unsuccessful in its application to stay the order of the Federal Court pending an appeal to the Supreme Court. Consequently all prisoners were able to vote in the Canadian general election held in 1997. The Canadian Government has advised that the appeal of the substantive issues in the *Sauve* case will be heard by the Federal Court of Appeal in 1999. This matter may eventually go before the Supreme Court, but it is likely to be many years before it does so.

43.11 Finally, the Democrats have made a number of recommendations to amend section 44 of the Constitution. In advance of the 1998 federal election, the AEC published Electoral Backgrounder No 2, entitled *"Parliamentary Report on section 44 of the Constitution"*; and Electoral Backgrounder No 4, entitled *"Constitutional Disqualifications"*, which were provided to all candidates and political parties. The AEC has also addressed the issue of constitutional disqualifications in parts 5.4 and 12.3 of submission No 88; in paragraphs 41.3 to 41.4 and 42.45 to 42.55 of submission No 176; and a further AEC submission on the outcomes of election litigation, in particular the *Sue v Hill* and *Sharples v Hill* election petitions, which involved section 44 of the Constitution, is in preparation.

44 Submission No 208 – Mike Bowden

44.1 The AEC endorses the views put forward in this submission by Mr Mike Bowden of the Tangentyere Council, on the conduct of the 1998 federal election at the Tangentyere polling booth in Alice Springs, to the extent that they are in accordance with the views already expressed by the AEC in parts 7.5 and 7.6 of submission No 88; parts 30 and 38 of submission No 176; by the Australian Electoral Officer for the Northern Territory, Mr Kerry Heisner, at the public hearing of the JSCEM in Canberra on 29 June 1999 (see part 49

below); and in response to the NTCLP submission 201 (see part 37 above) and the public hearings of 21 May (see part 47 below).

45 Public Hearings of 11 May 1999

45.1 At the public hearings of 11 May 1999, the JSCEM received evidence from **Mr Allan Morris MP** on his submission No 158 of 10 March 1999, concerning the death of a candidate during the election period. The death of the Democrat candidate in the Division of Newcastle required a supplementary election to be held on 21 November 1998, under the provisions of sections 180 and 181 of the Electoral Act.

45.2 It should be noted that electors in the Division of Newcastle who turned out to vote on the national polling day, 3 October 1998, were able to cast a vote for the Senate, and at that time would have been properly advised of the need for a supplementary election for the House of Representatives. The AEC does not share Mr Morris's view that there was "mass confusion" in the Division as suggested at page EM2 of the transcript, despite an unfortunately misleading headline in the local newspaper.

45.3 On page EM4 of the transcript, Mr Somlyay asked what would happen if a Senate candidate died during the election period. The Electoral Act makes provision in sections 180(1), 239(4) and 273(27) for the election of Senators to proceed, with votes for the deceased candidate going to the next candidate preferred. The different procedures that follow the death of a candidate during an election period for the House of Representatives and the Senate are based on an important underlying principle in the Electoral Act. This is best explained with reference to the analogous situation when a candidate is declared unqualified after the election is completed.

45.4 The High Court, sitting as the Court of Disputed Returns, has concluded more than once in the last decade that a fresh election is required for the House of Representatives if a candidate is found disqualified after the election *(Sykes v Cleary 1992, Free v Kelly 1996*), whereas a recount is required for the Senate in the same circumstances (*In re Wood 1988*). In *Sykes v Cleary (1992) 176 CLR 77 at 102*, the Court said:

> …The situation in In re Wood was such as to warrant the conclusion that the special count would reflect the voters' true legal intent'. Furthermore, in the light of the group system of voting which applies in Senate elections, it was highly probable, if not virtually certain, that a person who voted for Mr Wood would have voted for another member of his group, had the voter known that Mr Wood was ineligible. The same comment cannot be made in the present case. Here a special count could result in a distortion of the voters' real intentions because the voters' preferences were expressed within the framework of a larger field of candidates presented to the voters by reason of the inclusion of the first respondent.

45.5 That is, by analogy, any attempted counting down of the preferences of voters in a House of Representatives election where a candidate has died, would have the effect of distorting the voters' real intentions, because their

preferences are expressed within the framework of a relatively limited field of candidates. By contrast, because of the proportional representation electoral system and group ticket voting for the Senate, no significant distortion of the voters' real intentions would result from counting down preferences on the death of a Senate candidate. It follows that a supplementary election is appropriate in such circumstances for the House of Representatives, but is not necessary for the Senate.

45.6 On page EM6 of the transcript Mr Morris says that, "I just assure you that there will be people getting notices and being threatened with fines who actually voted and wondering whether they had to vote again." In general terms, the AEC has no intention of prosecuting any elector for failure to vote, if he or she advises the AEC in the proper way that there was a valid and sufficient reason for not voting. The JSCEM may be assured that the AEC is sensitive to the circumstances that may have inadvertently deterred some voters from presenting at a polling booth on either 3 October or 21 November. On the other hand, comments such as, "We're sick of elections; we're sick of politicians", would not constitute a valid and sufficient reason for not voting, for reasons that are explained at length in the AEC Electoral Backgrounder No 8 entitled *"Compulsory Voting"*.

45.7 On the same page of the transcript, Senator Faulkner remarked that the current legislative provisions governing the death of a candidate maintain the integrity of the electoral process, and Mr Morris responded by suggesting that the problem is that a supplementary election is conducted with a "different population", that is, not on the same roll as for the original election. This is not the case. Section 181(1) of the Electoral Act provides that "the supplementary election shall be held upon the roll which was prepared for the purpose of the election which failed."

45.8 The AEC addressed the general issue of the death of a candidate in part 5.7 of submission No 88 of 12 March 1999, and does not believe that any major policy changes are required, as proposed by Mr Morris. However, recommendations 7 and 8 in submission No 88 would provide some technical improvements to the relevant legislative provisions.

45.9 At the same public hearing on 11 May, the JSCEM received evidence from **Mr Jim Lloyd MP** on his submission No 141 of 23 February 1999 concerning provisional voting, alleged 'dead voters', roll maintenance and postal addresses. The AEC addressed the issue of the alleged 'dead voters' in the Division of Robertson at part 10.2 of submission No 88, and responded to the whole of Mr Lloyd's submission at part 36 and Attachment 13 of submission No 176.

45.10 On page EM10 of the transcript, Mr Nairn suggested that the AEC might be asked for information on procedures for checking alleged 'dead voters'. As explained in paragraph 10.2.11 of submission No 88, the Registrar of Births Deaths and Marriages advises the AEC regularly of deceased persons in the relevant Division, and in the case of Mr Lloyd's alleged 'dead voters', there was no such advice from the Registrar. Further, the individuals

involved were actually seen and spoken to by AEC officers who visited their enrolled addresses.

45.11 The issue of 'dead voters' or 'cemetery voting' is raised at every federal election, but investigations by the AEC have consistently shown that such allegations have no foundation in fact, and that 'cemetery voting' is not a problem in contemporary Australian elections. At **Attachment 8** are relevant extracts from the May 1989 JSCEM Report, the December 1990 JSCEM Report, and the November 1994 JSCEM Report, all of which concluded that there was no evidence to support allegations of 'cemetery voting'. Reference might also be made to page 475 of the article by the former Electoral Commissioner, Dr Colin Hughes, at Attachment 27 to AEC submission No 88.

45.12 In his oral evidence on 11 May, Mr Lloyd noted that provisional voting in the Division of Richmond had increased since the 1996 federal election. The statistics on provisional voting are provided at part 8.10 and Attachment 25 to submission No 88, and a further analysis, demonstrating that provisional voting activity at the 1998 federal election was not unusual, is provided at paragraphs 43.12 to 43.13 and Attachment 28 to submission No 176. In general terms, the availability of provisional voting ensures that voters are not disenfranchised by administrative error, and through no fault of their own (see also paragraph 41.26 in submission No 176).

45.13 Discussion between Mr Lloyd and the JSCEM continued on the procedures for the preliminary scrutiny of provisional votes, which may result in the reinstatement of enrolments by the AEC under Schedule 3 of the Electoral Act. The AEC has recommended changes to the legislation in part 9.12 of submission No 88 and in submission No 159.

45.14 Mr Lloyd also raised the issue of return-to-sender (RTS) mail, which has been addressed in general terms by the AEC in part 9 of submission No 176. Past JSCEMs have also investigated RTS mail and consistently found that there was no evidence to support allegations that the level of RTS mail indicated enrolment fraud (see **Attachment 9**). In some cases, those making such allegations were found to have used out-of-date enrolment information when addressing constituency mail. More usually, those expressing such concerns fail to appreciate the high mobility of the population in many Divisions, and the fact that enrolment activity will naturally increase around the time of an election.

45.15 The Commonwealth Electoral Roll can never be 100% correct at any one point in time, because there will always be a time lag between population movements and the processing of new and transferring enrolments. There is also the possibility of administrative error by the AEC in processing the enrolments of hundreds of thousands of electors in the very short time frames around the close of the rolls for an election. These practical realities are reflected in legislative terms throughout the Electoral Act, and in particular, in the provisions of Part IX in relation to enrolment objections, in the availability of provisional voting on polling day under section 235, and in the prohibition in

section 361 against grounding any election dispute on the correctness of the roll.

46 Public Hearings of 14 May 1999

46.1 At the public hearings of 14 May 1999, the JSCEM received evidence from **Mr Neil Gillespie** and **Mr Fred Leftwitch** on submission No 73 of 5 March 1999, which the AEC responded to at part 24 of submission No 176.

46.2 The AEC would support any move to ensure that, under the *Aboriginal and Torres Strait Islander Commission Act 1989*, ATSIC officials are accorded the same rights and privileges in relation to resignation and re-appointment for the purpose of contesting federal and other elections, as are federal public servants under the *Public Service Act 1922* (see paragraph 35 in Electoral Backgrounder No 4 entitled *"Constitutional Disqualifications"*).

46.3 At the same public hearing on 14 May 1999, the JSCEM received evidence from **Dr Amy McGrath** on her submission No 161 of 2 March 1999, which the AEC has responded to in part 40 of submission No 176, and on her submission No 164, which the AEC has responded to above in part 3 of this submission. However, there are various related issues raised in Dr McGrath's oral evidence which are addressed in further detail below.

46.4 At the outset it might be noted that at page EM80 of the transcript, where Dr McGrath details her personal links with various high-level electoral officials and political operatives in the United Kingdom, there is no mention of the two significant reports on electoral reform published late last year in that country. These reports recommended the adoption of many of the elements of the Australian electoral system, which are the focus of Dr McGrath's ongoing complaints about electoral fraud in Australia. The UK reports are discussed in more detail above in part 3, and are reproduced at **Attachments 2** and **3**.

46.5 In her written and oral submissions Dr McGrath once again presents previously discredited "evidence" in support of her claims that electoral fraud is endemic in the federal electoral system. In particular, on page EM90 of the transcript, Dr McGrath raises the 1993 elections in the Divisions of Macquarie and Dickson, and an unnamed Western Australian Division, in support of her allegations that the votes of religious objectors have been defrauded. However, it is notable that Dr McGrath has not offered to provide the correspondence, which she claims supports her allegations, to either to the AEC or the JSCEM for further investigation.

46.6 The electoral fraud allegations made by the "Enterprise Council" in relation to the 1993 supplementary election in the Division of Dickson, and in particular the allegations concerning religious objectors, are recycled by Dr McGrath, despite the unanimous conclusions reached in the November 1994 JSCEM Report at pages 64-65 (see also **Attachment 10**):

> 4.6.5 ….the Committee is satisfied that the evidence put forward by the Enterprise Council fails to substantiate its allegations. This view would appear

to be shared by the Liberal candidate in Dickson, Dr Bruce Flegg, who has advised the AEC that

> the Enterprise Council …in no way speaks for me and I in no way support their misguided campaign.

4.6.6 The AEC did not act unreasonably in declining to challenge the Dickson result in the Court of Disputed Returns. The Committee therefore finds the Enterprise Council's accusation of political interference or improper collusion between the Commonwealth Government and the AEC to be unfounded.

46.7 The electoral fraud allegations made by the unsuccessful Liberal Party candidate, Mr Alastair Webster, and resultant High Court proceedings, in relation to the 1993 election in the Division of Macquarie, are also recycled by Dr McGrath, despite the unanimous conclusions reached in the November 1994 JSCEM Report at page 67:

4.7.4 Dr Sue Flanagan, on behalf of a group including the petitioner in the Macquarie case, Mr Alasdair Webster, submitted that procedures for the Court of Disputed Returns are restrictive and actively discourage any challenge. Their concerns included the Court's preliminary hearing procedures, rules relating to the viewing of electoral material, the fact that one petition cannot challenge the whole of a general election result, and the requirement that no amendment be made to the facts relied on to invalidate an election result forty days or more after the return of the writ.

4.7.5 However, the Committee was not persuaded that Court procedures have operated in the past, or would operate in the future, to prevent a thorough review of a contested election. Therefore the Committee does not see a need for a full review of procedures for bringing a petition before the Court of Disputed Returns.

46.8 In this context, on page EM85 of the transcript, Dr McGrath complains that Mr Webster was required to provide proof to the High Court that, "…the people who he said were ghost voters with false names did not exist".

46.9 Mr Webster was indeed expected to provide sustainable evidence in support of his allegations, but failed to do so. Instead, the AEC took the material provided by Mr Webster in his petition and affidavits, which named hundreds of innocent electors in the Division of Macquarie as suspected multiple voters or impersonators, and, where possible, contacted and interviewed every elector named (including those electors overseas or interstate).

46.10 The AEC then provided sworn evidence to the Court that, except in a few cases where the evidence was inconclusive (and not sufficient to have affected the result), the alleged multiple voters did not vote more than once, and there was no evidence to support the allegations of impersonated votes. As a consequence, Mr Webster decided not to press his petition any further, and it was duly dismissed by the Court. Mr Webster was ordered to pay the

costs Ms Deahm incurred in defending her election (see also paragraphs 10.2.1 and 10.2.2 of submission No 88).

46.11 On page EM86 of the transcript, Dr McGrath says, "…there is no penalty in the act for putting the name of a person who does not exist on the roll. Were you aware of that?" In fact, section 339(1)(k) of the Electoral Act makes it an offence to "make a statement in any claim, application, return or declaration…that, to his or her knowledge, is false or misleading in a material particular." It might also be noted that section 339(1)(b) of the Electoral Act makes it an offence to "impersonate any person for the purpose of voting". The penalty for each of these offences is imprisonment for 6 months. (Dr McGrath made the same claim to the previous JSCEM in her submission No 69 of 3 August 1996)

46.12 In the context of defining "electoral fraud", which has been addressed in general terms above in part 3 of this submission, Dr McGrath asks, at page EM86 of the transcript:

> How can you prove that a person does not exist? The law does not provide for it.

46.13 Presumably, the need to prove that a person does not exist would arise in the context of someone claiming a right or a benefit in the name of another person who is not claiming that right or benefit, or is deceased. While it may be possible in some circumstances to "invent" a person, and claim a benefit or right in the short term, the checks and balances available in the administrative processes of government ensure that such cases are usually detected and exposed over time. In relation to electoral enrolment, for example, there is an array of enrolment verification techniques and procedures available to the AEC, ranging from personal contact during electoral roll reviews, to the various data-matching techniques adopted by the AEC on the recommendation of the previous JSCEM (see part 4 of submission No 88).

46.14 In the shorter term, the AEC is confident that any inexplicable surge in enrolments leading into an electoral event, which Dr McGrath might take as an indicator of a significant number of 'ghost' electors enrolling in a Division for the purposes of an election, would be picked up by those AEC officers charged with processing enrolments applications and maintaining the roll, at the Divisional level. And indeed, this occurred relatively recently, when AEC staff in the Division of Herbert in north Queensland noticed certain anomalies when processing enrolment claim cards during the time of an ALP preselection ballot prior to a State by-election.

46.15 The suspicions raised by AEC staff were investigated by the AFP, and the perpetrators were prosecuted and convicted for forgery of enrolment claim cards under section 344 of the Electoral Act and under section 67 of the *Crimes Act 1914*. The early detection of these forgeries was sufficient to ensure that any corruption of the roll was forestalled, and there was no suggestion raised by the Queensland State Electoral Commission that the result of the State by-election was affected. It is noted that Dr McGrath does

not mention these widely-publicised convictions for “electoral fraud” that were detected in the first instance by AEC staff, except in a passing reference at page EM93 of the transcript.

46.16 At a more general level, the invention of identities, for the purposes of claiming rights or benefits from any government agency, could be addressed by more stringent public security measures such as the introduction of an ‘Australia Card’, but such measures have so far been rejected by the Parliament, as unnecessarily intrusive of personal privacy. Similar considerations apply to ‘limited vote tracing’ as recommended by the H S Chapman Society (see part 10.3 of submission No 88).

46.17 On page EM87 of the transcript, Dr McGrath asserts that ‘DROs are worried about the photocopying of votes since watermarks on ballot papers have gone”. The amendment of the Electoral Act to allow for the replacement of watermarked ballot papers with security printed ballot papers was the result of a recommendation of the November 1994 JSCEM Report, which concluded at page 124:

> 8.5.3 Since 1915 the Electoral Act has required that ballot papers be authenticated by an official watermark. The AEC advised the inquiry that this requirement is costly and technologically obsolete.
>
> 8.5.4 If a security printing process (as used for chequebooks) were used to produce ballot papers, the AEC would not be obliged to store stocks of watermarked paper to cater for at least two elections. Also, as an “official mark for identification” security printing would probably prove superior to watermarking; for example, the security printing could be such that erasures could not be disguised.
>
> Recommendation 61: that section 209A of the Electoral Act be amended to provide that ballot papers may be printed using either a security mark approved by the AEC or a watermark.

46.18 In fact, the AEC has not yet invoked this provision for security marking of ballot papers, because AEC stocks of watermarked paper have only recently come close to exhaustion. That is, watermarked ballot papers were used at the 1998 federal election, which makes the alleged comments from DROs, as reported by Dr McGrath, somewhat puzzling. In relation to the photocopying of ballot papers in emergency situations, such as occurred across the country at the 1998 federal election, due to the confluence of the timing of the election with school holidays and various sporting and cultural events, reference should be made to part 7.2 of submission No 88.

46.19 On page EM87 of the transcript, Dr McGrath puts forward her view that the term “fraud” is taken to cover

> anything from incompetence to irregularities by officials that can contribute to failure of a result, as was shown by an audit in 1989 by the AEC itself. The results in those six inquiries were enough to have overturned the result of the election. They included irregularities by officials.

46.20 Dr McGrath's reportage of the 1989 AEC internal audit of six Divisions completely misrepresents its purpose, its outcomes, and its implications, as indicated in the extract from the May 1989 JSCEM Report at **Attachment 11**. This is not the first time that Dr McGrath has misrepresented this audit by the AEC in her publications. It is worth noting that the audit, which followed the December 1986 JSCER review of the implementation of the 1983-84 reforms to the Electoral Act, and which was reported in full to the JSCEM inquiry into the conduct of the 1987 federal election, was to ensure that those major legislative reforms were being properly implemented at the Divisional level. The specific administrative problems that were uncovered in that audit have since been comprehensively addressed by the AEC and the JSCEM, and any suggestion that the same general problems continue to exist demonstrates a complete failure to appreciate the developments in administrative practice within the AEC over the past decade.

46.21 In support of her recommendation in her written submission No 164 that an Electoral Ombudsman be established, Dr McGrath criticises the judicial consideration of election disputes. For example, on page EM88 of the transcript Dr McGrath asserts that

> parliaments used to be courts of disputed returns well into this century. A lot of people know that. That was a speedy method of looking into irregularities. Politicians understood them. They knew the political process and they would quickly resolve the problems. The Speaker was responsible. In 1928 it was the Labor Party which resisted the parliament abdicating this responsibility in favour of the courts because they said they would be too narrow and legalistic.

46.22 In fact, immediately after Federation, the *Commonwealth Electoral Act 1902* established the High Court as the Court of Disputed Returns for the purposes of election disputes by petition, under (the now) Division 1 of Part XXII of the Electoral Act. Division 2 of Part XXII of the Act, relating to parliamentary references to the Court of Disputed Returns, was inserted in 1907 by the *Disputed Elections and Qualifications Act 1907*.

46.23 Dr McGrath goes on at page EM88 of the transcript to claim that, "one area that must be changed is the archaic fact that candidates cannot challenge the roll in courts". This is a reference to section 361(1) of the Electoral Act, which has its historical roots in much earlier English law, and is reflected in identical terms in all State/Territory electoral legislation. Dr McGrath made the same complaint to the previous JSCEM, to which the AEC responded by relying on the words of Justices Gibbs, Mason and Stephen of the High Court in *In Re Berrill's Petition (1976) 51 ALJR 127*:

> Any electoral system which, instead of providing a means of putting the electoral rolls in order before an election, allows alleged errors in those rolls to ground an attack upon the subsequent election exposes to risks of dislocation the democratic process it is designed to serve. Hence, no doubt, the provisions, commonly found in our election laws, for the prior adjudication of disputes as to the state of the rolls, such disputes being treated as wholly

distinct from, and not the proper subject-matter of, petitions concerning disputed elections and returns.

46.24 On pages EM93 and EM94 of the transcript, Dr McGrath claims that the Court of Disputed Returns is too costly for ordinary citizens to approach with their allegations of electoral fraud, and mentions the sum of $100,000. Unless a case is allowed to drag on for months and even years, which did happen in *Webster v Deahm*, this figure is way beyond the normal costs incurred in most petition cases before the High Court. In any case, section 360(4) of the Electoral Act empowers the High Court to order the Commonwealth to pay the costs of petitions, where it is considered justified, and which it has done in a number of recent decisions.

46.25 Any litigant who enters the court system should have the necessary argument and/or evidence to support their case, and assuming that case is successful, the costs incurred by the litigant can be claimed from the losing party. Conversely, any litigant who enters the court system on a "fishing expedition", with no proper evidence to ground their allegations, risks having costs awarded against them. The system is designed to indemnify the successful party against costs that would not be otherwise incurred, and Dr McGrath would be well aware of this.

46.26 In considering whether to mount a challenge in the High Court after a federal election, petitioners must consider firstly whether their case is able to be substantiated and has a prospect of success, and secondly whether they require legal representation to advocate their case, and what level of legal advice/representation might be necessary. In the past, many petitioners, without personal wealth or financial backing have had filing fees and other preliminary costs waived by the court, and advocated their case without legal representation. After the 1993 federal election, for example, five of the six petitioners were either pensioners, impecunious or bankrupt, but quite adequately represented themselves. (However, in the outcome all five petitions were dismissed, which suggests that legal advice, at least in the early stages, is recommended.)

46.27 In fact, the Parliament did consider the issue of costs in election petitions in the early part of this century, although the focus at that time appeared to more on protecting elected Members of Parliament from vexatious and frivolous challenges by wealthy litigants. The balance that must be struck between allowing access to the courts for all citizens regardless of their means, and protecting legally elected Members of Parliament from unnecessary litigation, has not been disregarded by the Parliament. It was raised as part of AEC submission No 124 of 15 November 1993, reflected in the recommendations in the November 1994 JSCEM Report, and resulted in amendments to the Electoral Act (**Attachment 12**).

46.28 In this context, it is important to note that immediately following each electoral event, the Australian Electoral Officers in each of the States/Territory actively review all relevant information, such as polling booth reports, and statistical data arising from the election, to determine whether any "electoral

fraud" (under the provisions of Part XXI of the Act) is indicated, sufficient to have affected the result of any election, particularly in marginal Divisions. If such irregularities are discovered, the AEC is empowered to petition the High Court under section 357 of the Electoral Act to seek an appropriate remedy. (The AEC petitioned the Federal Court under a similar provision after the 1993 ATSIC election, when the AEC discovered inadvertent mishandling of declaration votes by polling officials in five electorates, to a degree sufficient to have affected the results).

46.29 Section 355(e) of the Electoral Act provides that petitions disputing an election must be filed with the Court within 40 days of the return of the writ for the election. The AEC takes very seriously its public responsibility to review any indicative evidence of electoral fraud in this time frame, and any person who believes that electoral fraud might have occurred in a particular Division is entitled to raise their concerns with the AEC in the first instance, for prompt investigation (see for example, part 10.2 in submission No 88). Assuming that evidence of electoral fraud is uncovered by the AEC, sufficient to have affected an election result, then a petition to the Court will be considered by the Commission, within the terms of section 362 of the Act. Alternatively, the evidence will be referred to the Australian Federal Police and/or the Commonwealth Director of Prosecutions for possible prosecution under the offences provisions of Part XXI of the Act.

46.30 On page EM 94 of the transcript, Dr McGrath raises the issue of cardboard ballot boxes, saying, "Nobody likes the cardboard ballot boxes". The AEC has no evidence that there is any widespread discontent with cardboard ballot boxes in the electorate. Cardboard ballot boxes and voting screens were introduced over a decade ago for the 1987 federal election, and produced immediate savings in capital replacement and storage costs, without any loss in security. The May 1989 JSCEM Report concluded on page 47 that:

> 4.14 On the matter of security a number of submissions raised doubts about the use of cardboard ballot boxes stating that ballot boxes were not sealed, broke open, were too small or permitted ballot papers to get stuck.
>
> 4.15 Despite such claims, the Committee found the cardboard ballot boxes to be a secure means of collecting ballot papers. On polling day individual ballot boxes remained in view of all voters, and more importantly, they were constantly under the scrutiny of a Presiding Officer and party scrutineers. Similarly, smaller ballot boxes used for mobile polling remained under the scrutiny of Divisional Office staff. Also important was the fact that most polling places were counting centres and as a result security problems with transporting ballot papers were negligible.

46.31 It is also worth noting the response provided by the former Electoral Commissioner, Dr Colin Hughes, at pages 478-479 of his article at Attachment 27 to submission No 88, to suggestions made in Dr McGrath's book *"Corrupt Elections"*, about the potential for electoral fraud in cardboard ballot boxes.

> *Corrupt Elections* hints at another opportunity to get at the ballot papers – before the scrutiny has started: "we have sold [to Third World countries] our tamper-proof metal ballot boxes and replaced them with large cardboard ones that could be opened with a razor blade" (p. 24). Suspicion of the cardboard ballot boxes – "giant unreliable and broachable cardboard boxes" (p. 115) – disappeared fairly quickly in the eighties, and it is somewhat surprising to see it given another run. When they were introduced, most of the boxes then in use were only as "tamper proof" as their metal padlocks which could be opened by the right key, a copy of the right key, or any picklock to hand, after which no one would be the wiser.
>
> Even worse, they were small and during the day at a middle-size or large polling booth a number would become filled with ballot papers and put aside, often in another room, until the count began. This was exactly the scenario that would permit removal or substitution. Cardboard allowed manufacture of a much larger box which only in a very few polling places could be filled during the poll, and so the box must now sit prominently in the open area of the polling place under the eye of all the polling officials and every elector who comes in – and who might well ask where the ballot box was.
>
> Its security is a plastic looking device with a unique number that can only be opened by destroying it – which happens when the count starts. A box previously slit with a razor blade would be obvious when it was opened and disassembled in the presence of the scrutineers at 6 pm. Where a box has to travel, as with hospital visiting or a mobile team, then an old "hard" box is still used.

46.32 In her written submission and oral evidence, Dr McGrath has again raised the case of the hacker, Mr Timothy Cooper, and her suspicions about the consequential potential for fraud in outsourcing the computer platform on which the Commonwealth Electoral Roll is maintained. These issues have already been addressed by the AEC in paragraph 40.7 of submission No 176. The original AEC submission No 128 of 24 January 1997 to the previous JSCEM, on the subject of Mr Timothy Cooper, is reproduced as **Attachment 13** to this submission for the convenience of the JSCEM.

46.33 In her oral evidence and in her written submissions, Dr McGrath suggests that provisional voting might be an avenue for electoral fraud and corruption of the electoral rolls, and from this it might be concluded that Dr McGrath is not in favour of provisional voting, as provided for under section 235 of the Electoral Act. Provisional voting ensures that electors are not disenfranchised because of official errors on the rolls, and it could be expected that the removal of provisional voting would result in a reduction in the franchise.

46.34 The AEC has already provided information relevant to provisional voting at the 1998 federal election at part 8.10 and Attachment 25 of submission No 88, and further comment and analysis at paragraph 41.26, and paragraphs 43.12 to 43.13 and Attachment 28, of submission No 176. The AEC has also recommended changes to the legislation governing the admissibility of provisional votes and the reinstatement of enrolments in part 9.12 of submission No 88, and in submission No 159. However, in the context

of Dr McGrath's present complaints, it may be useful to canvass some of the conclusions of past parliamentary inquiries that have dealt with provisional voting.

46.35 The December 1986 Report of the Joint Select Committee on Electoral Reform made the following general conclusion at page 137:

> 7.70 A major achievement of the 1983 amendments was to take away from presiding officers a discretion, which they arguably possessed previously, to refuse an elector a provisional vote in certain circumstances. This amendment had the advantage of smoothing transaction of business at polling booths, where previously instances of open conflict between polling officials and scrutineers were not unknown. It is now the case that whenever an elector claims to vote at an election and his name is not on or cannot be found on the certified list of voters for that division, he may claim a provisional vote…..

46.36 The December 1990 Report of the JSCEM made the following general conclusion at page 29:

> 3.32 Amendments to the *Electoral and Referendum Amendment Act 1989* which took effect on 30 September 1990, consolidated the former sections 235, 236 and 237 into a new section 235. This now provides for voting by electors whose names or addresses cannot be found on the certified list, by electors having been shown as being already supplied with postal ballot papers and by electors whose names have been marked as having already voted at that polling place.
>
> 3.33 The Liberal Party is concerned that there is potential for misuse of this section by electors and recommends amendments to the legislation to prevent the possibility of any illegalities (Evidence p. 234).
>
> 3.34 The AEC stated that it has no reason to believe that voting under section 235 has been abused in any systematic or fraudulent way. The AEC provided a copy of the procedures to be followed for the scrutiny of provisional votes prior to such votes being accepted. These procedures are systematic and comprehensive and appear to be adequate to prevent abuse of the provisional voting system by all but the most determined abuser. The AEC is of the opinion that only the institution of radical measures like a national database of individuals as was proposed in connection with the Australia Card would render the provisional voting system less susceptible to abuse. As there has been little, if any, such abuse reported the Committee considers the legislation in its current form is adequate.

46.37 In discussing her requests to the AEC in late 1998 for various categories of information on declaration voting, on page EM82 of her oral evidence, Dr McGrath says that, "I had a conference with the Electoral Commissioner….". There was in fact no conference between Dr McGrath and the Electoral Commissioner, but there was some lengthy correspondence, which was copied in its entirety at Attachment 21 to submission No 176, and is again copied as **Attachment 14** to this submission for the convenience of the JSCEM. After clarifying exactly what information Dr McGrath was seeking at the time, and explaining the sort of information that was legally and

practically available, the Commissioner provided Dr McGrath with the following:

- the number of declaration votes counted for the Division of Dickson in the four categories of postal, pre-poll, absent and provisional.
- the number of postal votes returned outside their envelopes for the Division of Dickson.
- the number of enrolment reinstatements of declaration voters for the Division of Dickson, in the four categories of postal, pre-poll, absent and provisional.
- An undertaking to provide the national voting statistics for the 1998 federal election in print form and on CD-ROM.

46.38 Dr McGrath was not provided with the personal information on declaration voters that she originally requested, as this is private information protected by law from disclosure, nor was Dr McGrath provided with national statistics on the number of enrolment reinstatements of declaration voters, in the four categories of postal, pre-poll, absent and provisional.

46.39 Such statistics are not routinely collected or collated by the AEC as they would not appear to serve any high priority purpose during the actual election period, when the pressure is on to obtain results. Whilst some Divisions may have such information in a readily available form, as was the case in the Division of Dickson, other Divisions across the nation do not, as it is not an administrative or legislative requirement. The Electoral Commissioner concluded that it would be an unreasonable diversion of national resources to require Divisional Returning Officers to undertake such research when there were other more pressing post-election priorities.

46.40 In her oral evidence, Dr McGrath makes a number of assertions about the conduct of provisional voting, that reveal a misunderstanding of the legislative framework and relevant procedures. For example, on page EM82 of the transcript Dr McGrath says that,

> …nobody I spoke to, neither politicians nor candidates, knew that provisional votes were issued other than on polling day. So it would not be possible to investigate.

46.41 Section 235 of the Electoral Act, entitled “provisional votes”, makes it clear that a provisional declaration vote can only be issued by a polling official at a polling place if the person’s name or address cannot be found on the certified list of voters, or if a mark on that list indicates that the person has already voted. That is, provisional votes are only issued on polling day, not at any time before or after polling day.

46.42 However, and this may be the source of Dr McGrath’s confusion, it could be said at a stretch that *all* declaration votes (postal, pre-poll, absent, and section 235 provisional votes) are in a sense “provisional”, in that they must all pass through the preliminary scrutiny under Schedule 3 of the Electoral Act, to verify the voter’s entitlement, before the declaration envelope is opened and the ballot papers are entered into the count (the “further scrutiny”).

46.43 During the preliminary scrutiny, all four categories of declaration votes are treated in basically the same way, and the legislation may require that declaration voters in any of the four categories have their enrolments reinstated for future elections, under certain conditions. Because all declaration votes are processed in substantially the same way, there has never been any obvious need for the AEC to collect and collate statistics about enrolment reinstatements by declaration vote category.

46.44 Dr McGrath's underlying assumption, as it can be gleaned from the transcript and the correspondence mentioned above, appears to be that provisional voting is a wide-open door for organised electoral fraud, and the AEC is for some reason "hiding" the relevant statistics that might expose such fraud. The AEC rejects these assumptions and conclusions on the basis that they are founded on a misguided view of the law and procedures, and unsubstantiated suspicions of political bias within the AEC. The legislative provisions relating to the preliminary scrutiny of declaration votes and the reinstatement of certain enrolments, as provided for by the Parliament, are admittedly complex, but they are no mystery to well-informed electoral observers, candidates and scrutineers.

46.45 Dr McGrath asserts on page EM82 of the transcript that:

> I have documentation from the Electoral Commissioner, Mr Gray, giving figures of provisional votes in all four categories in Dickson, so they do exist and lists are kept….Mr Gray has admitted that. But he says that nobody is entitled to look at them and he invokes the privacy law.

46.46 If Dr McGrath is referring to the numbers of enrolment reinstatements by declaration vote category, then it is simply not the case that the Electoral Commissioner "admitted" that national lists are kept, nor is it the case that privacy law was invoked by the Commissioner to deny access to such national lists (even if they existed across the board), as a proper reading of the correspondence would indicate. Dr McGrath was provided with enrolment reinstatement statistics by declaration vote category for the Division of Dickson because they happened to be available for that Division, given the intense public interest in that particular election.

46.47 If Dr McGrath is referring to the national statistics for declaration votes, by category (postal, pre-poll, absent and provisional), and by Division, then such statistics are normally generated for every federal election, are currently in production for the 1998 federal election, and are to be provided to Dr McGrath, as indicated in the Commissioner's last letter to her.

46.48 In relation to the handling of declaration votes by polling officials, at page EM94 of the transcript, Dr McGrath says that, "I went in the pre-poll booth and he would not let me put a pre-poll vote in the box, which was five feet behind the counter." Dr McGrath appears to be unaware of section 200E(6) of the Electoral Act, which specifically requires the issuing officer to

place the pre-poll vote in the ballot box (see also response to submission No 182 above).

46.49 At the same public hearing on 14 May, the JSCEM received evidence from **Mr Brian Cox,** on his submission No 31 of 25 January 1999, which the AEC has already responded to at part 11 of submission No 176.

47 Public Hearings of 21 May 1999

47.1 At the public hearings of 21 May 1999 in Darwin, the JSCEM received oral evidence from **Mr Matthew Coffey** on his submission No 191 of 12 May 1999. The AEC has responded to the issues raised in this submission at paragraphs 42.30 to 42.31 of submission No 176. The JSCEM received oral evidence from **Mr Lex Martin** on his submission No 189 of 12 May 1999, which the AEC has responded to at part 25 above.

47.2 The JSCEM also received oral evidence from **Mr Warren Snowdon MP** on assisted voting in Aboriginal communities, which has been the subject of submissions by the AEC in parts 7.5 and 7.6 of submission No 88; in parts 30 and 38 of submission No 176; and in this submission in response to submission No 201 above, and in the following part, in response to the oral evidence provided by the Northern Territory Country Liberal Party. It is noted that Mr Snowdon has not yet filed his written submission with the JSCEM, but in his oral submissions has recommended two changes to the delivery of the franchise to Aboriginal communities.

47.3 The first recommendation, on page EM133 of the transcript, is the restoration of the Aboriginal and Torres Strait Islander Education and Information Service (ATSIEIS), which was abolished when the Government removed the annual AEC funding for this program, of approximately $2 million, from the 1996 budget (see paragraph 7.5.3 in submission No 88). The second recommendation, on page EM 134 to 135 of the transcript, is to add photographs of candidates to the ballot papers, as is done for Northern Territory Legislative Assembly elections (see paragraphs 30.9 to 30.10 of submission No 176).

47.4 The AEC does not support the inclusion of photographs on ballot papers, given the already expanding size and complexity of the Senate ballot paper, and because, for reasons relating to equity in access to the franchise, it would probably have to be applied to all ballot papers for the whole of Australia, not just in certain areas of the Northern Territory, or for elections only for one House of the Parliament.

47.5 However, the AEC strongly supports Mr Snowdon's recommendation for the restoration of funding for the ATSIEIS program, which not only provided continuing education to Aboriginal communities in enrolment and voting, thus reducing the pressures on assisted voting, but also kept the rolls up-to-date in communities, thus decreasing the need for provisional voting. This is addressed further below in relation to the oral evidence provided to the

JSCEM on 29 June by Mr Kerry Heisner, the Australian Electoral Officer for the Northern Territory, and in recommendation No 3 of this submission.

47.6 On the same day in Darwin, the JSCEM also received oral evidence from NTCLP representatives **Ms Suzanne Cavanagh**, **Mr Charlie Taylor** and **Ms Jenny Sinclair**, which was supplementary to the NTCLP submissions No 92 and 157. (The AEC had responded to the issues raised at that stage by the NTCLP at parts 7.5 and 7.6 of submission No 88, and in parts 30 and 38 of submission No 176.) It might be noted for the record, that before the formal hearing commenced on the day, AEC staff provided representatives of the NTCLP and interested members of the JSCEM with a demonstration of the procedures used in the computerised search for electors' names during the preliminary scrutiny of declaration votes, including provisional votes.

47.7 The Australian Electoral Officer for the Northern Territory, Mr Kerry Heisner, could not be present at this public hearing in Darwin because he was at the time assisting the United Nations in New York with preparations for the referendum in East Timor. However, most of the issues raised at this public hearing have since been responded to either through the oral evidence provided by Mr Heisner at a public hearing in Canberra on 29 June (see below), or in response to the NTCLP submission No 201 (see above). In this part the AEC will only address any new issues raised by the NTCLP at this hearing.

47.8 At page EM137 of the transcript, Ms Cavanagh says the following:

> There is one matter I would like to raise that is not included in their response or in ours. They did refer, in both the AEC submission and verbally to us, to the so-called manual that the Australian Electoral Commission uses. On the face of it, this appears to be the bible of the AEC. This manual is a secret document which none of us had access to, but which is referred to on a regular basis to justify any concerns we may have. In some cases it appears to us, on the face of it, that this manual actually contravenes the Commonwealth Electoral Act, for example, by allowing party scrutineers to assist people to vote and giving the district [sic] returning officer the power to have one set of laws for one group of people as opposed to another set of laws for another group of people when determining whether provisional votes are to be accepted or not accepted to the count….
>
> Mr Heisner advised us that he would be allowing up to 11 years discrepancy in the dates of birth for Aboriginal voters as opposed to no discrepancy for other voters. When we challenged this, he told us that it was in the manual.

47.9 The Divisional Office Procedures (Elections) Manual is a detailed manual of instructions and guidelines for the administration of elections by Divisional staff. The manual was written over a decade ago, and is updated continuously in accordance with legal advice on the Electoral Act as provided by the Attorney-General's Department, and so as to reflect various legislative, administrative and technical developments in the conduct of elections.

47.10 The manual contains policy guidelines on a number of matters that must remain confidential to the AEC for the proper administration of elections. For example, the manual contains legal advice on valid and sufficient reasons for not voting, which it would not be in the public interest to publicise, as it would then become a manual for avoiding the law. However, if the JSCEM wishes to sight the parts of the manual relevant to Ms Cavanagh's complaint then they can be provided separately on request.

47.11 Contrary to Ms Cavanagh's suspicions, the manual does not contain any secret instructions on how to apply the legislation in a racially biased manner. As to the "11 years" mentioned by Ms Cavanagh in her oral evidence, Mr Heisner has responded that he did not make any such statement, as it makes absolutely no sense as a generalisation under the terms of the legislation.

47.12 On page EM38 of the transcript, Ms Cavanagh criticises the statement read by Mr Heisner at the declaration of the poll. Mr Heisner has responded to Ms Cavanagh's criticisms as follows:

> It is true that at the Declaration of the Poll I did make a statement concerning a statement read by Suzanne Cavanagh. The Declaration of the Poll in the Northern Territory has been transformed by the CLP over the last two elections as an opportunity to criticise the Australian Electoral Commission. The Australian Electoral Commission is an independent statutory body and the Australian Electoral Officer is a statutory position. Criticism is fair if it is based on fact. It would be wrong to think that criticism levelled at the Australian Electoral Commission during a public and media intensive function such as the Declaration of the Poll should not be answered. My statement was not made until Suzanne Cavanagh had completed reading the statement of Senator Tambling, and involved issues which are now before the Joint Standing Committee on Electoral Matters. These are:
>
> - Assistance under Section 234 of the Commonwealth Electoral Act
> - Railway Side (Tangentyere Council) Polling Place
> - Remote Mobile Polling
> - Scrutinies
> - Declaration on screen scrutiny
>
> Relationships between the CLP, especially Suzanne Cavanagh, and the Australian Electoral Commission have not been good since the Australian Electoral Commission instigated an investigation into leakage of confidential data (DOB information) during the 1996 elections. The investigation by the AFP followed a public statement by the CLP candidate concerning his use of the confidential data. It was during this time that Suzanne Cavanagh also spoke to the Australian Electoral Officer Northern Territory stating that it was inappropriate for a public servant to make comments on public statements critical of the Australian Electoral Commission from the then Chief Minister.

47.13 At page EM139 of the transcript, Ms Cavanagh says the following:

> Then we heard on the grapevine that Tangentyere was going to be set up as a static booth on polling day. We waited four days to be advised by the

Australian Electoral Commission. We were advised by a letter from them to say that they had set up Tangentyere. I rang Kerry Heisner to object. He laughed and he said, 'I was expecting this call'. Now it is just an attitudinal thing, but it is something that really erodes our confidence in that officer to conduct his duties in what we consider to be a fair and open manner…

47.14 Mr Heisner has responded to Ms Cavanagh's criticism as follows:

Suzanne Cavanagh states that I (the Australian Electoral Officer) "laughed" when she rang to complain about the establishment of Railway Side polling place. It is true that when Suzanne Cavanagh rang I did say that I was expecting a call from her. This was based on the fact that I had already received phone calls concerning the establishment of mobiles to service Aboriginal people in town camps (in consideration of electors having to complete 3 ballot papers). At no stage did I laugh **at** Suzanne Cavanagh. Anyone that deals with me knows that I try and inject some humour into tense situations. My friendly greeting to Suzanne Cavanagh was my attempt at diffusing another awkward situation with CLP.

47.15 On pages EM142 and 143 of the transcript, Ms Sinclair criticises the physical accommodation at Tangentyere polling booth, and raises the assault against her person by an elector. The Assistant Divisional Returning Officer at Alice Springs, Mr Joe Beath, has responded as follows:

The room at Tangentyere Council was small but I was assured by Council employees that the excess furniture would be removed to make more room. When I first visited the polling place on polling day I could see the excess furniture was **not** removed but simply pushed to one end and voting screens placed in front. This actually cut the useable space in the room by about 40%. Given the fact that there were 2 issuing officers at tables, 1 declaration table, OICs area, voting screens, ballot boxes, language interpreters, the maximum number of scrutineers from ALP, CLP and No to Statehood and electors voting. **Yes,** the useable space was very limited in the end and it was close. I visited the booth 4 or 5 times before noon and each time the booth was operating well. The OIC of the booth did not need as many interruptions she was getting from the CLP. The booth only took about 400 votes.

I sympathised with Jenny Sinclair after she had been assaulted. On each occasion I saw her at other booths I spoke with her and asked how she was holding up. Not once did she mention people fighting inside the booth and the OIC did not report any fighting. She did however say it was the worst experience she had encountered in 20 odd years as a party worker in both Territory and Federal elections. There was no mention of people covered in blood by Jenny Sinclair or the OIC or anybody else for that matter. There was mention of a drunk person who fell across voting screens and pulled them to the floor but no fighting or absolute pandemonium as stated by Jenny Sinclair. I believe that the intoxicated person who pulled the voting screens down was the same person who assaulted Ms Sinclair.

I visited the booth quite regularly in the morning and each time things were running smoothly. At the first visit there were quite a number of aboriginal electors trying to get into the room but a Tangentyere council employee was controlling the queue outside the door. This employee did this voluntarily, he was not employed by the AEC.

At times there were many electors trying to vote as the 2 buses ferrying people from the Town Camps were sometimes arriving at the same time. This did cause a bottle neck at the booth entrance. This was effectively controlled by “Council employee Willie”.

47.16 On page EM144 of the transcript, Ms Cavanagh says

I spoke to Kerry Heisner on probably three or four occasions that morning about Tangentyere. I complained. I said, ‘You’ve got to do something about that booth. Its obviously too small.’ He came back to me and told me that he had spoken to the assistant returning officer in Alice Springs and that he had confirmed our concerns with the presiding officer. He told me that they were going to try and find somebody else to take her place, which they never did. He also then indicated to me that because things started to get really bad there they might have to close the booth….

47.17 Mr Heisner has responded to Ms Cavanagh’s statement as follows:

On each occasion that Suzanne Cavanagh rang me in Darwin on polling day concerning Railway Side I informed her that I would, through the Assistant Divisional Returning Officer in Alice Springs, investigate her complaint. I did indicate that if there was violence etc. in the booth I would consider what action to take. The Assistant Divisional Returning Officer in Alice Springs scheduled visits to the polling place throughout the day and actually visited the booth 8 times. All these visits were not in response to complaints, but each visit was used to examine complaints. The Assistant Divisional Returning Officer rang me after each visit and advised that progressively during the day the polling place settled down after the initial rush. The Assistant Divisional Returning Officer was required in the morning to assist the Officer in Charge in maintaining polling place order. This in fact was due to too many electors trying to get into vote at the same time.

47.18 The Assistant Divisional Returning Officer, Mr Joe Beath, has responded to Ms Cavanagh’s statements on page EM144 of the transcript as follows:

There was no indication at any time when Kerry Heisner spoke to me during polling day that he was considering closing Railway Side. Kerry had complaints from the CLP and asked me to visit that booth on several occasions, which I immediately did. I also visited Railway Side as I was travelling past or close to the booth while on my rounds to visit all polling places in Alice Springs. I am sure that if there had been blood flowing in the booth I would have noticed it.

I do not know what Suzanne Cavanagh means when she supposedly quotes me as saying “that booth was an absolute root, that it should never have been there in the first place. It was not put there at his recommendation”. I probably did say that it “was not put there at his (my) recommendation”, but I never use the word “root” or the phrase “an absolute root”. The word “root” is not in my vocabulary as it is used here. I do not know what they mean by this sentence.

47.19 On page EM145 of the transcript, Mr Taylor says the following:

In my statement at page 22 there is a comment about a person who rang me up. I think that is extremely important and the committee really should speak to this person. He was a temporary employee of the AEC. I have never met. I do not know him and only knew of his name on a remote mobile polling schedule until the day he rang me up. He had been contracted at that stage by the AEC, I believe by Kerry Heisner. He rang up and said he did not trust him and he did not know what to say to him. There is an account of our two phone calls in my statement. I believe this committee should contact that man. Rather than talk to the man in charge, you should talk to the people on the ground.

Joe is the assistant divisional returning officer from Alice Springs. The account given by the AEC in their response to our submission does not support what Joe told us originally. Certainly, this Joseph told me that he has further evidence and that he did not like the way he was being treated by Mr Heisner. As it says in there, he is a member of the Bahai faith. He is not prone to telling lies. His faith prohibits that. He did not know what to say to this man. We have not visited him. We do not know him. This committee should contact him in an effort to ascertain some of the things that actually happened without any party political bias. Talk to the people who were there and find out what happened.

47.20 Mr Heisner has responded to this statement by Mr Taylor as follows:

The Australian Electoral Commission did collect information so that a reply to the CLP submission could be drafted. This included a visit by the Australian Electoral Officer and the Assistant Divisional Returning Officer to Alice Springs. All staff that were still in Alice Springs discussed the CLP submission and this included Joseph. Neither the Assistant Divisional Returning Officer [Joe Beath] or the Australian Electoral Officer felt that the conversation with Joseph was other than normal and at no time intimidating. At no time was Joseph ever asked to sign any document whatsoever.

When Joseph first arrived the Australian Electoral Officer and Assistant Divisional Returning Officer [Joe Beath] explained to him that the CLP had made a submission to the Joint Standing Committee on Electoral Matters and we needed to discuss and then confirm or deny its contents. Joseph needed to have a break and all decided that we would resume at 11.00 am. Joseph read the document and made some comments on its content. Joseph was asked whether he would be willing, if necessary, to appear before the Joint Standing Committee on Electoral Matters to give evidence. Joseph declined this offer as he stated that he did not want to harm reconciliation in Alice Springs.

All staff were asked whether they would appear before the Joint Standing Committee on Electoral Matters, but it was only Joseph who declined. From evidence given by the CLP, it appears that although unwilling to talk to the Joint Standing Committee on Electoral Matters, Joseph was willing to ring the CLP. Joseph was also specific that he did not want his name involved in any discussion with Aboriginal people concerning the alleged mobile polling problems.

As Joseph is now mentioned in the CLP evidence to the Joint Standing Committee on Electoral Matters the Officer in Charge of the mobile team, Elena Williams, has been approached for her view on the statement allegedly made by Joseph to the CLP. The Officer in Charge states that on no occasion did polling proceed without Joseph being present.

47.21 The Assistant Divisional Returning Officer, Mr Joe Beath, has responded to the statement by Mr Taylor as follows:

Joseph Tarwala was a member of Mobile Team 16 and was contacted to visit the office of the AEC in Alice Springs to comment on the submission to the Joint Standing Committee on Electoral Matters by the CLP. When Joseph attended the office in Alice Springs Kerry Heisner and Joe Beath spoke with him and explained the reason why we wished to talk with him. Joseph then asked if he could come back at a later time, 11.00 am was suggested and he returned at that time. Joseph was given a copy of the CLP submission to the Joint Standing Committee on Electoral Matters and given time to read it.

When it was time to discuss the events described in the CLP submission Joseph Tarwala became very nervous and said that he was a member of the Bahai Faith and that he did not want to comment on things that happened while working for the AEC on Mobile Team 16. The Bahai Faith were endeavouring to reconcile with the aboriginal people of the Northern Territory and Australia and he did not want to jeopardise this.

47.22 On pages EM148 and EM149 of the transcript Ms Cavanagh refers to the sealing of ballot boxes on Remote Mobile Polling Team 16, and refers again to Mr Joseph Tawala. The Assistant Divisional Returning Officer, Mr Joe Beath, has responded as follows:

[It is not clear whether the discussion concerns] breaking the seal or unlocking the ballot box. The resealing of the ballot box does not have to be witnessed by a CLP scrutineer. It could be an ALP scrutineer or if no scrutineer is around, it could be one of our AEC casuals.

All records show that polling took place on the morning of the second day out. If polling officials went off sightseeing why didn't we hear of this at the time. One would assume that scrutineers would have wised up to the fact that no one was around to conduct polling.

47.23 On page EM154 of the transcript, Ms Cavanagh says the following:

We are not convinced, when you have one person who is voting for vast numbers of Aboriginal people, that their wishes are being followed. I will give you an example, seeing that it is the 1996 federal election being referred to. After the 1996 federal election, they had some post-election polling because of the wet weather. One of the places was Miniyeri, and I was actually at the scrutiny of the count of Miniyeri.

I cannot remember the exact number but over 100 people actually cast a vote that day. There was one for the CLP. The rest of the votes were completed by one individual with a back-to-front 5, I think it was. It was a funny way of doing a 5. We sat there and watched them going down that ballot paper. And every

> single ballot paper was scrupulously completed and there were no informal votes. They just went down one after the other, and we just stood there and we thought, 'This is not right'.

47.24 Mr Heisner has responded to this statement by Ms Cavanagh as follows:

> Suzanne Cavanagh states that of the over 100 voters who voted at Miniyeri at the 1996 federal election, 99 ballot papers were completed by "one individual with a back to front 5" and that "this is just not right". Suzanne Cavanagh is correct in saying it's not right – the actual details are as follows.
>
> Polling was postponed during the 1996 federal election in 10 polling places because of cyclonic conditions. During the week following polling day voting took place in 6 of the 10 communities (in 4 places there was no one present). A total of 167 votes were issued including a total of 84 in Miniyeri. Of the 167 votes issued only 59 electors were given assistance. Of the 59 assisted votes 30 were issued in Miniyeri and 29 issued amongst the other 5 polling places.
>
> As a total of 59 votes were assisted (and only 30 in Miniyeri), Suzanne Cavanagh's statement that all but 1 of over 100 votes were completed by an individual using a back to front 5, is impossible. What is possible, however, is that these communities at large write a 5 back to front and that the CLP has judged this to be electoral fraud.
>
> It should also be noted that assistance to electors for this mobile was, to a great extent, provided by the Team Leader, Mr Geoff Marshall, who has assured me that he does not write back to front 5's.

47.25 On page EM158 of the transcript, Ms Cavanagh says the following:

> I find it very paternalistic the way that they turn up and people tell them that they need someone to help them. They talk about us putting them down, but I think that is the biggest put-down there is.

47.26 Mr Heisner has responded to this statement by Ms Cavanagh as follows:

> Aboriginal electors are not told by the Australian Electoral Commission when they turn up to vote at the polling place "that they need someone to help them." Electors are informed that assistance is available if they require it. Without electors being informed of their entitlement (ie. their right to assistance under the Commonwealth Electoral Act) it is very difficult for electors to utilise their entitlement.

47.27 The policy issues relating to the provision of assisted voting have already been addressed by the AEC at part 7.5 of submission No 88 (in particular at paragraphs 7.511 to 7.5.14), but to put these comments in a more general context, it might be noted that the 1993 JSCEM inquiry considered the provision of assistance to electors at *all* mobile polling booths, including those servicing remote areas, hospitals, nursing homes and prisons, and made the following unanimous recommendation:

> Recommendation 5: that section 234 of the Electoral Act be amended to require that
>
> - every elector voting at a mobile polling booth be informed of his or her right to be assisted in casting a vote. Where the elector requests assistance, the officer in charge of the booth shall identify the AEC officers and any scrutineers present, and inform the elector of his or her right to choose any or none of those present to assist….

47.28 On page EM161 of the transcript, Mr Cavanagh quotes from a letter to her from Mr Heisner, who has responded as follows:

> Suzanne Cavanagh wrote to the Australian Electoral Officer on 29 September, 1998, complaining about the appointment of the Railway Side polling place. In her evidence to the Joint Standing Committee on Electoral Matters, Suzanne Cavanagh quotes from the Australian Electoral Officer's reply to her letter. It is a shame that Suzanne Cavanagh did not quote a little more of the reply. The reply, dated 30 September, 1998, contained the words used by Suzanne Cavanagh, but went on to say: "Also, as you are aware polling places on polling day are open to all electors and Railway Side is no exception." Indeed polling officials report that locals working in the immediate vicinity of the polling place also voted there.

48 Public Hearings of 22 June 1999

48.1 At the public hearings of 22 June 1999 in Canberra, the JSCEM received oral evidence from **Mr Lynton Crosby**, the Federal Director of the Liberal Party of Australia, on his submission No 162 of 19 March 1999. The AEC has responded to the issues raised in this submission at part 41 of submission No 176.

48.2 In his oral evidence Mr Crosby stated that while two companies associated with the Queensland Branch of the Australian Labor Party had lodged annual disclosure returns as 'associated entities', another four had failed to do so. However, in the view of the AEC, there has been no failure of disclosure by those four companies.

48.3 While Mr Crosby was correct that these companies had not themselves lodged disclosure returns, their transactions had been fully incorporated into the disclosure returns lodged by another company of which they are all subsidiaries. Consolidated disclosure in this form is in accordance with section 287(6) of the Electoral Act, which deems related bodies corporate to be the one entity for disclosure purposes.

49 Public Hearings of 29 June 1999

49.1 At the public hearings of 29 June 1999 in Canberra, the JSCEM received oral evidence from **Senator Grant Tambling** of the Northern Territory Country Liberal Party (NTCLP). The AEC has already responded to the issues raised by Senator Tambling at part 38 of submission No 176, and elsewhere in this submission, in response to other submissions and evidence

from the NTCLP (see response to NTCLP submission No 201 above, and response to NTCLP oral evidence of 21 May above).

49.2 At the public hearings of 29 June 1999 in Canberra, the JSCEM also received oral evidence from **Mr Kerry Heisner**, the Australian Electoral Officer for the Northern Territory, on aspects of assisted voting and provisional voting in Aboriginal communities in the Northern Territory, which have been the subject of a series of complaints and allegations from the Northern Territory Country Liberal Party.

49.3 Mr Heisner provided the following formal statement as an introduction, which was read into the transcript at pages EM205 to EM207:

> Thank you for the opportunity to appear before the committee today. As you are aware, I will shortly be leaving the Australian Electoral Commission to take up a position as project manager with the International Foundation for Election Systems, which operates out of Washington. I then expect to be posted to Kyrgyzstan to assist their central electoral commission with election preparations in that country. This means that I would be unable to attend the scheduled meeting for Alice Springs, and so instead the commissioner has made me available today.
>
> My appearance at this time is to enable me to provide to the committee an early response to the written and oral submissions made by the Northern Territory Country Liberal Party, which has been critical of the conduct of the election by the AEC and Aboriginal communities in the Northern Territory. The CLP has complained about assisted voting and remote mobile polling in Aboriginal communities in the Northern Territory, alleging that the conduct of such polling in particular instances, and generally, was illegal and improper. The CLP has also made specific criticism of my conduct and that of certain AEC officials in relation to both arrangements for such polling, and the preliminary scrutiny of declaration votes, particularly provisional votes.
>
> The CLP allegations and complaints are contained in submissions Nos 92, 157, 201 and the transcript of the hearing in Darwin on 21 May. The AEC has formally responded in parts 7.5 and 7.6 of submission No 88 and in parts 30 and 38 of submission No 176. It was only late last week that the AEC completed its investigations of particular incidents, and taking of statements from relevant individuals, in relation to the further detail provided by the CLP in its latest submission No 201 on 11 June. An AEC submission containing the results of those investigations and interviews will be filed with the committee shortly. In the meantime I am available to answer your questions to the best of my ability.
>
> I would like to take this opportunity to make some general statements of principle in response to the claims by the CLP that the AEC has not administered its powers properly and lawfully in the provision of the franchise to Aboriginal voters in the Northern Territory. The Australian Electoral Commission is empowered under the Commonwealth Electoral Act to conduct federal elections. The central plank of that legislation is compulsory voting. That means that the AEC is obliged by legislation to ensure that all electors in Australia have access to polling facilities, so that each elector is able to discharge his or her compulsory voting responsibilities.

Many Australian electors live in townships in remote and inaccessible parts of the large land mass, many of them servicing primary industries such as agriculture and mining. Other Australian electors, who are equally entitled to the franchise, live in Aboriginal communities in remote areas, such as in the sparsely populated desert areas of the NT. The Electoral Act makes provision for remote mobile polling, which enables the AEC to service all Australian electors in such remote townships and communities.

In many Aboriginal communities, English is not the first language and is not fluently spoken or written. Such electors may require assistance, not in making up their minds about who to vote for, but in marking the ballot paper properly. The federal electoral system requires full preferential voting, which means that marking the ballot paper is not a simple matter of a cross or a tick. The provision for assisted voting in the Act ensures that all Aboriginal electors are able to communicate their preferences and cast a formal vote. Without assisted voting and remote mobile polling, many Aboriginal electors in the NT, as well as in other remote parts of Australia, would be denied their right to vote.

The Committee would be aware that the AEC is considered a world leader in the provision of the franchise to remote communities. Our expertise has been extensively drawn upon by the United Nations for the past decade and by emergent democracies with large and inaccessible land masses, such as South Africa, Namibia, and Cambodia.

The complaints by the Northern Territory Country Liberal Party against the AEC and its conduct of polling in Aboriginal communities should be considered in the light of the following factors: (a) the AEC has received no formal complaints from Aboriginal electors themselves about the conduct of assisted voting and remote mobile polling in the NT or elsewhere in Australia. (b) the AEC does not accept that there is any balanced or credible evidence to support generalised claims that assisted voting and remote mobile polling in Aboriginal communities have been conducted improperly or illegally, either at the last federal election or at previous federal elections, and (c) The CLP did not put its allegations about illegalities under the Electoral Act before the Court of Disputed Returns for judicial consideration following the 1998 federal election.

It is notable that the CLP complaints about assisted voting and remote mobile polling in the Northern Territory are concentrated on one polling booth, the Tangentyere polling booth in Alice Springs, and remote mobile polling runs 15 and 16. Remote mobile polling by the AEC in the Northern Territory covers a total of 21 remote mobile teams, 70 polling officials and 241 communities in a six-day period.

The first CLP submission No 92 reported that most scrutineers have high praise for the efficiency and cooperation received from both the AEC and mobile teams. It was conceded by the CLP that difficulty seems to be limited to a few people. No new allegations or complaints of substance were made in regard to our oral submissions in Darwin on 21 May or in our latest submission. The AEC is of the view that, when the facts are separated from the rhetoric in these submissions, it should be clear that the CLP has no grounds for claiming that the legislative provisions governing Aboriginal voting

require any substantial amendment or that AEC officials in the Northern Territory such as myself deserve any censure.

I would like to take this opportunity to foreshadow a recommendation from the AEC that is central to the general concerns raised by the CLP about the extent of assisted voting and provisional voting in the Northern Territory. For more than a decade, until 1996, the AEC conducted a highly successful information and education program in Aboriginal communities across Australia, known as the Aboriginal and Torres Strait Islander Electoral Information Service. The program employed 15 to 20 field officers nationwide who regularly visited remote communities in most states and in the Northern Territory at a cost to the taxpayer of some $2 million a year. In 1996 the Federal Government withdrew funding for the program in the budget.

The ATSIEIS program educated Aboriginal people in the federal electoral system and in the mechanics of expressing their franchise, such as marking a ballot paper formally. It also functioned as an enrolment review program in Aboriginal communities. Aboriginal people were encouraged to enrol and their enrolments were checked for the accuracy of name spelling and community address. The movement of people was also informally tracked so that their enrolments could be kept up to date. The ATSIEIS program was not only important in reducing the need for assisted voting, but also important in keeping the roll up to date, thereby reducing the need for provisional voting.

It is my opinion, as the senior electoral officer in the Northern Territory, that the roll covering Aboriginal communities in the Territory is not being maintained to the same standard as that which resulted from the ongoing implementation of the ATSIEIS program, because field officers are no longer available to visit those communities and to cleanse the roll. If this Committee is of the view that the CLP complaints about the conduct of the election in the Northern Territory merit attention, then the most effective way of reducing the extent of assisted voting and provisional voting in Aboriginal communities would be to recommend the immediate reinstatement of the ATSIEIS program. Thank you for your time.

49.4 At this hearing, members of the JSCEM had the opportunity to question Mr Heisner in detail on all the complaints and allegations made by the NTCLP in its previous written submissions Nos 92, 157, 194 and 201, and in its oral evidence provided in Darwin on 21 May. Mr Heisner's oral evidence in this transcript speaks for itself.

49.5 The AEC now makes the following formal recommendation:

Recommendation 3: that the JSCEM recommend to the Government that funding be provided to enable the re-establishment of the Aboriginal and Torres Strait Islander Electoral Information Service (ATSIEIS).

Attachments

Submission No 164 - Attachment 1

ENROLMENT OBJECTIONS

AEC pamphlet entitled "Objections to the Roll"

(see attached)

Submission No 164 - Attachment 2

ELECTORAL REFORM IN THE UNITED KINGDOM

House of Commons Home Affairs Committee – Fourth Report – Electoral Law and Administration – Volume 1 – Report and Proceedings of the Committee – (and extract Volume 2 – Minutes of Evidence and Appendices) – 10 September 1998

(see attached)

Submission No 164 - Attachment 3

ELECTORAL REFORM IN THE UNITED KINGDOM

The Report of the Independent Commission on the Voting System – extract Chapter 9 – Recommendations and Conclusions - 29 October 1998

(see attached)

Submission No 201 - Attachment 4

TANGENTYERE POLLING BOOTH

Report by Elena Williams, Presiding Officer, Tangentyere Polling Booth

On Saturday I was the OIC at Railway Siding Polling Place. I did inform all scrutineers before the polling booth opened that if an assisted vote was taking place by an AEC official interpreter they could enter the booth and watch the vote take place. They seemed happy about this.

Mr. John Elferick was in attendance when I informed all scrutineers about assisted voting.

From 8.00 am until 10.00 am Mr John Elferink a CLP scrutineer was totally intrusive, constantly intimidating and extremely rude to both myself and the issuing officer Sue Sokal.

I did ask (2) CLP scrutineers to leave the booth as there were four (4) CLP scrutineers, where ALP only had two (2) scrutineers at all times in the booth.

Two (2) of the CLP scrutineers were constantly rude, intrusive, and argumentative they were also nominated by Eric Poole and Richard Lim who were not candidates in this election. Both scrutineers were also very rude and constantly standing in the way of voters wanting to cast a vote.

Lesley one (1) of the CLP scrutineers asked to leave the polling booth and returned to the booth as a YES to Statehood scrutineer. No-one objected to Lesly's return. I eventually had to ask Lesley to leave the booth yet again for being rude and pushy. She was also pushing the CLP platform not YES to statehood which she was renominated for.

Also the CLP scrutineers wanted to enter a booth while a voter was casting a vote assisted by a friend they brought with them to assist. I told them as they brought a friend to assist them no-one was allowed to enter the booth while they casted their vote. Richard Lim a CLP scrutineer argued against this ruling until I showed him the manual. He then left the polling booth and did not return.

An ALP scrutineer did assist a voted as the man requested when he entered the booth. I am satisfied that Mr. Avery did not solicit anyone as when he was requested to assist he called myself and a CLP scrutineer over to watch the vote take place.

When Mr. Harold Furber a NO to Statehood scrutineer entered the booth the CLP scrutineers as well as lesley the YES to statehood scrutineer objected. I said unless Mr. Furber did something wrong I could not eject from the booth.

Mr Furber was polite and was never rude or intrusive either to AEC officials nor the scrutineers so the decision was made to allow him to stay in the polling both.

At no time was any AEC official rude to voters or scrutineers. I as OIC did not lose my cool or lose control of the situation as being claimed. I felt I was straight to the point and polite to scrutineers.

I had the distinct feeling before polling began the CLP were out to sabotage the booth as they were constantly rude to AEC officials and other scrutineers they were constantly complaining throughout the day about petty issues that had nothing to do with AEC officials they just wanted the booth closed.

At Hermannsburg Polling booth Mrs. Allison Hunt who is employed by the Chief ministers Office in Alice Springs put herself forward as the person to assist voters. I asked her to leave to leave the booth and I will call her if asked for by name by voters as it was felt she was telling people who to vote for instead of assisting them. I did see Mrs Hunt take pencil of a voter and fill out the boxes for them. The person could actually read and write.

A comment made by Mrs hunt when approached for filling the boxes in was she was the persons mother so could assist them. I knew the person and she is a cousin to Mrs Hunt but in Aboriginal Law she is their mother. Under Aboriginal Law if the person is able to do things for themselves they should do so without any interference.

I did ask Mr Nick Dondas to leave Hermannsburg as he was a candidate and the community people did not want him. He was very rude to me but I took it on the chin and walked away. Mr Dondas did leave after gathering a group of people together and telling them to enter the booth with Mrs Hunt who will help them vote.

Throughout the voting taking place at Hermannsburg and surrounding Outstations Mrs Hunt and Mr Russell Lynch a CLP scrutineer constantly interfered and at all times were very rude.

I have worked with the AEC on six occasions including the last federal election, ATSIC elections and the last NT elections.

Elena Williams

Submission No 201 - Attachment 5

REMOTE MOBILE POLLING TEAM 16

Statement by Elena Williams, Team Leader, Remote Mobile Polling Team 16.

The decision not to go to Palm Paddock as per schedule for Wednesday morning as the traditional owner Amy Pareloutja advised us that everyone voted at Hermannsberg on the Tuesday.

There was no suggestion of not voting because the CLP would have secured these votes. Once you are told not to go to a particular place by the traditional owner you do not go.

We did not drive around the community on the Friday morning as suggested but left the community at 7:30 am to go to Kaporolyia as designated on our schedule. Ntakarra is not 15 Kms from Hermannsberg as suggested by the CLP but is actually 2 hr round trip.

I did not think it was illegal to reopen the booth on the Wednesday at Hermannsberg as their were people who wanted to vote and as we were not allowed to go to Palm Paddock (Ntakarra) I made the decision to open. The booth was promptly closed once I was advised by the Presiding Officer in Alice Springs to close the Booth.

Eli Fly had already voted at Hermannsberg so when we saw him along the road we did not open the polling booth so he could vote again. Also when we saw Eli it was in a place where there were no scheduled polling places.

Mr. Patrick Oliver I believe was told where our next stop would be and that he could vote there if he wished. Mr. Oliver did not attend any of the scheduled polling places. He had every opportunity to do so.

The taped conversation by Russell Lynch was taken at Gilbert Springs once all voting was completed on the Friday. I said the boxes had not been opened because all the outstations on the way to Gilbert Springs were unoccupied. Gilbert Springs was occupied but everyone present voted at Hermannsberg. Ralph Malbunka who is the traditional owner of Gilbert Springs advised the team that everyone voted at Hermannsberg. Team 16 stayed at Gilbert Springs for the allotted time so did Russell Lynch.

On Wednesday afternoon, not Friday as suggested by the CLP, both polling officers of team 16 went to Palm Valley with Kenneth Windley who was employed by AEC as a Community Liaison Officer. We went with both Ian and Joseph. At no time did I ask Joseph to sign for the resealing of the ballot box on his return from Palm Valley as all ballot boxes were locked as soon as voting completed.

The 84 votes taken as suggested by the CLP were taken on the Tuesday and Wednesday at Hermannsberg. No extra votes were taken on Friday as suggested by the CLP.

With regards to Tangentyere Council polling booth all scrutineers were briefed about the procedures of the polling place and they were intimidating and overbearing whilst inside the polling booth.

Elena Williams

TRUTH IN POLITICAL ADVERTISING

AEC submission No 115 of 19 October 1993

1.1 This Supplementary Submission is part of a series of additional submissions to the major submission from the Australian Electoral Commission on the Conduct of the March 1993 Federal Election which was filed with the Joint Standing Committee on Electoral Matters on 3 August 1993.

1.2 The purpose of this Supplementary Submission is to provide the Committee with detailed background on the offence created by the publication of misleading and deceptive electoral advertisements during an election period under section 329(1) of the Commonwealth Electoral Act 1918 (the Act).

1.3 It is also to provide the Committee with the considered view of the Commission on the advisability and practicality of legislating for "truth" in political advertising, as is often advocated by concerned members of the public and others.

1.4 In this context, the Commission emphasises at the outset that the practicality of requiring "truth" in political advertising was considered in great detail in 1984 in the Second Report of the Joint Select Committee on Electoral Reform. The Committee concluded that legislative provisions requiring "truth" in political advertising, which had been inserted in the Commonwealth Electoral Act 1918 by the Commonwealth Electoral Legislation Amendment Act 1983, were unworkable in practice and recommended their repeal. This was effected prior to the 1984 federal election.

1.5 The Commission is of the view that nothing has happened since 1984 to reduce or remove the practical problems with requiring "truth" in political advertising which were identified then. For that reason, the Commission does not favour the re-introduction of legislative provisions requiring "truth" in political advertising.

1.6 The Commission has held this view consistently over the past decade and has made a number of written and oral submissions on this basis to previous Parliamentary committees.

2. Overview

2.1 During and after the 1993 election period the Commission received a steady stream of telephone calls and written correspondence complaining of misleading and deceptive advertising. In the main these complaints related to the truth content of political advertising by candidates and political parties. However, the volume of such complaints is not considered to have been significantly greater than at previous elections in the past decade.

2.2 None of these complaints of misleading and deceptive political advertising were prosecuted by the Commission because they did not fall within the scope of the offence as provided for in section 329(1) of the Act.

2.3 Under section 329(1) of the Act it is an offence during the election period to print, publish, distribute or broadcast any matter or thing that is likely to mislead or deceive an elector in relation to the casting of a vote. The offence, which was then section 161(e), was judicially considered by the High Court in *Evans v Crichton-Browne (1981) 147 CLR 169* in which it was held:

> that the words in section 161l(e) “in or in relation to the casting of his vote” refer to the act of recording or expressing the elector’s political judgement, e.g. in obtaining and marking a ballot paper and depositing it in the ballot box, and not to the formation of that judgement. (emphasis added)

2.4 This means that only published or (as the Act is now) broadcast material which provides misleading or deceptive information about obtaining, marking and depositing a vote in the ballot box would be in breach of the Act. That is, the truth or otherwise of political advertising is not covered by the Act.

2.5 Some fourteen submissions to the Committee from politicians, political parties and private individuals have complained of misleading and deceptive publications and broadcasts during the 1993 election period (see pages S32, S92, S170, S197, S201, S208, S222, S311, S334, S340, S387, S500 and S564 of the bound volumes of Committee submissions).

2.6 Truth in political advertising was advocated in at least three of these submissions and in one submission it was suggested that section 52 of the Trade Practices Act, which prohibits misleading and deceptive advertising in the commercial arena, might serve as a model for legislating for truth in political advertising.

2.7 In an article in the Mercury of 30 March 1993 Dr Dean Jaensch, Senior Reader in Politics at Adelaide University, also suggested that truth in political advertising is now absolutely necessary, and that the consumer protection law in the Trade Practices Act should be applied in the Electoral Act to prohibit untruthful political advertising.

2.8 In submission number 50 to the Committee, Mr Barry Wakelin, Member for Grey, has foreshadowed a Private Members Bill to legislate for truth in political advertising. Legislation to provide for truth in political advertising has been attempted in the past by the Australian Democrats, but has been opposed by the Government.

2.9 On 30 September 1993 Mr Michael Cobb, Member for Parkes, gave notice of a Motion in the House of Representatives:

> That this House:
>
> (a) regrets the inability of the Commonwealth Electoral Act to deal with misleading and untruthful political advertising and statements as was so blatantly evident with the March 1993 federal elections.
>
> (b) notes that similar misleading and untruthful advertising and statements by business would be vigorously prosecuted by the Trade Practices Commission; and
>
> (c) calls on the Parliament to make appropriate amendments to the Commonwealth legislation to ensure that truth in advertising for political purposes be aligned with commercial and business advertising.

3. Background

3.1 In order to provide the necessary perspective for consideration of truth in political advertising the following survey of legislation, case law and past

Parliamentary enquiries relating to the publication of electoral advertisements and the issue of truth in political advertising is provided.

3.2 Originally, the Commonwealth Electoral Act 1902 contained the following limited offence in section 180 in relation to publications:

> 180. In addition to bribery and undue influence the following shall be illegal practices:
>
> (a) Any publication of any electoral advertisement hand-bill or pamphlet or any issue of any electoral notice without at the end thereof the name and address of the person authorizing the same, and on the face of the notice the name and address of the person authorizing the notice;
>
> (b) Printing or publishing any printed electoral advertisement hand-bill or pamphlet (other than an advertisement in a newspaper) without the name and place of business of the printer being printed at the foot of it;
>
> (c) Any contravention by a candidate of the provisions of Part XIV of this Act relating to the Limitation of Electoral Expenses.

3.3 In 1911 section 180 of the Commonwealth Electoral Act 1902 was amended by section 36 of the Commonwealth Electoral Act 1911 to insert the following:

> (d) Printing, publishing or distributing any electoral advertisement, notice, handbill, pamphlet, or card containing any representation of a ballot paper, or any representation apparently intended to represent a ballot-paper, and having thereon any directions intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote;
>
> (e) Printing publishing, or distributing any electoral advertisement, notice, handbill, pamphlet, or card containing an untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote. (emphasis added)
>
> Provided that nothing in paragraphs (d) and (e) of this section shall prevent the printing, publishing or distributing of any card, not otherwise illegal, which contains instructions or how to vote for any particular candidate, so long as those instructions are not intended or likely to mislead any elector in relation to the casting of his vote.

3.4 In 1917, in the context of the World War 1 conscription referendums, regulation 11 of Statutory Rules 1917 No 304 inserted the regulation 42(1) in the War Precautions (Military Service Referendum) Regulations:

> 42(1) Any person who, on or before the polling day for the Referendum, makes or authorizes to be made, verbally or in writing, any false statement of fact of a kind likely to affect the judgment of electors in relation to their votes, or who prints, publishes, or distributes, or distributes any advertisement, notice, hand-bill, pamphlet, or card containing any such statement shall be guilty of an offence:
>
> Provided always that it shall be a defence to a prosecution for an offence under this sub-regulation if the defendant proves that he had reasonable

ground for believing, and did, in fact, believe, the statement to be true. (emphasis added)

3.5 This war-time regulation was the first explicit provision making it an offence to publish or utter untrue statements likely to affect the judgement of electors during an electoral event. The regulation ceased to have force after the referendums.

3.6 In 1918, sections 180(d) and (e) were renumbered as sections 161(d) and (e) of the Commonwealth Electoral Act 1918. (Section 161(e) is now known as section 329(1)).

3.7 In 1981 the meaning of section 161(e) of the Commonwealth Electoral Act 1918 was tested in the High Court sitting as the Court of Disputed Returns as the result of a petition challenging the result of the Western Australian Senate election of 18 October 1980.

3.8 The petition was lodged by a failed Australian Democrat Senate candidate John Evans against the election of a Liberal Party Senate candidate Noel Crichton-Browne on the grounds that the newspaper and television advertising campaign run by the Liberal Party in the lead-up to polling day offended against section 161(e) of the Commonwealth Electoral Act 1918.

3.8 The substance of the Liberal Party advertising campaign was that the Australian Democrats were identified with the Labor Party, and that if electors voted for Australian Democrat candidates the result would be the same as voting for Labor Party candidates because the two parties were alleged to have much the same political philosophy and policies, and that members of each were likely, allegedly on most occasions, to vote in the Senate in the same way.

3.9 Effectively the petitioner was asking the Court to decide on the truth content of the Liberal Party advertising campaign and to declare the election void because of illegal practices committed under section 161(e) which allegedly prohibited the making of untrue or incorrect statements in electoral advertising.

3.10 Similar petitions concerning the truth content of political advertising were heard and decided at the same time: Muscio v McMahon, and Gun v Chapman.

3.11 As described earlier, on 18 March 198l the Full Bench of the High Court sitting as the Court of Disputed Returns held:

> that the words in section 161(e) “in or in relation to the casting of his vote” refer to the act of recording or expressing the elector’s political judgement, e.g. in obtaining and marking a ballot paper and depositing it in the ballot box, and not to the formation of that judgement.

(Evans v Crichton-Browne (1981) 147 CLR 169)

3.11 With the exception of a period of some 8 months described below, it has been understood since 1981 that the Commonwealth Electoral Act 1918 does not prohibit untrue advertising that could affect a voter’s political preference. The Act only prohibits advertising that might mislead or deceive an elector in relation to the more mechanical aspects of marking and depositing a ballot paper in the ballot box.

3.12 As the result of the September 1983 First Report of the Joint Select Committee on Electoral Reform there was a major rewrite of the Commonwealth

Electoral Act 1918. That report made no recommendations in relation to truth in political advertising.

3.13 However, section 114 of the Commonwealth Electoral Legislation Amendment Act 1983 repealed section 161(d) and (e) and substituted section 161 to read (in part) as follows:

> 161(1) A person shall not, during the relevant period in relation to an election under this Act, print, publish or distribute, or cause, permit or authorize to be printed, published or distributed, any matter or thing that is likely to mislead or deceive an elector in relation to the casting of his vote.
>
> (2) A person shall not, during the relevant period in relation to an election under this Act, print, publish, distribute, or cause, permit or authorize to be printed, published or distributed, any electoral advertisement containing a statement -
>
> > (a) that is untrue, and
> > (b) that is, or is likely to be, misleading or deceptive. (emphasis added)

3.13 There is no indication in the Second Reading Speech, the Explanatory Memorandum, or the Committee Debates of the 1983 amending legislation to show why this amendment to the legislation to expressly prohibit untrue political advertising was considered justified. The Act was assented to on 22 December 1983 and came into force on 21 February 1984.

3.13 The Commonwealth Electoral Legislation Amendment Act 1984 then renumbered the Commonwealth Electoral Act 1918 so that section 161 became section 329 after the commencement date of 23 July 1984.

3.14 In August 1984 the Joint Select Committee on Electoral Reform published its Second Report and its first recommendation was the repeal of section 329(2) which prohibited untrue political advertising (from which recommendation Senator Michael Macklin of the Australian Democrats dissented).

3.15 In recommending the repeal of section 329(2) the Committee said on page 26 of its Second Report the following:

> 2.78 ... While everyone agrees that fair advertising is a desirable objective, the Committee concludes that it is not possible to achieve “fairness” by legislation.
>
> 2.79 Political advertising differs from other forms of advertising in that it promotes intangibles, ideas, policies, and images. Moreover, political advertising during an election period may well involve vigorous controversies over the policies of opposing parties.
>
> 2.80 In implementing the recommendations contained in the Committee’s first report, the Government also amended the then s.161 to prohibit untrue advertising. The Committee has noted the concern expressed by broadcasters and publishers on the inhibiting effect this section would have on political advertising. The Committee notes with some concern the fact that these difficulties were not raised during debate on the 1983 Bill. This oversight suggests the need for legislation committees to closely examine

complex Bills such as this, to ensure that the Parliament is aware of the full implications of every provision.

2.81 ... the Committee concludes that even though fair advertising is desirable it is not possible to control political advertising by legislation. As a result, the Committee concludes that s.329(2) should be repealed. In its present broad scope the section is unworkable and any amendments to it would be either ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising. The safest course, which the Committee recommends, is to repeal the section effectively leaving the decision as to whether political advertising is true or false to the electors and to the law of defamation. (emphasis added)

3.16 The Second Reading Speech of the Special Minister for State, the Hon Michael Young, during the passage of the Electoral and Referendum Act 1984, mirrored the comments of the Committee.

3.17 Section 5 of the Electoral and Referendum Act 1984 repealed section 329(2) and came into force on the 25 October 1984.

3.18 In May 1990 the Australian Democrats introduced a Private Members Bill to restore the “truth in political advertising” provision. The Bill failed to gain the support of Parliament.

3.19 In March 1991 the Australian Democrats foreshadowed that they might insist on the enactment of “truth in political advertising” legislation as a condition for support of the Government's then proposed ban on political advertising during election periods.

3.20 The Democrats publicised their view that the Australian Electoral Commission should have the power to scrutinize newspaper and magazine advertising to ensure it is as factual as possible (Financial Review, 21 March 1991, page 3).

3.21 Such a scheme would have placed the Australian Electoral Commission in an impossible position, leading to perceptions that the Commission’s political neutrality was compromised. The Commission made its view known to the Government of the day that it was opposed to any such scheme that would make the Commission the final arbiter on the truth or otherwise of political advertising.

3.22 On 19 December 1991, the Political Broadcasts and Political Disclosures Act 1991 introduced a ban on political advertising on radio and television by inserting Part IIID into the Broadcasting Act 1942. On 28 August 1992 the High Court ruled that the political advertising ban was unconstitutional and as a consequence, on 5 October 1992, the Broadcasting Act 1942 was repealed by the Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992.

3.23 It is worth considering, in the light of the High Court’s recent finding of an implied freedom of speech guarantee in the Constitution, whether any legislation designed to curtail

4. Recommendation

4.1 Whilst the Australian Electoral Commission does not of course condone the publication of political material that is untrue or misleading, it opposes legislating for “truth in political advertising” because of the imponderables in a volatile political

environment pre-election, the difficulty of assessing “policy” statements and the risks of manipulation/mischief/misuse, and particularly if the Commission were to have a role which could appear to compromise its neutrality and/or impose a burden of work such as to interfere with its electoral task.

4.2 The Australian Electoral Commission recommends that the Joint Standing Committee on Electoral Matters reject any suggestion that section 329 of the Commonwealth Electoral Act 1918 be amended to make it an offence to print, publish, distribute or broadcast during an election period any matter that is “untrue”.

Extract from part 8.1 of the November 1994 JSCEM Report

8.1.1 Subsection 329(1) of the Electoral Act makes it an offence to print, publish, distribute or broadcast during the election period any matter likely to “mislead or deceive an elector in relation to the casting of a vote”. However, this should not be interpreted as a truth-in-advertising provision; in 1981 the Court of Disputed Returns in effect determined (in *Evans v Crichton-Browne)* that the words “in relation to the casting of a vote” refer only to the process of obtaining, marking and depositing a ballot paper.

8.1.2 In 1984 the Electoral Act did contain, briefly, a provision aimed at prohibiting untrue political advertising. Subsection 329(2) of the Act came into force in February 1984 and stated that

> a person shall not, during the relevant period in relation to an election under this Act, print, publish, distribute, or cause, permit or authorise to be printed, published or distributed, any electoral advertisement containing a statement
> (a) that is untrue; and
> (b) that is, or is likely to be, misleading or deceptive.

8.1.3 The first detailed examination of this provision was carried out by the Joint Select Committee on Electoral Reform in its August 1984 *Second Report.* The committee found the aim of “truth” in political advertising to be unachievable through legislation:

> political advertising differs from other forms of advertising in that it promotes intangibles, ideas, policies and images. Moreover, political advertising during an election period may well involve vigorous controversies over the policies of opposing parties...the Committee has noted the concern expressed by broadcasters and publishers on the inhibiting effect this section would have on political advertising. The Committee notes with some concern the fact that these difficulties were not raised during the debate on the 1983 bill. This oversight suggests the need for legislation committees to closely examine complex Bills such as this, to ensure that the Parliament is aware of the full implications of every provision.

The committee concluded that

> it is not possible to control political advertising by legislation [and] section s.329(2)...should be repealed. In its present broad scope the section is unworkable and any amendments to it would be either ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising. The safest course, which the Committee recommends, is to repeal the section effectively leaving the decision as to whether political advertising is true or false to the electors and to the laws of defamation.

8.1.4 Legislation repealing subsection 329 (2) came into force in October 1984.

8.1.5 While several submissions to the 1993 election Inquiry debated the issue of "truth" in political advertising, none provided an argument to convince a majority of the Committee that legislation would be more workable now than when subsection 329(2) was repealed in 1984.
I
8.1.6 As such, the Committee still believes that legislation cannot sensibly regulate the assertions that are the essence of an election campaign. Voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.

8.1.7 The Committee is also of the view that it would be entirely inappropriate for the AEC to be made responsible for the administration of truth-in-advertising legislation. Any decision the AEC could make in a truth-in-advertising case would inevitably lead to perceptions that its political neutrality had been compromised.

8.1.8 A dissenting report from Mr Connolly, Senator Minchin, Senator Tierney, Mr Cobb and Senator Chamarette is at page 164. A dissenting report from Senator Lees is at page 168.

Part 6.3 of AEC submission No 30 of 29 July 1996

6.3.1 The AEC made a detailed submission on 19 October 1993 (No 115) to the previous JSCEM on the subject of the "Truth in Political Advertising" recommending against formal regulation, and the Report of the JSCEM on the 1993 federal election concluded that legislating for "truth" in political advertising would be impracticable (pages 107-109).

6.3.2 The brief background to this contentious issue is that in 1983, section 329(2) was inserted in the CEA to prohibit the printing and publication of "untruths" in political advertising during the election period. In August 1984 the Joint Select Committee on Electoral Reform (JSCER) concluded that section 329(2) was unworkable, and as a consequence it was immediately repealed. The 1993 JSCEM agreed with the analysis of the 1984 JSCER, and recommended no regulation.

6.3.3 However, a recommendation in a dissenting report to the Report of the previous JSCEM on the 1993 federal election, by members of the Coalition and the Greens Senator, was that the original 1983 section 329(2) be reinserted in the CEA. The minority members of the previous JSCEM observed that regulation of truth in political advertising has worked effectively in South Australian elections.

6.3.4 Section 113 of the South Australian Electoral Act does not ban "untruths" in political advertising, which would require complex and subjective assessments of ideas, images and intangibles in political debate. Instead, the South Australian Electoral Act bans "inaccurate statements of fact", which is a much more practical basis for regulation.

6.3.5 In Becker v Cameron (1995) 64 SASR 238 it was held by the South Australian Supreme Court on appeal, that the offence created by section 113 of the Electoral Act 1985 (SA) requires the prosecution to prove that the alleged statement is inaccurate and misleading to a substantial or significant extent. The section confines itself to electoral material containing a statement of fact, not a statement of opinion, and the defence of honest and reasonable mistake of fact is available. The

Supreme Court also decided that the implied freedom of communication inherent in the Commonwealth Constitution does not confer a right to disseminate false or misleading information.

6.3.6 During the last parliamentary session of the previous Government, the Australian Democrats moved an amendment to the Electoral and Referendum Amendment Bill 1995 to reinstate in the CEA the old section 329(2) banning "untruths". This amendment was supported by the Coalition members of the Senate, but was not accepted by the House of Representatives. The impasse was not resolved before the Parliament rose for the 1995 Christmas recess.

6.3.7 The AEC remains opposed to the regulation of the "truth" content of political advertising, believing that it is the right and responsibility of voters, with the assistance of a vigilant media, to make their own judgements about such matters. However, if the JSCEM were minded to recommend some form of regulation, then the AEC would suggest a closer consideration of section 113 of the South Australian Electoral Act, rather than the reinsertion of the old section 329(2) of the CEA.

6.3.8 If such regulation of the content of political advertising were to be introduced, some consideration should also be given to whether a separate body should be established to receive complaints and to undertake the necessary investigations and prosecutions. If the AEC were to become the responsible body, there would inevitably be accusations of political partisanship in decisions on investigations and prosecutions, which could impair the AEC's reputation for political neutrality. Further, it is probable that the creation of such an offence would lead to a large case load which suggests the creation of a separate regulatory body specifically equipped for such tasks. Essentially, the AEC does not believe that its central charter, which is the conduct of federal elections and referendums, should be extended to include the monitoring of "truth" in political debate.

6.3.9 The JSCEM would also need to consider the time frame in which such regulation should operate, that is, at all times, or only during election periods, and whether it is intended that broadcast electoral matter should be regulated as well as with printed electoral matter, in which case, the responsibilities of the Australian Broadcasting Tribunal would have to be considered.

AEC submission No 109 of 14 November 1996

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the Joint Standing Committee on Electoral Matters (JSCEM) in response to its "Inquiry into the 1996 Federal Election", as advertised on Saturday 22 June 1996 in all major newspapers. The submission is supplementary to the major AEC submission, "The Conduct of the 1996 Federal Election", presented to the JSCEM on 29 July 1996 (submission No 30).

1.2 The AEC has opposed the introduction of a law to regulate truth in political advertising for the past decade, and this position has been in accordance with the conclusions of a number of parliamentary inquiries over that period. However, two significant recent events suggest that this JSCEM may recommend the introduction of such a law: the minority report of the 1993 JSCEM inquiry which recommended the re-introduction of section 329(2) of the CEA; and the amendment to the Electoral and Referendum Amendment Bill 1995, moved in the Senate last year by the Democrats and supported by the Liberal/National Coalition, which would have re-introduced section 329(2) of the CEA. This provision, which made it an offence to

print, publish or distribute “untrue” advertising, was repealed in 1984, six months after its enactment.

1.3 On the understanding that some form of regulation of the content of political advertising may be imminent, this supplementary submission suggests, in outline only, a possible model for an independent, separately resourced, statutory organisation to administer any new such law - the Election Complaints Authority (ECA). The AEC emphasises that this model organisation is indicative only, and a more detailed examination of its place in the larger scheme of Commonwealth enforcement policy would be required if the JSCEM is interested in pursuing the model. However, the AEC has been advised by the Attorney-General’s Department and the Director of Public Prosecutions, on a preliminary basis, that there appear to be no major legal/policy obstacles to the establishment of such an organisation.

2 Introduction

2.1 The possibility of legislating to regulate the content of political advertising at federal elections has been the subject of periodic inquiry by parliamentary committees for the past decade. In the major reforms to the Commonwealth Electoral Act 1918 (CEA) in 1983, section 329(2), which made it an offence to print, publish or distribute “untrue” political advertising, was enacted. Some six months later in 1984 it was repealed as being unworkable. The 1984 Joint Select Committee on Electoral Reform recommended that it be repealed for the following reasons:

> Political advertising differs from other forms of advertising in that it promotes intangibles, ideas, policies and images. Moreover, political advertising during an election period may well involve vigorous controversies over the policies of opposing parties.
>
> ...The Committee has noted the concern expressed by broadcasters and publishers on the inhibiting effect this section would have on political advertising. The Committee notes with some concern the fact that these difficulties were not raised during debate on the 1983 Bill. This oversight suggests the need for legislation committees to closely examine complex Bills such as this, to ensure that the Parliament is aware of the full implications of every provision.
>
> ... The Committee concludes that even though fair advertising is desirable it is not possible to control political advertising by legislation. As a result, the Committee concludes that s.329(2) should be repealed. In its present broad scope the section is unworkable and any amendments to it would be either ineffective, or would reduce its scope to such an extent that it would not prevent dishonest advertising. The safest course, which the Committee recommends, is to repeal the section effectively leaving the decision as to whether political advertising is true or false to the electors and to the law of defamation.

2.2 Following the Report of the 1989 Joint Standing Committee on Electoral Matters (JSCEM), entitled “Who Pays the Piper Calls the Tune”, and the Report of the Senate Select Committee on Political Broadcasts and Political Disclosures of 1991, the Political Broadcasts and Political Disclosures Act 1992 was enacted to ban political advertising altogether on the electronic media. For some six months in 1992 the Australian Broadcasting Tribunal was obliged to order the removal of electronic advertising that offended against this law. This included, for example, ordering the

removal of Forest Industry advertising from the airwaves during the 1992 Tasmanian State election.

2.3 In August 1992 the High Court decided that the political advertising ban was unconstitutional in that it was contrary to the implied freedom of political discussion in the Constitution *(Australian Capital Television Pty Ltd v Commonwealth (1992) 108 ALR 577; Nationwide News Pty Ltd v Wills (1992) 108 ALR 681).* The amendments to the Broadcasting Services Act 1992 made by the Political Broadcasts and Political Disclosures Act 1992 were repealed soon after. It is now understood that the reach of the constitutional right to "free speech" has considerable implications for any form of regulation of political discussion.

2.4 The AEC made a detailed submission to the 1993 JSCEM, entitled "Truth in Political Advertising" (submission No 115 of 19 October 1993) which said the following:

> The Commission is of the view that nothing has happened since 1984 to reduce or remove the practical problems with requiring "truth" in political advertising which were identified then. For that reason, the Commission does not favour the re-introduction of legislation provisions requiring "truth" in political advertising.
>
> ... It is worth considering, in the light of the High Court's recent finding of an implied freedom of speech guarantee in the Constitution, whether any legislation designed to curtail political advertising would survive a challenge in the court.
>
> Whilst the Australian Electoral Commission does not of course condone the publication of political material that is untrue or misleading, it opposes legislating for "truth in political advertising" because of the imponderables in a volatile political environment pre-election, the difficulty of assessing "policy" statements, and the risks of manipulation/mischief/misuse, and particularly if the Commission were to have a role which could appear to compromise its neutrality and/or impose a burden of work such as to interfere with its electoral task.

2.5 After considering the issues, the majority of the 1993 JSCEM concluded the following at page 109 of its Report on the 1993 federal election:

> ...the Committee still believes that legislation cannot sensibly regulate the assertions that are the essence of an election campaign. Voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.
>
> The Committee is also of the view that it would be entirely inappropriate for the AEC to be made responsible for the administration of truth-in-advertising legislation. Any decision the AEC could make in a truth-in-advertising case would inevitably lead to perceptions that its political neutrality had been compromised. (emphasis added)

2.6 However, the minority report of the 1993 JSCEM made the following comments at page 164 of the Report:

> We disagree with the majority's conclusion that no form of truth-in-advertising legislation is necessary. At the 1993 election it was clearly demonstrated that

such legislation is needed to eliminate deliberate misrepresentation of a party's stated policies on particular issues. We note that if some of the misrepresentations which occur during election campaigns were to occur in the private sector, the perpetrators would find themselves liable to prosecution under the Trade Practices Act.

Truth-in-advertising legislation has worked very effectively in South Australia. The existence of such legislation at a national level would provide a means of protecting electors against misleading information.

We recommend that

> the former subsection 329(2) of the Electoral Act, which prohibited misleading political advertising, be reinstated.

Senator Charmarette supports this recommendation.

2.7 The Electoral and Referendum Amendment Bill 1995, which arose out of the majority recommendations of the 1993 JSCEM Report, failed to gain passage by the Parliament before the announcement of the 1996 federal election. Part of the reason for that failure to gain passage was the disagreement between the Houses of Parliament on an amendment to the Bill, moved in the Senate by the Australian Democrats and supported by the Liberal/National coalition, which would have re-enacted section 329(2) to make "untrue" statements in political advertising an offence.

2.8 In the AEC submission No 30 of 29 July 1996 to this JSCEM, the AEC once again stated its opposition to the re-enactment of section 329(2) to require truth in political advertising. The AEC not only re-iterated the principle objection to such a law, that it is unworkable because of the difficulties of defining "truth" in a political context, but also stated its agreement with the 1993 JSCEM majority view, that if such a law were to be enacted, it should not be administered by the AEC, because this might compromise its reputation for political neutrality:

> If such regulation of the content of political advertising were to be introduced, some consideration should also be given to whether a separate body should be established to receive complaints and to undertake the necessary investigations and prosecutions. If the AEC were to become the responsible body, there would inevitably be accusations of political partisanship in decisions on investigations and prosecutions, which could impair the AEC's reputation for political neutrality. Further, it is probable that the creation of such an offence would lead to a large case load which suggests the creation of a separate regulatory body specifically equipped for such tasks. Essentially, the AEC does not believe that its central charter, which is the conduct of federal elections and referendums, should be extended to include the monitoring of "truth" in political advertising.

2.9 It is noted that the AEC's view is shared by the Queensland Electoral Commissioner, who said the following in a submission to the Queensland Legal Constitutional and Administrative Review Committee in July 1996:

> If legislation is introduced to regulate political advertising, consideration needs to be given as to the appropriate body to investigate complaints and prosecute offences. ECQ does not have investigative staff and even it did have the resources, the number of complaints would likely interfere with the

efficient conduct of the election. Furthermore, any action taken by ECQ during an election period would impair its reputation for political neutrality and may influence electors in a manner disproportionate to the matter being investigated. Therefore ECQ would be most reluctant to seek injunctions or other direct action until after polling day in relation to any complaints it may receive.

2.10 During the current JSCEM hearings it has become apparent that some members of the JSCEM are giving serious consideration to recommending the enactment of a law similar to that which already operates for South Australian State elections, section 113 of the Electoral Act 1985 (SA), which prohibits the making of inaccurate statements of fact in political advertising. In submission No 30 the AEC said the following:

> The AEC remains opposed to the regulation of the "truth" content of political advertising, believing that it is the right and responsibility of voters, with the assistance of a vigilant media, to make their own judgements about such matters. However, if the JSCEM were minded to recommend some form of regulation, then the AEC would suggest a closer consideration of section 113 of the South Australian Electoral Act, rather than the reinsertion of the old section 329(2) of the CEA.

2.11 On the assumption that some form of regulation of the content of political advertising will be recommended by this JSCEM, the AEC is concerned to ensure that the responsibility for the administration of such a law be carefully considered. If the Government accepts any JSCEM recommendation to either re-enact section 329(2), which prohibits "untrue" political advertising, or to enact section 113 (SA), which prohibits "inaccurate statements of fact", then the definitional boundaries of such an offence will probably result in considerable public interest and litigation at the next federal election.

2.12 As indicated in oral evidence to the JSCEM provided by the AEC on 15 August 1996 (at pages EM 61 to EM 63), the AEC believes that there should be an independent statutory authority established to administer the expected high case load, and put decision-making on the content of political advertising at a distance from the AEC, in order to avoid any public perceptions developing that the organisation primarily responsible for the conduct of federal elections is biased in the application of the law.

2.13 This AEC submission suggests, in outline only, a possible model for an independent, separately resourced, statutory organisation to administer any new law to regulate the truth content of political advertising - the Election Complaints Authority (ECA). The AEC emphasises that this model organisation is indicative only, and a more detailed examination of its place in the larger scheme of Commonwealth enforcement policy would be required if the JSCEM is interested in pursuing the model.

3. Preliminary Issues - Injunctions

3.1 There would be little point in legislating to regulate the truth content of political advertising if remedies are not available during the election period, when any likely damage to the political campaign process is occurring. To leave the enforcement of such law to post-election prosecutions is to shut the gate after the horse has bolted. The most obvious immediate remedy during the election period is the use of court-ordered injunctions to stop any apparently illegal activity from arising or continuing.

3.2 Under section 383 of the CEA, the AEC and candidates in a federal election are empowered to seek injunctions from the court in relation to offences under the CEA or any other law of the Commonwealth. The AEC invoked this power most recently in obtaining an injunction against Mr Albert Langer at the 1996 federal election to restrain him from continuing to breach section 329A of the CEA. The public reaction to the result of the exercise of this power by the AEC was substantial.

3.3 If the CEA were to be amended to re-enact section 329(2) or to enact section 113 (SA) for the next federal election, then the AEC would be obliged, in circumstances where compliance with the law regulating the content of political advertising could not be obtained voluntarily, to make use of the injunctive power in section 383 to enforce compliance with that law during the election period.

3.4 However, it is not clear at this stage whether the implied freedom of political discussion in the Constitution, would suggest to a court in an injunction application that some particular caution be exercised in granting that injunction, and that a higher than usual standard of evidence that the alleged offence is indeed untrue or factually incorrect be produced.

3.5 In deciding on whether to apply for an injunction in particular cases, the AEC would be placed in the very difficult position of assessing the truth (or factual) content of party political campaign advertising and gathering sufficient supporting evidence to convince a court, a task well beyond its present responsibilities, and would be obliged to initiate court proceedings that would undoubtedly provoke serious and possibly damaging criticism of the AEC from one or other side of politics.

3.6 This risk of damage to the public reputation of the AEC, and the impact the administration of such a law would have on the resources of the AEC, the Director of Public Prosecutions, the Australian Federal Police, the Australian Government Solicitor and the courts, would be compounded by the opportunities available to the political parties to derail the campaign activities of their opponents. This potential for disruption of the political process through the use of the injunctive power by political parties is aptly summarised by the Queensland Electoral Commissioner in his July 1996 submission to the Queensland Legal Constitutional and Administrative Review Committee:

> Once an offence of untruthful political advertising is created by legislation, the Electoral Act 1992 allows any candidate or ECQ to seek an injunction (section 177). An injunction could prove an effective tactic for a candidate or political party to obtain publicity and to disrupt the advertising campaign of another party. With the existing media “black out” law prohibiting political advertising after Wednesday evening preceding polling day, a party’s campaign could be seriously damaged by an injunction granted against it in the final week of an election period.
>
> Accordingly, as the injunctive remedy has the potential to cause a grave injustice to political parties or candidates and disrupt the normal cut and thrust of electoral campaigns, ECQ is most reluctant to enter the political fray and seek injunctions during an election period.

3.7 The AEC agrees with the ECQ about the risks to the integrity of the political process arising from the use of the injunctive power by candidates. It would be possible of course, to provide specifically in section 383 of the CEA, that candidates are not able to seek injunctions in relation to advertising offences in the CEA.

However, the AEC remains as reluctant as the ECQ to be put in the position of having to enter the political fray to seek injunctions in relation to the truth content of political advertising. It is for this reason that the AEC suggests that the JSCEM consider removing the regulation of truth in political advertising to a separate statutory organisation specifically equipped and resourced to enforce such a law.

4. Preliminary Issues - Investigations

4.1 The speed at which the AEC, the DPP and the AFP are able to deal with complaints concerning alleged CEA offences during the election period has been criticised in some submissions to this JSCEM. Any law to regulate truth in political advertising would also require rapid investigation to obtain evidence in preparation for the issuance of warnings, the obtaining of injunctions, or the initiation of prosecution proceedings.

4.2 It has been suggested by some that perhaps AEC officers should be supplied with specific investigatory powers similar to those available to the Australian Federal Police. Under section 316 of the CEA, for example, in relation to audit investigations for financial disclosure purposes, authorized officers of the AEC are provided with specific powers to require appearances and the production of documents, and if necessary to obtain search and seizure warrants (although if a matter reaches the point where a warrant may be necessary it is usually turned over to the Australian Federal Police).

4.3 However, the AEC does not commend this pathway to the JSCEM. The AEC does not believe that such a fundamental shift in the role of AEC staff would in any way enhance the electoral process. Further, the additional burden of undertaking potentially complex investigations would put AEC staff at risk of not adequately attending to their core duties in the conduct of the election.

4.4 It may be of interest to compare developments in this area in Canada. In the 1994 Report of the Chief Electoral Officer of Canada, a new organisational structure for the investigation and speedy resolution of election complaints is outlined (Appendix).

4.5 Elections Canada previously relied on the services of the Royal Canadian Mounted Police for election investigations, but with the developing need to find: “alternative means to investigate breaches of election law, most of which are not of a truly criminal nature”, it has now established a complaints investigation office with the following staff:

- the Counsel to the Commissioner, assisted by two staff lawyers;
- a lawyer seconded from Legal Services at Elections Canada to assist with case management part time during and after the election period;
- the Chief Investigator for the Commissioner of Canada Elections;
- twenty-four special investigators, in locations across the country; and
- three support staff.

5. Background - Political Advertising Ban

5.1 In suggesting a statutory body separate from the AEC to investigate complaints about the truth content of political advertising, the AEC was mindful of the strongly-stated views of the majority of the 1993 JSCEM (see para 2.5), and of the 1989 JSCEM, which covered some analogous territory.

5.2 In its June 1989 Report entitled “Who Pays the Piper Calls the Tune” that JSCEM, in recommending the allocation of free broadcasting time for political advertising, made the following specific recommendation at page 99 of the Report, on how such time should be allocated:

> An independent committee, such as the Party Political Broadcast Committee in the United Kingdom, be established and that it have responsibility for allocating free time to parties and candidates and the determination of time slots.

5.3 The 1989 JSCEM Report went on to say:

> The Australian version of the Party Political Broadcast Committee (which would be referred to as the PPBC) should have discretion in allocating free time in certain circumstances as is currently the case with the allocation of time for the political broadcasts by the Board of the ABC. The role of the PPBC would be of the utmost importance in the application of a system of free time and hence its membership would also be of importance. The final view of the Committee is that as the ABT has been responsible for the regulation of television and radio in the past it should be responsible for this further development in the broadcasting area. Some form of consultative process would be necessary between the PPBC and radio and television networks to ensure fairness to all participants. Should there be disagreement over a decision of the PPBC there should be a right of appeal to an Appeals Committee. Such a committee should consist of representatives from the ABT, the AEC and representatives from FARB and FACTS.

5.4 It appears that the 1989 JSCEM was concerned to avoid any perception of political bias in the allocation of free broadcasting time, and accordingly recommended the establishment of an independent committee, responsible to the Australian Broadcasting Tribunal (as the Australian Broadcasting Authority was then known), but with separate membership and with powers to exercise its own discretions in decision-making.

5.5 The recommendations of this 1989 JSCEM led to the enactment of the Political Broadcasts and Political Disclosures Act 1992, which amongst other things, gave the Australian Broadcasting Tribunal powers to enforce the ban on political advertising. From January to August 1992, prior to the striking down of the legislation by the High Court, the ABT used those powers to enforce the political ad ban at the New South Wales The Entrance by-election, the Tasmanian State election, and the A.C.T. Legislative Assembly election, by demanding the withdrawal of some advertising with political content.

6. Election Complaints Authority - Truth in Advertising

6.1 The regulation of truth in political advertising could be undertaken by an independent statutory organisation, separate from the AEC in the same manner that, for example, the above described PPBC was to be. This would have the effect of putting the AEC at a distance from any allegations that might arise in the heat of an election campaign that investigations into truth in political advertising complaints were being handled in a politically biased manner.

6.2 Such an organisation, which is here called the “Election Complaints Authority” (ECA) for ease of reference, could be created with its own functions and powers

under the CEA, and relatively few staff, perhaps seconded in part from the AEC, and other government agencies and departments such as the Australian Federal Police and the Australian Broadcasting Authority.

6.3 The ECA could be established at each federal election for a specified time period only, say one year from the announcement of a federal election - assuming that any offence relating to truth in political advertising would be in force only from the announcement of the election until the end of polling day, and any prosecutions recommended by the Director of Public Prosecutions would be completed within a year. If no prosecutions arose from the election, and its business was concluded, the ECA could be disbanded at any time after polling day.

6.4 As indicated in the oral evidence provided by the AEC on 15 August 1996 (transcript pp EM60-EM63), the ECA would ideally be provided with strong coercive powers of investigation, together with the power to seek injunctions as in section 383 of the CEA (but excluding candidates), to enable it to investigate and act upon complaints with the speed necessary to enable effective regulation in the relatively short time period of an election campaign.

6.5 A possible model for the sorts of powers that could be considered is the Australian Broadcasting Authority (ABA). The ABA is an independent statutory authority established under the Broadcasting Services Act 1992 (BSA). The ABA is responsible for technical planning and licensing of broadcasting services, ownership and control regulation of media companies and content regulation for the services provided.

6.6 The ABA is granted the power to undertake investigations by Part 13 of the BSA for the purpose of the performance of or exercise of any of its functions and powers, and may use one or more of the following methods to obtain all the necessary information:

- written submissions from the public, the licensee and/or a complainant;
- meetings between the ABA and interested parties;
- examination of documents;
- exchange of correspondence;
- hearings;
- consultation with groups;
- consultation with or examination of individuals.

6.7 Section 177 of the BSA states that an individual must provide any documents which may contain information relevant to an investigation. When a person is examined, the questions are asked in private but the person may have an adviser present. Examinees are required to take an oath or affirmation to the effect that the information provided is true to the best of the person's knowledge or belief. Under section 208 of the BSA it is an offence to knowingly provide false or misleading evidence, to do so carries a penalty of up to one year.

6.8 The ABA is obliged to investigate complaints referred to it which have not been resolved between complainants and broadcasters. However, under section 149(2) of the BSA the ABA is not required to investigate complaints it finds to be "frivolous, vexatious, or not made in good faith". At its discretion, the ABA may publish a report of its investigation or release information from the report to the general public. However, information on the progress of an investigation is not usually made publicly available.

6.9 In deciding what action to take in the course of an investigation and in its outcome the ABA is required by section 5(2) of the BSA to use its powers in a manner which is appropriate for the seriousness of the breach concerned. If licensees are found to be in breach of their licence conditions or of the control provisions of the BSA, the ABA may issue notices directing them to take action to conform with the requirements of the licence or to take action to remedy the breach. Licensees may face fines up to $200,000 for breach of licence conditions or up to $2m for failure to comply with notices. If the investigation relates to conduct that could amount to an offence under the BSA, the ABA may refer the matter to the Director of Public Prosecutions.

6.10 In summary, an organisation similar to the ABA, could be established under the CEA with its own powers and functions to regulate truth in political advertising. The powers of the Election Complaints Authority might include the holding of public hearings, ordering the production of documents, the examination of witnesses, the issuance of warnings, and the making of remedial orders, and where necessary, obtaining injunctions and instituting prosecution proceedings.

6.11 In this organisational model the role of the Director of Public Prosecutions remains unchanged, but strong coercive powers of investigation are provided directly to the ECA, rather than being available indirectly only through the assistance of the Australian Federal Police. While there might still be a need to enlist the assistance of the AFP in particular local circumstances, or where the scope or seriousness of the case suggests the forces of the AFP are necessary, there would not be complete dependence by the ECA on the AFP for all investigations of possible breaches of the legislation, as is currently the case for electoral offences under the CEA.

6.12 This model organisation, the Election Complaints Authority, has the following advantages:

(a) Because the ECA would possess strong coercive powers of investigation, and the power to seek injunctions, rapid resolution of complaints within the short time frame of a federal election period would be possible;

(b) Because the ECA would be established as separate from the AEC, there could be no allegations of political bias levelled at the AEC, the organisation primarily responsible for the conduct of the election.

(c) Because the ECA would be separately resourced, there would be no competition with the AEC for scarce resources in administering the expected large case load.

6.13 It is important to note that if the ECA powers of investigation were to include requiring people to answer questions and produce documents even though that may involve self-incrimination, the evidence so obtained would generally not be able to be used against the person in a criminal prosecution, although civil remedies, such as injunctions, would not be affected.

6.14 Further, if the Election Complaints Authority were to be given the power to make orders outside the judicial process, such as for example concluding that a television advertisement contains an untruth or an inaccurate statement of fact and ordering the cessation of its broadcasting, this would assist in immediately remedying any perceived damage to the political campaign process during an election period,

and would avoid putting perhaps insupportable pressures on the courts for injunctions.

6.15 However, it should be recognised that such a power implies a trade-off between the improved speed at which complaints can be acted upon, and the lowered standards of evidence necessary to support such action. Under the law at present, any complaint to the AEC which might lead to an application to the court for an injunction must be supported by sufficient evidence to satisfy the court that there are appropriate grounds to issue the injunction. If this evidentiary standard is relaxed in order to expedite action, as might be implied in the making of immediate orders by the ECA, there will of necessity be a greater risk that the ECA will make an order for a person or party to desist from advertising which is not in fact proscribed by the law.

6.16 Two related issues are those of appeal rights, and the effect of wrongful ECA orders on the validity of an election. In case an ECA order were to be wrongly issued, a right of appeal is imperative to enable that error to be corrected. Further, it is possible that a campaign strategy by a political party, and its impact on the voting public, could be seriously compromised through obedience to a wrongful ECA order. The question would then arise as to whether such a disruption, arguably representing a form of "official error", ought to be able to form the basis of a challenge to the validity of the election in the Court of Disputed Returns.

7. Election Complaints Authority - All Offences

7.1 It is also worth considering whether the responsibilities of such an Election Complaints Authority should be widened to deal with complaints in relation to all election offences under the CEA, during the election period only. The AEC notes that some submissions to this JSCEM have complained about the necessary time taken by the AEC, the DPP and the AFP to investigate and assess possible breaches of the CEA, and it is recognised by the AEC that, short of the AEC invoking its injunctive powers under section 383 of the CEA, offences during the election period are unlikely to be prosecuted in time to remedy any perceived immediate damage to the electoral process.

7.2 However, any such extended organisational model for an Election Complaints Authority, responsible for the immediate resolution of all election complaints under the CEA during the election period, with the assistance of the AFP only as necessary in serious cases, should not be so modelled as to displace the proper role of the Director of Public Prosecutions and the courts in the electoral process.

7.3 Whereas such an Election Complaints Authority would be able to obtain immediate compliance with the law in most cases, by for example ordering the removal of offending political advertising from the newspapers or the airwaves, or by obtaining court injunctions in some circumstances, prosecutions would only be undertaken in due course with the advice of the Director of Public Prosecutions, and it would always be available to citizens to challenge the results of an election in the Court of Disputed Returns during the statutory 40 day period following the return of the writs.

8. South Australian Experience

8.1 The AEC is aware that this JSCEM is giving serious consideration to some form of regulation in relation to the content of political advertising and accordingly the AEC suggested consideration of section 113 of the Electoral Act 1985 (South Australia) as a less onerous alternative to the repealed section 329(2) of the CEA.

8.2 Under section 113(1) of the South Australian Electoral Act 1985, it is an offence for a person to authorise, cause or permit the publication of an electoral advertisement which contains a statement purporting to be a statement of fact and the statement is inaccurate and misleading to a material extent. The section applies to advertisements published by any means including radio and television. It is a defence for the defendant to prove that he or she took no part in determining the contents of the advertisement, and that he or she could not reasonably be expected to have known that the statement was inaccurate and misleading. The penalty in the case of a natural person is $1,000 and in the case of a body corporate $10,000.

8.3 Section 113(1) was recently considered in the case of Cameron v Becker (1995) 64 SASR 238 which involved an appeal to the Full Court of the Supreme Court of South Australia. The Court held that:

> (a) Section 113 is directed only to statements of fact. It has no application to expressions of opinion. Further, it applies only to electoral advertisements, which restricts its application to advertisements calculated to affect the result of an election.
>
> (b) The statutory defence would ordinarily only be available to a small class of persons, such as printers and publishers of newspapers and the proprietors of radio and television stations. However there is nothing in the subject matter of section 113 which would indicate the preclusion of the common law defence expounded in Proudman v Dayman (1941) 67 CLR 536, being a defence of honest and reasonable mistake of fact.
>
> (c) The constitutional free speech defence failed because the limitation imposed by section 113 is manifestly proportionate to the legitimate object of ensuring that what is represented as factual material published in political advertisements is accurate and not misleading.

8.4 The South Australian law was therefore found to be constitutionally valid by the South Australian Supreme Court, but there is no guarantee that an appeal from this decision to the High Court, had it proceeded, might not have produced a different result. As has been noted previously by the AEC, section 113 has only been before the courts on this one instance, and this is a very limited experience upon which to base such a fundamental change to the federal electoral process.

8.5 The experience of the South Australian Electoral Commission in implementing this law may be instructive. To avoid any perception of bias in invoking section 113, the South Australian Electoral Commissioner will only act upon formal written complaints, and prosecutions after the election will not proceed without the advice of the Crown Solicitor. If such a law were to be enacted federally, and in the absence of an Election Complaints Authority as outlined above, the same cautionary measures would be applied by the AEC, with the Director of Public Prosecutions substituting for the Crown Solicitor.

8.6 In a Bill now before the South Australian Parliament, amendments are proposed to section 113 of the South Australian Electoral Act to provide the Electoral Commissioner with the power, not formerly available to him, to apply for court injunctions and orders in relation to advertising offences.

8.7 The proposed amendments to the South Australian electoral law would increase the powers of the South Australian Electoral Commissioner to control the

content of political advertising within the timeframe of the election period, by seeking injunctions from the court in relation to advertising offences, a course already notionally available to the AEC through section 383 of the CEA. However, the AEC's concerns about public perceptions of political bias in the application of the law remain, and are not satisfied by these latest developments in South Australia.

9. Conclusion

9.1 The establishment of an independent Election Complaints Authority with strong coercive powers of investigation, and with the authority to require compliance with the law by making orders and issuing warnings on its own authority, as well as being able to seek injunctions through the courts, would go a considerable way towards meeting the concerns of this JSCEM that complaints during the election period, including any that might arise from new legislation in relation to truth in political advertising, are dealt with efficiently and speedily. It would also meet the concerns of the AEC that its public reputation for political neutrality not be compromised in any way by the enactment of any law to regulate the content of political advertising.

9.2 If such a model Election Complaints Authority were to be considered further by the JSCEM, the AEC suggests that formal confirmation be obtained from the Attorney-General's Department and the Director of Public Prosecutions that an Electoral Complaints Authority would conform with overall Commonwealth policy on the administration of the law.

Extract from part 7 of the June 1997 JSCEM Report

7.3 Section 329(1) of the Electoral Act makes it an offence to print, publish or distribute, during election periods, anything "likely to mislead or deceive an elector in relation to the casting of a vote". The AEC is responsible for applying the offence in relation to printed matter. The Australian Broadcasting Authority is responsible for applying the offence in relation to matter broadcast on radio or television.

7.4 During the 1996 election the AEC once again received complaints based on a mistaken belief that section 329(1) prohibits "untruths" in political advertising. In fact, section 329(1) does not prohibit electoral advertising that is "untrue" and might mislead or deceive voters in deciding on their preferences. As decided by the High Court in *Evans v Crichton-Browne* (1981) 147 CLR 169, section 329(1) only prohibits advertising that misleads voters in the basically procedural aspects of how to mark a ballot paper and deposit it in the ballot box.

7.5 In 1984 the Electoral Act did contain, briefly, a section prohibiting untrue political advertising. Section 329(2) of the Act came into force in February 1984 and stated that

> A person shall not, during the relevant period in relation to an election under this Act, print, publish, distribute, or cause, permit or authorise to be printed, published or distributed, any electoral advertisement containing a statement
> (a) that is untrue; and
> (b) that is, or is likely to be, misleading or deceptive.

7.6 The first detailed examination of section 329(2) was carried out by this Committee's predecessor, the Joint Select Committee on Electoral Reform. in its August 1984 *Second Report.* The committee found the aim of "truth" in political advertising to be unachievable through legislation:

> political advertising differs from other forms of advertising in that it promotes intangibles, ideas, policies and images. Moreover, political advertising during an election period may well involve vigorous controversies over the policies of opposing parties...
>
> The Committee has noted the concern expressed by broadcasters and publishers on the inhibiting effect this section would have on political advertising. The Committee notes with some concern the fact that these difficulties were not raised during the debate on the 1983 Bill. This oversight suggests the need for legislation committees to closely examine complex Bills such as this, to ensure that the Parliament is aware of the full implications of every provision.

The committee concluded that

> it is not possible to control political advertising by legislation [and] section s.329(2)...should be repealed. In its present broad scope the section is unworkable and any amendments to it would be either ineffective. or would reduce its scope to such an extent that it would not prevent dishonest advertising. The safest course, which the Committee recommends, is to repeal the section effectively leaving the decision as to whether political advertising is true or false to the electors and to the law of defamation.

7.7 Legislation repealing section 329(2) came into force in October 1984. Section 329(2) was also considered in 1994 by the previous committee, which concurred (non-government members dissenting) with the Joint Select Committee's findings. The committee added that it would be “entirely inappropriate” for the AEC to administer truth-in-advertising legislation, as such a role for the AEC would inevitably lead to perceptions that its neutrality had been compromised.

7.8 During the last session of the 37th Parliament, the Australian Democrats moved an amendment to the *Electoral and Referendum Amendment Bill 1995* to reinstate section 329(2). The amendment passed the Senate but was not accepted by the House of Representatives. As noted elsewhere in this report, the Electoral and Referendum Amendment Bill lapsed when the 37th Parliament was dissolved.

7.9 This Committee agrees with its predecessors that the old section 329(2) is not the proper mechanism for enforcing “truth” in political advertising. Adding to the limitations identified in 1984 by the Joint Select Committee is the subsequent discovery of the implied constitutional freedom of political discussion (Chapter Three refers).

7.10 While it is not feasible to regulate assertions about the impact of a party’s policies, this does not excuse deliberate misrepresentations of what a candidate’s or party's stated policies actually are, or other distortions of straightforward matters of fact. If some of the misleading statements made during elections were instead made in private enterprise, the perpetrators would most likely find themselves prosecuted under the Trade Practices Act. There is no valid reason for not applying similar principles to the factual content of election advertising.

Possible Sanctions Against Misleading Advertising

7.11 The most practical form of sanction against misleading advertising is that provided for in section 113 of South Australia's Electoral Act. As explained by the AEC,

> Section 113 of the South Australian Electoral Act does not ban "untruths" in political advertising, which would require complex and subjective assessments of ideas, images and intangibles in political debate. Instead, the South Australian Electoral Act bans "inaccurate statements of fact", which is a much more practical basis for regulation.

7.12 Section 113 provides that where an electoral advertisement contains a purported statement of fact which is "inaccurate and misleading to a material extent", a person who authorised, caused or permitted the publication of the advertisement shall be guilty of an offence. Section 113 applies to electoral advertisements published by any means, including radio and television. The penalty for a breach of section 113 is $1000 where the offender is a natural person, and $10 000 where the offender is a body corporate. However, it is a defence to such a charge for the defendant to prove that he or she took no part in determining the contents of the advertisement and "could not reasonably be expected to have known that the statement to which the charge relates was inaccurate and misleading".

7.13 Section 113 was recently considered in the case of *Cameron v Becker* (1995) 64 SASR 238, which involved an appeal to the South Australian Supreme Court. The case established that the offence created by section 113 requires the prosecution to prove that the alleged statement is inaccurate and misleading to a substantial or significant extent. Also, section 113 is directed to electoral advertisements containing statements of fact, not expressions of opinion, and the common law defence of an honest and reasonable mistake of fact is available. The Supreme Court further decided that the implied constitutional freedom of political discussion does not confer a right to disseminate false or misleading information and section 113 is therefore valid (the Committee notes the AEC's caution that an appeal to the High Court might have produced a different result).

7.14 A version of the South Australian sanction should be introduced into the Commonwealth Electoral Act. The Committee notes that a Queensland parliamentary committee recently came to a similar conclusion, recommending that legislation be introduced in that State to prevent "inaccurate and misleading statements of fact" in political advertising.

Method of Enforcement - the "Election Complaints Authority"

7.15 The AEC believes there is little point in regulating the factual content of political advertising if remedies are not available when the damage is actually occurring:

> To leave the enforcement of such law to post-election prosecutions is to shut the gate after the horse has bolted. The most obvious immediate remedy during the election period is the use of court-ordered injunctions to stop any apparently illegal activity from arising or continuing.

7.16 A provision allowing post-election prosecutions, if properly drafted and enforced, will act as a deterrent to improper behaviour in the first place. Nonetheless there ought to be injunctive remedies available during an election.

7.17 The AEC has consistently argued that its reputation for neutrality would be impaired if it were to be given responsibility for a truth-in-advertising provision. The AEC proposed a separate statutory organisation, dubbed the "Election Complaints Authority" (ECA), to enforce the proposed sanction. Such an organisation

> could be created with its own functions and powers under the CEA, and relatively few staff, perhaps seconded in part from the AEC, and other government agencies and departments such as the Australian Federal Police and the Australian Broadcasting Authority.
>
> The ECA could be established at each federal election for a specified time period only, say one year from the announcement of a federal election [and] would ideally be provided with strong coercive powers of investigation, together with the power to seek injunctions as in section 383 of the CEA (but excluding candidates), to enable it to investigate and act upon complaints with the speed necessary to enable effective regulation in the relatively short time period of an election campaign.

7.18 However, the South Australian experience suggests that the AEC's concerns are overstated. South Australia does not need a separate bureaucracy to administer the truth-in-advertising provision; as with the other provisions of South Australia's Electoral Act the State Electoral Office administers section 113. There has never been a suggestion that the Electoral Office is incapable of performing this function or has somehow been compromised, even though prosecution action has taken place.

7.19 In conclusion, a provision similar to the South Australian section 113 should be introduced into Commonwealth law. The AEC should be responsible for assessing whether there is sufficient evidence to refer complaints to the DPP, as is the case with other offence provisions in the Electoral Act. If necessary, the AEC should be provided with additional resources to enable it to fulfil this new responsibility.

7.20 Recommendation 47:

> that the Electoral Act and the Broadcasting Act be amended to prohibit, during election periods, "misleading statements of fact" in electoral advertisements published by any means.

Extract from the Government Response of 8 April 1998

48. Not supported. The Government firmly believes that political advertising should be truthful in its content. However, any legislation introduced to enforce this principle would be difficult to enforce and could be open to challenge.

49. Previous Committees have found that it was not possible to legislate to control political advertising and that voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.

Extract from part 6 of AEC submission No 88 of 12 March 1999

6.9.1 Section 329(1) of the Act makes it an offence during the election period to print, publish or distribute any matter or thing that is likely to deceive an elector in relation to the casting of a vote. This provision was considered by the High Court in *Evans v Crichton-Browne (1981) 147 CLR 169* in which it was held:

> that the words “in or in relation to the casting of his vote” refer to the act of recording or expressing the elector’s political judgment, eg, in obtaining and marking and depositing it in the ballot box, and not to the formation of that judgment.

6.9.2 This means that only published or broadcast material which provides misleading or deceptive information about obtaining and marking and depositing a vote in the ballot box would be a breach of section 329 of the Act. Section 329 is not intended to regulate the political content of publications and broadcasts that are directed at influencing voters.

6.9.3 Over the past decade, the AEC has consistently advised the JSCEM that any regulation of the ‘truth’ of political debate would be unwise and unworkable. However, during debate in late 1995 in the Senate on the Electoral and Referendum Amendment Bill 1995 the Australian Democrats moved an amendment to introduce ‘truth in advertising’, which was supported by the then Coalition Opposition, but was not supported by the then ALP Government. The Bill was returned to the House of Representatives, where the Government rejected the amendment. The Bill was returned to the Senate and eventually lapsed at the 1996 federal election.

6.9.4 Further consideration was given to this issue during the hearings of the JSCEM into the conduct of the 1996 federal election, when the possibility of introducing a version of the South Australian section 113 into federal law was canvassed. In the June 1997 JSCEM Report it was recommended that:

> the Electoral Act and the Broadcasting Act be amended to prohibit, during election periods, “misleading statements of fact” in electoral advertisements published by any means. (Recommendation 47)

6.9.5 The Government Response to the JSCEM recommendation, which was tabled in the Senate on 8 April 1998, was as follows:

> Not supported. The Government firmly believes that political advertising should be truthful in its content. However, any legislation introduced to enforce this principle would be difficult to enforce and could be open to challenge.
>
> Previous committees have found that it was not possible to legislate to control political advertising and that voters, using whatever assistance they see fit from the media and other sources, remain the most appropriate arbiters of the worth of political claims.

6.9.6 Effectively, it would appear that the Liberal/National Coalition and the ALP have now signalled their intention not to press for or support ‘truth in advertising’ for federal elections, whether modelled on the South Australian legislation or in some alternative form.

PRISONER ENROLMENT AND VOTING

Extract from submission No 90 of 20 September 1996

4.10.1 *Subject: prisoner enrolment and voting*: Prior to the reforms to the electoral legislation in 1983, section 39(4) of the CEA read as follows:

> No person who is of unsound mind, and no person attainted of treason, or who has been convicted and is under sentence for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer shall be entitled to have his name placed on or retained on any roll to vote at any Senate election or House of Representatives election.

4.10.2 In 1983 the First Report of the Joint Select Committee (JSCER) on Electoral Reform made the following comments and recommendation:

> In relation to the loss of voting rights of prisoners, the majority of the Committee was of the view that, as an initial revision, being convicted and sentenced for an offence punishable by 5 years imprisonment rather than one year as at present should be the basis for deprivation of rights. There was strong support within the Committee for the view that punishment provided by the courts should not be added to by this legislation. This view is taken by several States. The Committee recommends that sub-section 39(4) be amended to read "imprisonment for 5 years or longer".

4.10.3 As a consequence of this 1983 JSCER recommendation, clause 23 of the Commonwealth Electoral Legislation Amendment Bill 1983, proposed to substitute five years for one year in section 39(4) of the CEA. During the House of Representatives Committee stage of the Bill, Mr Steele Hall moved an amendment to omit 5 years and substitute one year on the grounds (a) that there should be consistency with the one year Constitutional disqualification for Members of Parliament, and (b) that prisoners should pay the penalty for their transgressions. Dr Klugman said that it was the duty of the courts to punish and that the loss of civil rights is an additional punishment that should not be metered out. The Hall amendment was defeated.

4.10.4 During the Senate Committee stage of the Bill, Senator Peter Baume moved the same amendment as the Hall amendment in the House. Senator Macklin argued for the liberalisation of the disqualification on the grounds that the criminal activities of people and sentences from which they might suffer ought not to be relevant to their rights as citizens to engage in the political process. The Baume amendment was defeated. The Bill was passed and section 93(8)(b) came into force as follows:

> A person who:
>
> (b) is serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory;
>
> Is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.

4.10.5 In 1986 the JSCEM considered the issue of prisoner enrolment and voting rights and recommended that section 93(8)(b) be repealed. As a consequence the

clause 35 and Schedule 3 of the Electoral and Referendum Amendment Bill 1988 proposed to provide enrolment and voting rights for all prisoners. In his Second Reading Speech Senator Robert Ray said:

> The Bill establishes a more rational and consistent approach to the recognition of the voting rights and responsibilities of those in prison. It makes provision for prisoners, other than those convicted of treason, to enrol to vote or to retain their entitlement to enrolment. Honourable Senators would be aware that the present provision only allows prisoners convicted of an offence of five years or less to retain their entitlement to enrolment....a principal aim of modern criminal law is to rehabilitate offenders and orient them towards the society they will re-enter on their release. This process is assisted by a policy of encouraging prisoners to observe their civil and political responsibilities.

4.10.6 In response Senator Puplick foreshadowed that the Opposition would move for an amendment to delete the proposed new provision and return to the 5 year disqualification. He said that if that amendment was not successful then the Opposition would vote against the entire Bill. Senator Knowles expressed great concern that prisoners were to be given the vote and suggested that the purpose of the legislation was to gain electoral advantage for the Government. He said that the Opposition was of the view that prisoners should not be entitled to all the privileges of law-abiding citizens and that our system of justice exists to punish and deter. The Puplick amendment was agreed to and section 93(8)(b) remained as before.

4.10.11 In 1995, during debate in the House of Representatives on the Electoral and Referendum Bill 1995, Mr Connolly moved an amendment to reduce the prisoner voting entitlement to 12 months. This amendment was defeated in the House, and the Bill failed to gain passage before the announcement of the 1996 federal election. The AEC understands that the 1995 Bill will be re-introduced, with amendments, into the current Parliament.

Extract from submission No 135 of 7 May 1997

2.8.1 The AEC has no comment to make on whether or not prisoners should enrol and vote; that is a policy matter for the Parliament. The AEC is unable to comment within the time frame available on whether problems might be experienced with a total ban on prisoners enrolling and voting. As with partial bans, the problems that are likely to arise will be in the actual identification of those disqualified. Mobile polling and the availability of postal vote applications in prisons would cease, but access to postal votes for those prisoners voting for their home address might still be possible through family members or friends, and the position of parolees would be problematic.

2.8.2 In this context, the AEC is now satisfied that the operational problems raised with the previous JSCEM about the reporting to the AEC of actual/potential sentences by Prison-Controllers has been resolved by amendments made to section 93(8)(b) and section 109 of the CEA by the *Electoral and Referendum Amendment Act 1995*. The following list of extracts provides a background account of the progress of these amendments:

(a) pages 10-11 of AEC submission No 91 dated 2 August 1993;
(b) AEC submission No 141 dated 27 January 1994;
(c) pages 1-2 of AEC submission No 151 dated 25 May 1994;

(d) pages 142-144 (and page 165) of the JSCEM Report on the 1993 Federal Election, recommending amendments to section 93(8)(b) and section 109 (recommendation 68), and a dissenting view;
(e) page 1253 and 1262 of the Senate Hansard of 21 September 1995, providing the Government Response to recommendation 68 of the JSCEM Report on the 1993 Federal Election.
(f) provisions of the *Electoral and Referendum Amendment Act 1995* amending sections 93(8)(b) and section 109.

2.8.3 Attention is also drawn to page 19 of the AEC submission No 84 of 16 September 1996, where it was reported that 730 votes were issued at the 1996 federal election by mobile polling teams visiting prisons, as detailed by State/Territory in Table 18 of that submission; and pages 47-48 of the AEC submission No 90 of 20 September 1996, which outlines the recent history of parliamentary debate on prisoner enrolment and voting.

2.8.4 In relation to the question on how many additional people would have been disenfranchised at the 1996 election had there been (a) a total ban on prisoners voting or (b) a one year disqualification, the AEC is unable to respond with any useful information because there is no baseline data on the total number of prisoners who voted.

2.8.5 The AEC removes from the Commonwealth Electoral Roll those prisoners currently advised by the Prison-Controllers as disqualified from enrolment and voting, and any declaration votes received from such persons would not be admitted to the count. However the AEC does not maintain records of persons who are in prison, not disqualified from enrolment and voting, and who exercise their right to vote for their home address (or the prison).

Extract from part 4 of the June 1997 JSCEM Report

4.54 Section 93(8)(b) of the Electoral Act provides that any person serving a prison sentence of five years or longer is not entitled to enrol or vote at Federal elections.

4.55 Following the 1993 election the previous committee recommended that the franchise be extended to all prisoners. This recommendation was made with the intention of encouraging prisoners to observe their civil obligations. The recommendation was agreed to by the government and included in amending legislation, but was quickly withdrawn in the face of community opposition.

4.56 The Queensland Branch of the International Commission of Jurists submitted to this inquiry that the franchise should be extended to all prisoners, for reasons including those put forward by the previous committee. However, this Committee believes that its predecessor's recommendation was entirely inappropriate. While rehabilitation is an important aspect of imprisonment, equally important is the concept of deterrence, seeking by the denial of a range of freedoms to provide a disincentive to crime. Those who disregard Commonwealth or State laws to a degree sufficient to warrant imprisonment should not expect to retain the franchise.

4.57 Recommendation 24:

> that section 93(8)(b) of the Electoral Act be amended to provide that a person serving a prison sentence for any offence against the law of the Commonwealth, or of a State or Territory, is not entitled to enrol or vote at Federal elections.

4.58 While it might be argued that a prisoner serving a sentence of just a few days (for a minor offence) should not be disenfranchised, such a sentence is unlikely to coincide with the whole period of a Federal election. Pre-poll and postal voting will therefore remain an option. Further, in committing the minor offence the prisoner has still made his or her own decision to risk the loss of certain privileges.

Extract from Government Response of 8 April 1998

25. Supported. The Government notes the ALP's dissension to this recommendation. The Government recognises that the imposition of a prison term limits an individual's access to certain rights and privileges. The right to vote is considered by the Government to be one of the rights that should be foregone by prisoners.

Public Hearings of 11 May 1999 – Attachment No 8

CEMETERY VOTING

Extract from the JSCEM May 1989 Report – pp 76-78

Cemetery Voting

6.33 The timing of the close of rolls soon after the announcement of an election and the fact that deceased voters are removed on the advice of the Registrar of Births, Deaths Marriages means that at the time of any election it is not unusual to find the names of deceased persons still on the Electoral Roll and hence on the certified lists. In due course such names are systematically removed from the Roll but while they exist on the Roll they provide a means for unscrupulous persons to vote. This is colloquially known as 'cemetery voting'.

6.34 A number of submissions raised this issue as an area of concern and in particular, a submission from the Liberal Party of Australia referred to the alleged fraud perpetrated at the New South Wales by-election for the seat of Castlereagh in 1980. It had been alleged that the names of 400 dead people were used to win what was a close election. While the Castlereagh by-election was a State matter the Liberal Party suggested it was significant as a federal matter because the electoral rolls and certified lists used by the State were (and continue to be) produced by the AEC. Moreover, if the names of dead people had been used to win the by-election what was to say such techniques had not been used at a federal level.

6.35 In October 1988 the AEC responded to the Liberal Party's submission by forwarding to the Committee an unsolicited submission part of which sought to lay to rest the suggestion that the names of dead people had been used to any effect in the Castlereagh by-election. The AEC's submission noted that on 22 March 1988 the then Minister for Home Affairs, Senator Robert Ray, had written to the New South Wales Premier, the Hon. Nick Greiner, indicating his concern that the matter be investigated thoroughly and offering the assistance of the AEC. The Premier responded that a review of the State Electoral Office was about to commence which would look at the allegations. On 11 April 1988 Senator Ray again wrote to the New South Wales Premier this time suggesting that 'a more appropriate course [of action] would be reference via the State Electoral Office, to the New South Wales police'. Senator Ray noted that he had not referred the allegations to the Joint Standing Committee on Electoral Matters because they were more properly a matter for the New South Wales Electoral Act. Nevertheless, he saw that a Commonwealth investigation could serve a supplementary role and he awaited an indication that a New South Wales investigation had begun. The AEC has advised that no response was sent to Senator Ray's letter.

6.36 The AEC concluded its submission by noting that the means of verifying the allegations, that is the certified lists used for the 1980 Castlereagh by-election, had been destroyed as was normally the case for election documentation after the time for challenging results had past.

6.37 On 21 November 1988, Mr Gary Humphries appeared before the Committee on behalf of the Liberal Party and was offered the opportunity to rebut points made in the AEC's October 1988 submission. Mr Humphries took the question on notice. Subsequently, the Federal Director of the Liberal Party, Mr Tony Eggleton advised the Committee that the Party was not aware of the letters written between Senator Ray and the New South Wales Premier when the Party's submission was drafted. He

concluded that an inquiry by the New South Wales Government was 'the most appropriate way of pursuing [the] matter, ...'

6.38 In assessing the extent of cemetery voting, the Committee notes the findings and conclusions of the Report of the New South Government Inquiry into the Operations and Processes for the Conduct of State Elections which was tabled in the New South Wales Parliament in February 1989. The Report found that while it was possible for people to engage in cemetery voting there remained no evidence of its widespread use. In the case of the Castlereagh by-election the Report cited the investigation work carried out by the AEC, concluding 'it was proved beyond doubt that the allegation was without substance'.

6.39 While the Committee's Inquiry has raised the issue of cemetery voting no evidence of its widespread use has been forthcoming. The advice of the AEC is that the activity is negligible and the Committee therefore believes no legislative action is required at this time.

6.40 Despite recommendations in this Report designed to discontinue the practice of marking the certified lists (paragraph 6.21) there may be some advantage in using the information available at the close of rolls to code the certified lists with those voters believed to be dead even though formal advice has not been received from the Registrar of Births, Deaths and Marriages. Such coding could be used by polling staff to identify voters attempting to impersonate a dead voter.

6.41 The Committee notes the AEC's policy that certified lists 'are not to carry any marks, deletions, additions or any notations apart from those made during the poll itself' but believes the technology now used by the AEC would allow the coding to be done.

6.42 The Committee recommends that: At the next federal election the Australian Electoral Commission code on the laser printed certified lists the names of those voters believed to be dead but for which no official advice has been received from the Registrar of Births, Deaths and Marriages. (Recommendation 53)

Extract from the JSCEM December 1990 Report – p 57

Voting in the Name of a Deceased Person

6.56 Under legislation the names of deceased electors are removed from the electoral roll on the advice of the Registrar of Births, Deaths and Marriages for each State, although the AEC may not remove names after the roll has closed. It is not unusual for the names of people who have died between the close of rolls and polling day still to be on the roll on election day. With the AEC's new RMANS, however, information such as the lists of deceased persons received from the Registrar of Births, Deaths and Marriages for that period and later; other lists of advice on deaths; the names of ineligible voters; and computer errors are included in an alert list and run against the electoral roll following polling day to identify any occurrences of voting in the name of a deceased person or ineligible voter.

6.57 A misinterpretation of an AEC code in a consolidated list of voters led the National Party of Australia to allege in a submission to the Committee that a person or persons unknown had voted in the name of 42 deceased persons in the electorate of Richmond. The allegation was subsequently withdrawn by the National Party and it was agreed that rather than highlighting voting in the name of a deceased person the

data presented served to prove that the AEC's security program to detect such electoral fraud was working effectively.

6.58 The Committee concludes that based on the data presented there was no evidence to suggest that voting in the names of deceased persons had occurred in the electorate of Richmond.

Extract from the JSCEM November 1994 Report – p 33

Cemetery Voting

4.2.11 A peculiar variant of multiple voting is "cemetery" or "graveyard" voting, involving votes allegedly cast in the names of deceased electors not removed from the electoral rolls.

4.2.12 The Committee is satisfied that cemetery voting is not a problem in contemporary Australian elections. The Inquiry heard evidence from AEC staff that information from the State births, deaths and marriages bureaucracies, and publication of death notices in newspapers, allows information on deaths to be collated with some accuracy. This information is used to mark deceased electors' names received after the close of rolls on a single certified list in each Division - List number 350. The marks against electors' names on this list are then scanned and compared with marks on lists used for polling. Where there is a multiple mark against an elector's name on List 350 and another list, the circumstances are thoroughly investigated.

4.2.13 All but 18 of such multiple marks after the 1993 federal election were conclusively proven to be the result of an error in marking the certified list, or to relate to an elector who had died after the date of casting his or her vote. The investigation did not establish 18 cases of cemetery voting, but merely 18 cases - across all Divisions in Australia - where insufficient documentary evidence existed to prove conclusively that a multiple mark was the result of an error in marking the certified list.

RETURN-TO-SENDER MAIL

Extract from the December 1986 JSCER Report – pp 28-29

Real Place of Living

3.25 Sub-section 93(6) provides that except in the case of an eligible overseas elector, an itinerant elector or an Antarctic elector, enrolment is not of itself sufficient to confer a right to vote: the elector must in addition have had his 'real place of living' within the Division for which he is enrolled at some time during the 3 months immediately preceding polling day.

3.26 Ordinary voters are obliged to establish that they are not disqualified from voting by the 3 months rule by satisfactorily answering questions prescribed by the Act to be put by the polling official issuing votes. Each voter is asked the question 'where do you live?', and if the address given in response is not that shown on the certified list, the further question 'At what other place or places have you lived during the last 3 months?' is asked. If the address, or one of the addresses, given in answer to the latter question is within the Division, the elector is given an ordinary vote - otherwise, his claim to vote is rejected.

3.27 Absent voters, provisional voters, or electors voting pursuant to sections 192, 236 and 237 are obliged to make a declaration to the effect that they lived within the Division at some time during the 3 months immediately preceding polling day, the relevant declarations being forms approved by the AEC.

3.28 In the case of a postal voter, however, the declaration made - that the voter is entitled to a postal vote in accordance with the provisions of the Electoral Act - is not nearly so explicit, and could be interpreted simply as a declaration that one or more of the qualifications for a postal vote spelt out in sub-section 184(1) of the Act have been fulfilled. The relevant declaration is a form prescribed by sub-regulation 41(1) of the Electoral and Referendum Regulations: see sub-section 188(3).

3.29 It can be seen that the 3 month rule is therefore in practical terms incapable of across the board enforcement. More seriously, however, its operation is anomalous in that it only works to disenfranchise those electors who have not correctly maintained their enrolments, but are honest enough to admit it. This clearly raises the general question of whether the rule continues to serve any useful purpose.

3.30 The Committee believes that the regular maintenance of the Rolls by annual habitation reviews should ensure improved accuracy and reliability. The 3 months real place of living requirement has been needed because the accuracy of the Rolls at any given election could not be guaranteed. It might be reasonable to suppose that if the Rolls could approximate better to the ideal, the significance of the 3 months rule would be diminished.

3.31 It is also notable that the Court of Disputed Returns is specifically denied by sub-section 361(1) the power to 'inquire into the correctness of any Roll', the reason for this being that it is recognized by the legislature that Rolls of their very nature will contain defects. The 3 months rule as it stands, however, could give rise to challenges in the Court to the correctness of the admission of individual votes which, depending as they would on the question of where a person had resided, would be of

very similar nature to a challenge to the Roll itself - since in each case the assertion would be that the voter really should not still have been on the Roll. On this basis also, it could be argued, the 3 months rule should be abandoned.

3.32 The rule, it should be emphasised, is not an obstacle to fraud or impersonation. Very few electors were ever asked the complex pre 1983 prescribed questions (one of the reasons for their repeal) and there is nothing to suggest that any more were asked the sub-section 229(3) question regarding places of living during the previous 3 months. Any person contemplating fraudulent voting can, without difficulty state addresses or make declarations which will not of themselves prevent the admission of the vote. It must be emphasised that the ordinary voter's answer to the question, whether true or false, is for all practical purposes - as far as the vote being recorded and placed in the ballot box (and hence 'irretrievable') - conclusive.

Recommendation 20

3.33 That sub-section 93(6) of the Electoral Act, containing the requirement of three months real place of living within the electorate for which an elector is enrolled be repealed.

Extract from the JSCEM May 1989 Report – pp 38-40

Real Place of Living

3.101 Up until 1987 people wishing to cast ordinary votes were obliged to establish that their real place of living had been within the Division for which they were enrolled at some time during the three months preceding polling day. Each voter was asked a series of questions which included the question, 'Where do you live?'. If the answer given to this question was different to the address contained in the Certified List the voter was then asked, 'At what place or places have you lived during the last 3 months?'. If the answer to this question was an address in the Division where the person was attempting to vote then the they would be able to cast an ordinary vote. Otherwise their claim to vote was rejected.

3.102 Removal of the 3 month question had been recommended by the Joint Select Committee on Electoral Reform in its December 1986 Report on the 1984 Election. The Joint Select Committee had found that the operation of the 3 month rule could not be enforced properly because postal voters were able to avoid it and the rule disenfranchised those electors who had not correctly maintained their enrolment and were honest enough to admit it. Those who lied about their address were able to vote. Also of concern to the Joint Select Committee was its view that the 3 month rule could give rise to challenges in the Court of Disputed Returns.

3.103 A submission on the conduct of the 1987 federal election from the AEC Director of Victorian Operations, Mr Trefor Owen, claimed that the elimination of the 3 month question was leading to inaccurate enrolment. In particular, it was said that:

people who had left their address several years earlier but had not been removed from the Electoral Roll because of ordinary review activity were allowed to cast an ordinary vote; and

people claiming a provisional vote got one even though they may have been removed from the Electoral Roll by ordinary review activity and did not live at the address they claimed. This was said to be true in 90% of cases.

3.104 Mr Owen suggested there were three reasons why people maintained enrolment for an old address:

1. some were lazy;
2. some did not want to be found; and
3. some believed their vote was worth more in a marginal Division.

3.105 In relation to the third reason it was a matter of concern to Mr Owen that voters may be able to influence an election in a Division in which they did not live.

3.106 To overcome the problems he had described, Mr Owen recommended that the 3 month question be re-introduced and that a more comprehensive declaration be sought from a person wishing to make a declaration vote (that is a postal vote, absent vote or provisional vote) before the vote was counted.

3.107 In considering these recommendations the Committee noted that other submissions recorded similar concerns. It became apparent that the practice of electors claiming to live at one address when they did not was causing unnecessary administrative work for the AEC and generating a poor public image for the AEC with genuine occupants of houses complaining about the quantity of mail they received from the AEC for people who no longer lived at their address. More important, however, was the fact that the practice could have a significant effect in a closely fought marginal electorate.

3.108 The re-introduction of the 3 month question may lead to some improvement in the accuracy of the Electoral Roll but it is by no means the only available option.

3.109 An option preferred by the Committee involves limiting the automatic re-enrolment of voters once they have been removed from the Roll by a habitation review. At present some people obtain a vote by completing a declaration vote, saying they still live at a previous address. The Electoral Act provides that a voter who was on the Roll at a previous election and claims to be at the same address is entitled to vote. These voters are then automatically restored to the Roll for the old address.

3.110 Following the election these voters will again be removed from the Roll by habitation review unless they return to live at the old address. The only means of returning their name to the Roll is to complete an electoral enrolment form. At any subsequent election a voter may claim a vote but this vote will not be included in the count. The Committee proposes that at a subsequent election the voters may again claim a declaration vote (claiming to live at the old address) but on this occasion the vote would be disallowed.

3.111 To effect this method the Committee recommends that:

The Commonwealth Electoral Act 1918 be amended so as to provide that electors can only once be restored automatically to the Commonwealth Electoral Roll after they have been removed by habitation review. Such electors may then only be added to the Electoral Roll by means of completing an electoral enrolment form. (Recommendation 22)

3.112 The Committee notes that this recommendation requires the AEC to maintain an accurate record of any voter claiming declaration vote for an address for which the voter claims to have been at the time of a the previous election.

3.113 The Committee recommends that:

The Australian Electoral Commission ensure that an accurate record is maintained of all voters who, at the time of an election, claim a declaration vote for an address for which they are not enrolled but for which they claim to have been enrolled at a previous election. Such a list should be publicly available.
(Recommendation 23)

Extract from the JSCEM November 1994 Report – pp 62-65

4.6 Dickson

4.6.1 Following the death of a candidate after the close of nominations, the House of Representatives election for Dickson in Queensland was deemed to have failed in accordance with section 180 of the Electoral Act. A supplementary election was held on 17 April 1993 and won by the Attorney General, the Hon. Michael Lavarch MP.

4.6.2 A Queensland-based organisation called the Enterprise Council submitted that the result in Dickson was "manufactured", owing to:

- electors not residing at their enrolled addresses;
- non-existent or deceased electors at caravan parks;
- electors voting in the name of religious non-voters;
- multiple surnames enrolled at individual households;
- a high level of return-to-sender MP mail; and
- a high level of non-voting when compared with the State average.

4.6.3 The Enterprise Council charged that the AEC had acted improperly in not seeking to challenge the Dickson result in the Court of Disputed Returns.

4.6.4 The AEC responded to each allegation as follows:

- the only basis for alleging that electors were not at their enrolled addresses is a list of return-to-sender MP mail, and the Enterprise Council provides no evidence that any of the electors it refers to were not entitled to vote in Dickson;
- evidence put forward by the Enterprise Council does not address its proposition that electors at caravan parks "did not exist";
- of the three deceased electors referred to by the Enterprise Council, one died after the supplementary election, and no votes were recorded in the names of the other two;
- the Enterprise Council provides no evidence that any religious non-voters had votes cast in their names;
- the evidence put forward by the Enterprise Council relating to multiple surnames enrolled at households is severely flawed, by failure to explain why different surnames in a household should be regarded as indicating fraudulent enrolment, by factual errors, and by basic misunderstandings such as asserting that nine people were enrolled for one house. In fact, all nine had merely listed their enrolled address as Old Gympie Road, Dakabin (in common with many rural areas, there are no street numbers on this road);
- the accusation of a high level of return-to-sender MP mail is based solely on envelopes obtained in a dubious fashion from the office of the Liberal candidate. The envelopes have not been forwarded by the Enterprise Council to the AEC for

investigation, despite such a request being made by the AEC nearly a year ago; and

- the lower voter turnout in Dickson compared with the State average reflects a long-standing pattern of a lower turnout for by-elections than for general elections.

4.6.5 Having examined both submissions, the Committee is satisfied that the evidence put forward by the Enterprise Council fails to substantiate its allegations. This view would appear to be shared by the Liberal candidate in Dickson, Dr Bruce Flegg, who has advised the AEC that:

> the Enterprise Council...in no way speak for me and I in no way support their misguided campaign.

4.6.6 The AEC did not act unreasonably in declining to challenge the Dickson result in the Court of Disputed Returns. The Committee therefore finds the Enterprise Council's accusation of political interference or improper collusion between the Commonwealth Government and the AEC to be unfounded.

Extract from the JSCEM November 1994 Report – p 72

Return to Sender MP Mail

4.8.8 Submissions from several individuals and MPs expressed concern about apparently high rates of return-to-sender MP mail, suggesting that such mail indicates a high level of incorrect names or addresses on the electoral rolls. These claims are refuted by the AEC, which advised the Inquiry that it investigates names and addresses on return-to-sender mail forwarded to it.

One recent investigation in a marginal Division produced no evidence of fraudulent enrolment; indeed, "the evidence examined has tended to reinforce the view that the enrolment system is operating as intended". In the study in question, late-December 1992 roll data was being used for a March 1993 mail-out.

The AEC has emphasised the importance of Members and Senators using only the most current enrolment information for mail-outs; failure to do so can give rise to unfounded allegations of inaccuracies in the rolls.

4.8.10 Those organisations who believe that mail returned unclaimed to them indicates inaccuracies in the rolls always have the option of instituting objection action against the electors in question, as provided for in subsection 114(1) of the Electoral Act. As the AEC points out, there has been a dearth of such private objection action.

DIVISION OF DICKSON

Extract from the JSCEM November 1994 Report - p 62-66

4.6.1 Following the death of a candidate after the close of nominations, the House of Representatives election for Dickson in Queensland was deemed to have failed in accordance with section 180 of the Electoral Act. A supplementary election was held on 17 April 1993 and won by the Attorney General, the Hon. Michael Lavarch MP.

4.6.2 A Queensland-based organisation called the Enterprise Council submitted that the result in Dickson was "manufactured", owing to:

- electors not residing at their enrolled addresses;
- non-existent or deceased electors at caravan parks;
- electors voting in the name of religious non-voters;
- multiple surnames enrolled at individual households;
- a high level of return-to-sender MP mail; and
- a high level of non-voting when compared with the State average.

4.6.3 The Enterprise Council charged that the AEC had acted improperly in not seeking to challenge the Dickson result in the Court of Disputed Returns.

4.6.4 The AEC responded to each allegation as follows:

- the only basis for alleging that electors were not at their enrolled addresses is a list of return-to-sender MP mail, and the Enterprise Council provides no evidence that any of the electors it refers to were not entitled to vote in Dickson;
- evidence put forward by the Enterprise Council does not address its proposition that electors at caravan parks "did not exist";
- of the three deceased electors referred to by the Enterprise Council, one died after the supplementary election, and no votes were recorded in the names of the other two;
- the Enterprise Council provides no evidence that any religious non-voters had votes cast in their names;
- the evidence put forward by the Enterprise Council relating to multiple surnames enrolled at households is severely flawed, by failure to explain why different surnames in a household should be regarded as indicating fraudulent enrolment, by factual errors, and by basic misunderstandings such as asserting that nine people were enrolled for one house. In fact, all nine had merely listed their enrolled address as Old Gympie Road, Dakabin (in common with many rural areas, there are no street numbers on this road);
- the accusation of a high level of return-to-sender MP mail is based solely on envelopes obtained in a dubious fashion from the office of the Liberal candidate. The envelopes have not been forwarded by the Enterprise Council to the AEC for investigation, despite such a request being made by the AEC nearly a year ago; and
- the lower voter turnout in Dickson compared with the State average reflects a long-standing pattern of a lower turnout for by-elections than for general elections.

4.6.5 Having examined both submissions, the Committee is satisfied that the evidence put forward by the Enterprise Council fails to substantiate its allegations.

This view would appear to be shared by the Liberal candidate in Dickson, Dr Bruce Flegg, who has advised the AEC that:

> the Enterprise Council...in no way speak for me and I in no way support their misguided campaign.

4.6.6 The AEC did not act unreasonably in declining to challenge the Dickson result in the Court of Disputed Returns. The Committee therefore finds the Enterprise Council's accusation of political interference or improper collusion between the Commonwealth Government and the AEC to be unfounded.

Public Hearings of 14 May 1999 – Attachment 11

AEC INTERNAL AUDIT

Extract from the JSCEM May 1989 Report – pp 92-94

7.1 The AEC's submission on the conduct of the 1987 federal election was accompanied by a report and submission on an audit of six Commonwealth Electoral Divisions which was conducted following the 1987 federal election.

7.2 The audit was conducted as a result of statistics sought from the AEC by Senator Jim Short in October 1987. In the process of compiling the statistics sought by Senator Short the AEC discovered it had a number of problems in reconciling different sets of statistics. These difficulties suggested there may have been problems with the AEC's Election Manual and/or in its application by Divisional staff. Because of the problems this exercise revealed in the limited range of data sought by Senator Short it was decided a more comprehensive review should be undertaken.

7.3 In February 1988 the Electoral Commissioner authorised that an audit be carried out on the work of six Commonwealth Electoral Divisions. Four of the Divisions were in New South Wales and two were in Victoria. They were chosen on the basis that the DROs in these Divisions were experienced officers and therefore familiar with both the Electoral Act and the AEC's procedures. The chosen Divisions were not to be identified so as to avoid blame for errors being allocated to individuals.

7.4 The audit was conducted by a team of AEC officers headed by Mr Lionel Sampford, who had recently retired as the AEC's Director of Operations, Queensland. The team included DROs and members of the Internal Audit Section from the AEC's Canberra Office. The audit took approximately six weeks to complete and was forwarded to the Electoral Commissioner on 8 July 1988.

7.5 The terms of reference for the audit required the team to:

- conduct a fresh scrutiny of the House of Representatives ballot papers (both formal and informal);
- conduct a fresh scrutiny of the Senate Group Ticket vote ballot papers;
- conduct a fresh scrutiny of the informal Senate ballot papers;
- recheck all declaration votes admitted to the further scrutiny for both the House of Representatives and the Senate;
- recheck all declaration votes admitted to the further scrutiny for the Senate only;
- recheck all declaration votes rejected at the preliminary scrutiny; and
- make recommendations with a view to correcting any deficiencies that the audit might reveal.

7.6 The audit found a variety of problems had occurred during the 1987 election.

7.7 The AEC's Election Procedures Manual, which was used for the first time at the 1987 election, had not been complied with in a uniform manner and this was attributed to:

- a reluctance of AEC staff to accept national policy because of their long standing freedom to make their own interpretations of the Electoral Act;
- the fact that the Manual did not arrive in Divisional Offices until the day after the election was announced; and

- the fact that there was no training in the use of the Manual for Divisional staff.

7.8 The audit was critical of the lack of training for Divisional Office staff, casual employees and polling officials. In general, there was no training for these groups and as result there were problems on polling day with greater responsibility and pressure being placed on Divisional staff.

7.9 Other areas of criticism included:

- accounting for declaration votes;
- the withdrawal of reference rolls, with the result that a considerable number of voters were unnecessarily issued with provisional votes when their names were listed on the certified lists of voters; and
- a laxity in security arrangements in Divisional Offices after the election and the resultant misplacing and subsequent loss of some material.

7.10 The AEC has taken and is taking action in response to the findings of the audit of the six Divisions which includes the updating and distribution of the Election Procedures Manual and the training of Divisional staff.

7.11 The Committee recognises that a number of the difficulties experienced in the management of the 1987 election can be attributed to the late arrival of the Election Procedures Manual. However, it is noted that the delay in Divisional Offices receiving the Manual was the result of a long and protracted consultative process. It is also noted that various amendments to the Electoral Act were being made at the time the election was announced.

7.12 While it is somewhat alarming that the deficiencies exposed by the audit of the six Divisions may not have come to light but for Senator Short's questioning, the whole process has been beneficial for the AEC. The audit is one of the most positive management initiatives undertaken by the AEC in recent years.

7.13 The Report on the six audits recommends that after each election an audit be carried out on the operations of at least one Division, the Division being selected at random. The Report suggests this would be a means of confirming that national policy and procedures are being followed. The Committee supports the AEC's decision to conduct audits of the operation of Divisional Offices at future elections and believes the audits will only be effective if the strictest audit standards are applied.

Public Hearings of 14 May 1999 – Attachment 12

COSTS IN ELECTION PETITIONS

AEC submission No 124 of 15 November 1993 – extract on costs

4.3.2 During the hearing on 1 October 1993 on the question of costs, Justice Gaudron made a number of observations on the ease with which election petitions, which may have no legal merit, can be lodged with the Court of Disputed Returns under the current provisions of the *Commonwealth Electoral Act 1918.* For example, on page 54 of the transcript Justice Gaudron said the following:

> The Act is by no means of model of clarity as to who can bring petitions .... it sets it up so that a person can come without the benefit of legal advice which might deflect it. In fact, it discourages, positively prohibits, legal representation without leave, so that the Act is virtually inviting people ... to bring petitions which have not had the benefit of legal analysis.

4.3.3 Her Honour then appeared to agree with the proposition of Mr Gageler for the Commonwealth that whilst the $100 security for costs required under section 356 of the Act in order to lodge a petition may have been a deterrent to vexatious or frivolous petitioners when it was first legislated in 1902 (when it was 50 pounds), it can hardly be regarded as a meaningful deterrent these days.

4.3.4 In discussing with Mr Gageler the scheme of the Act which appears to encourage unimpeded access to the Court of Disputed Returns by any and all petitioners, Justice Gaudron said at page 55 of the transcript:

> Virtually unimpeded access, and as you tell me five out of six [of the petitions] have failed. One well knows that some of the grounds that have been advanced in these petitions - and I put Mr Hudson's to one side - have been grounds that one would think would not have survived legal advice...

4.3.5 In reference to section 370 of the Act which provides that "no party to the petition shall, except by consent of all parties, or by leave of the Court, be represented by counsel or solicitor... [and] ... in no case shall more than one counsel or solicitor appear on behalf of any party, Justice Gaudron went on to say:

> But very rarely do you have a provision such as this - you do in some Acts, but not commonly - no legal representation except by leave. So what you are doing is you are in fact encouraging people to come to the Court with arguments that do not necessarily have a basis in law.

4.3.6 And finally, on page 58 of the transcript, Justice Gaudron said:

> I was hoping maybe that the legislature might see fit to do something with respect to the provisions as they stand. It is by no means a model of clarity is it, that part of the Act?

4.3.7 These comments from the Bench are directed to petitions that “would not have survived legal advice”, that is, vexatious and/or frivolous petitions, and not to the Hudson petition in particular, as is obvious from Justice Gaudron’s comment that the ease of access to the Court for petitioners of limited means such as Mr Hudson is “commendable” (see paragraph 4.2.7 above).

4.3.8 If any review of the provisions of the Act relating to costs and legal representation were to be undertaken, it would need to be in the context of the following considerations.

4.3.9 For the average petitioner it costs a total of $900 in set fees and charges to lodge a petition, made up of the $100 deposit as security for costs under section 356 *of* the *Commonwealth Electoral Act 1918,* and the $300 filing fee and the $500 hearing fee under regulations 4(1) and 5(1) respectively of the *High Court of Australia (Fees) Regulations.* If a petitioner can provide a health care card or a health benefit card or provide other reasons acceptable to the High Court Registry that indicate financial constraints, then the High Court Regulations allow the $800 High Court fees to be waived. There is no waiver under the *Commonwealth Electoral Act 1918* for the $100 deposit as security for costs.

4.3.10 In addition to these set fees and the deposit, under Order 68 rule 3 of the *High Court Rules,* forthwith after filing a petition, the petitioner must arrange for the petition to be published in the *Commonwealth Gazette* and the relevant State *Gazette,* and in the case of an election for the House of Representatives, the petitioner must publish a notice giving details of the petition in a newspaper circulating in the relevant electoral Division. Further, under Order 68 rule 5 of the Rules, the petitioner must, 28 days after the filing of the petition, serve a copy of the petition upon every person whose election or return is disputed by the petition. These requirements under the *High Court* Rules for publication and service can clearly add up to a considerable financial burden to the petitioner.

4.3.11 The Commission has no difficulty with the fees, service and advertising requirements of the *High Court Rules* in so far as they apply to petitions disputing elections. The Commission does however agree with Justice Gaudron that the provisions in the *Commonwealth Electoral Act 1918* relating to costs and legal representation are dated and inconsistent.

4.3.12 The history of the introduction in 1902 to 1905 of the provisions of the *Commonwealth Electoral Act 1918* relating to costs and legal representation in the Court of Disputed Returns will not be canvassed in detail in this Submission. However it is worth noting that the two Houses of Parliament were divided at that time over whether to legislate for a non-judicial parliamentary Elections and Qualifications Committee, or a Court of Disputed Returns with full judicial powers, to settle election disputes. The primary cause of concern was the high cost of legal fees for respondents required to defend their election before a court against wealthy and possibly vexatious petitioners.

4.3.13 In the outcome, a Court of Disputed Returns was agreed upon as being more impartial in the settling of election disputes than a Parliamentary committee. However, as a trade-off, a provision was inserted in the Act limiting legal representation in order to protect elected parliamentarians from the costs of vexatious challenges. Section 370 of the *Commonwealth Electoral Act 1918,* which provides that, except by consent of all parties or by leave of the Court, no party shall be represented by counsel or solicitor, was therefore inserted by section 57 of the *Commonwealth Electoral Act 1905.*

4.3.14 As a corollary, the deposit to be paid by the petitioner as security for costs was held at a low level, in the expectation that court costs for the respondents would be contained by the limitation on legal representation. The further trade-off was that by holding the deposit to a low level, access to the court was not limited for the impecunious petitioner with a genuine dispute. Section 195 of the *Commonwealth*

Electoral Act 1902 provided that the deposit for security for costs should be 50 pounds. That amount has not substantially changed in the intervening 90 years and now stands at $100 in section 356 of the Act.

4.3.15 Despite the concerns of the early legislators to protect elected parliamentarians from wealthy and vexatious petitioners, modern day realities are that respondents will rarely appear without legal representation, and more often than not will hire a Queen's Counsel whose fee is guaranteed from party or other sympathetic resources. It is also unlikely that the court would decline to consent to such representation if there were to be any objection from the petitioner. This suggests that section 370 of the Act, limiting legal representation, no longer serves any practical purpose.

4.3.16 The provision does not appear in any way to either advantage or disadvantage the petitioner. The impecunious petitioner, by obtaining waivers on fees and by appearing without legal representation, has ready access to the court. The problem that Justice Gaudron has highlighted is that petitioners are encouraged by the apparent limitation on legal representation to bring disputes to court which might never have survived proper legal advice.

4.3.17 If section 370 were to be deleted from the legislation then the logical nexus between that provision and section 356 which sets a low $100 as the petitioner's deposit for security for costs would fall away. However, there are other provisions relating to costs in the Act, sections 360 (1)(ix), 360(1)(4), 372 and 373 for example, which would need to be considered as part of any general review of the issue of costs and legal representation that the Committee might recommend.

November 1994 JSCEM report – Extract on Court of Disputed Returns pp 67-69

4.7.4 Dr Sue Flanagan, on behalf of a group including the petitioner in the Macquarie case Mr Alasdair Webster, submitted that procedures for the Court of Disputed Returns are restrictive and actively discourage any challenge. Their concerns included the Court's preliminary hearing procedures, rules relating to the viewing of electoral material, the fact that one petition cannot challenge the whole of a general election result, and the requirement that no amendment be made to the facts relied on to invalidate an election result forty days or more after the return of the writ.

4.7.5 However the Committee was not persuaded that Court procedures have operated in the past, or would operate in the future, to prevent the thorough review of a contested election. Therefore the Committee does not see a need for a full review of procedures for bringing a petition before the Court of Disputed Returns.

Legal Representation

4.7.6 During one of the hearings before the Court of Disputed Returns, Justice Gaudron made a number of observations on the ease with which petitions which may have no legal merit can be lodged. In particular, with reference to section 370 of the Electoral Act which provides that no party to a petition shall, except by consent of all parties or by leave of the Court, have legal representation, Justice Gaudron stated that

> very rarely do you have a provision such as this - you do in some Acts, but not commonly - no legal representation except by leave. So what you are doing is you are in fact encouraging people to come to the Court with

> arguments that do not necessarily have a basis in law....I was hoping maybe that the legislature might see fit to do something with respect to the provisions as they stand.

4.7.7 These provisions were originally included in the Electoral Act in order to protect elected parliamentarians from wealthy and vexatious petitioners, however the AEC advises that section 370 is now dated and inconsistent:

> modern day realities are that respondents will rarely appear without legal representation, and more often than not will hire a Queen's Counsel whose fee is guaranteed from party or other sympathetic resources. It is also unlikely that the court would decline to consent to such representation if there were to be any objection from the petitioner. This suggests that section 370 of the Act, limiting legal representation, no longer serves any practical purpose.

4.7.8 The Committee agrees with Justice Gaudron and recommends that section 370 of the Electoral Act be repealed. Petitioners will still have the option of appearing without legal representation.

> *Recommendation 30:* that section 370 of the Electoral Act, restricting legal representation before the Court of Disputed Returns, be repealed.

Fees Payable by Petitioners

4.7.9 For the average petitioner it costs $900 to lodge a petition with the Court of Disputed Returns. High Court filing fees make up $800 of this amount, but can be waived if the petitioner is the holder of a health card or faces other financial constraints. The other $100 is a deposit as security for costs required under section 356 of the Electoral Act. There is no provision for waiver of this fee.

4.7.10 The AEC submitted that the $100 security for costs provides little meaningful deterrent to the lodging of vexatious or frivolous petitions, and could be increased. The amount has effectively not increased since 1902, and was originally set at a low level in part because the ban on legal representation would keep respondents' costs similarly low. The AEC submitted that if the ban on legal representation were to be repealed as recommended, then the logical nexus between that provision and section 356 which sets a low $100 as the petitioner's deposit for security for costs would fall away.

4.7.11 The Committee concludes that a person wishing to lodge a petition in the Court of Disputed Returns should be required to give security for costs sufficient to deter a vexatious or frivolous petition.

> Recommendation 31: that section 356 of the Electoral Act be amended so that the security for costs required of a petitioner to the Court of Disputed Returns is $500.

Public Hearings of 14 May 1999 – Attachment 13

COMPUTER HACKER

AEC submission No 128 of 24 January 1997 on Computer Security

1.1 This supplementary submission by the Australian Electoral Commission (AEC) is presented to the Joint Standing Committee on Electoral Matters (JSCEM) in response to its "Inquiry into the 1996 Federal Election", as advertised on Saturday 22 June 1996 in all major national newspapers. The submission is supplementary to the major AEC submission, "The Conduct of the 1996 Federal Election" presented to the JSCEM on 29 July 1996.

1.2 On 13 January 1997 the Secretary of the JSCEM, on behalf of the JSCEM Chairman, wrote to the Electoral Commissioner in the following terms:

> The Chairman has asked me to write to the AEC to seek the Commission's written comments on an article which appeared in the Sunday Mail on 29 December 1996. A copy is attached.
>
> The article relates to a "Hacker" gaining unauthorised access to the AEC's computer network prior to the 1993 election. This is a matter of concern to members of the Committee, especially as it may impact on the issue of electoral integrity. The Chairman is also surprised that this matter had not been brought to the Committee's attention by the AEC.....

1.3 This submission responds to the question raised. The Sunday Mail article is attached.

2. Background

2.1 In the first week of January 1993, the AEC found that an intruder (or "hacker") had been able to gain unauthorised access to AEC computing facilities. It appears that this access was first gained through another organisation's computer. AEC officers responded with a range of counter-measures designed to minimise exposure to any further attacks, and to monitor any unauthorised activity. These counter-measures, conducted in consultation with the Defence Signals Directorate (DSD), the Australian Federal Police (AFP), Telecom, the Australian National Audit Office (ANAO), and the AEC computer suppliers, were effective.

2.3 Inquiries by the AEC, Telecom and the AFP led to a suspect being identified, seizure by the AFP of the suspect's computer, and ultimately, conviction of the suspect for a range of offences. The Director of Public Prosecutions (DPP) and the Australian Government Solicitor provided legal advice as necessary during this time.

2.4 Extensive investigations of the incidents by AEC officers acting with the assistance of the AFP, and full testing of AEC computer systems, revealed no material damage to the programs and data files maintained on AEC computers. No evidence was found of any unauthorised attempts to access the electoral roll data maintained by the AEC on the mainframe computer operated by the Department of Administrative Services. Similarly, no evidence was found of any unauthorised attempts to access the electoral roll data maintained by the AEC on the mainframe computer operated by the South Australian Government. Unauthorised access was identified as installation of trapdoors (now removed) into AEC systems, alteration of

system logs to conceal the intruder's activities, and use of the AEC computer systems as a gateway into other organisations.

2.5 While the access by the intruder would have allowed entry to the AEC election and financial management systems, the AEC computer systems were used as gateways into other systems with which the AEC could be linked, rather than for any perceived benefit that might be gained from the AEC election and financial management systems or from data contained on the Commonwealth Electoral Roll. There was no indication that the intruder made any attempt to manipulate any of the AEC electoral or financial systems or data. In any event, the AEC is satisfied that the counter measures precluded any future interference.

2.6 After the 1993 federal election the AEC undertook a full review of the security of its Information Technology systems, for which an external contractor was engaged. From this review a comprehensive set of Information Technology policies, security plans and implementation procedures were developed and put in place. A continual process of review was also established and an Information Technology Security Officer was appointed to administer security policies, plans, and implementation procedures. The success of these measures will be subject to further audit during 1997.

3. Response

3.1 The AEC did not raise the eventual conviction of the offender with the 1996 JSCEM because the events leading up to his conviction did not relate to the 1996 federal election. In addition, the investigation of the matter during 1993 and 1994 by the AFP and the AEC, under tight confidentiality, precluded any reporting of the matter to the 1993 JSCEM. The AEC was advised at the time that any publicity about the investigation could make the AEC a possible target for other intruders. Further, it was clear that the 1993 federal election was not in any way affected by this security breach. Nonetheless, the then Minister for Administrative Services, and his successor after the 1993 election, were both briefed on the incident.

PROVISIONAL VOTING STATISTICS

Correspondence between Dr Amy McGrath and the AEC

October 29, 1998

Mr W Gray
Australian Electoral Commissioner
Australian Electoral Commission
West Block Offices
Parkes ACT 2600

Dear Mr Gray,

You will appreciate that the Electoral Act requires the electoral roll to be available for anone to peruse, but that there is no such roll available for public inspection in the case of voters reinstated on the roll during an election. Therefore I hereby request, under the Freedom of Information Act, the names and addresses of all electors reinstated on the Dickson Division electoral roll during the election just concluded, as a result of the preliminary scrutiny conducted on absent declaration votes, postal declaration votes, pre-poll declaration votes and provisional declaration votes issued to electors who declared their addresses as within that Division.

Could you supply the above information not merely as a total of reinstated votes of all categories, but separately in each of the four categories stipulated above, and photocopies of all envelopes with birthdates obscured if considered privileged information? Owing to time constraints under the Electoral Act, it would be appreciated if this information could be provided within 7 days.

Could you also indicate whether a full recount of votes was undertaken in the Dickson electorate and what is current AEC policy on whether such recounts arc undertaken or not?

Furthermore could you indicate to me whether any postal votes were returned outside their envelopes, as occurred in electorates during the 1996 election, to the Dickson electorate Divisional Returning Officer, and, if so, how many there were?

I will forward the original to this fax by express delivery tomorrow.

Yours sincerely

Dr Amy McGrath OAM
Convenor, H S Chapman Society

Dr Amy McGrath OAM
H S Chapman Society
PO Box 737
KENSINGTON NSW 2033

Dear Dr McGrath

I refer to your letter of 29 October 1998 in which you ask for certain information in relation to the 3 October 199S House of Representatives election for the Division of Dickson in Queensland.

You say that you require this information urgently in order to meet time constraints under the *Commonwealth Electoral Act 1918* ("the Electoral Act"), but unfortunately you do not specify which particular time period you have in mind. If you are referring to the 40 day period after the return of the writ for an election for the filing of a petition disputing that election under section 355(e) of the Electoral Act, you should be aware that the House of Representatives writs were resumed to the Governor-General on 29 October 1998, and that the 40 day period for the filing of petitions in the Court of Disputed Returns ends on 8 December 1998.

Under the *Freedom of Information Act 1982* ("the FOI Act"), you have requested the names and addresses of all electors reinstated on the electoral roll for the Division of Dickson as the result of the preliminary scrutiny conducted on absent, postal, pre-poll, and provisional declaration votes for that Division. You ask that this information be provided to you in lists of names and addresses under each category of declaration vote, and that photocopies of each declaration vote envelope in each category also be provided to you, with the birth-dates of electors obscured if necessary.

You would be aware that under the Electoral Act, the information you are seeking was available to all scrutineers during the preliminary scrutiny period in the Division of Dickson. Such access is provided to scrutineers during this period to enable candidates and their representatives to assess the integrity of the electoral process, and if necessary, to examine the information and assemble the particulars required to support any challenge to the election. Outside this period, the Electoral Act makes no provision for general access to the personal elector information contained on declaration envelopes.

After an election, the names and addresses of those electors whose enrolments have been reinstated as the result of the preliminary scrutiny process are added to the rolls, and this information is eventually included in the latest print of the roll, made publicly available by the Australian Electoral Commission (AEC) under section 90 of the Electoral Act. However, the enrolments reinstated to the rolls are not distinguishable from other new and amended enrolments on the additions lists.

With respect to your FOI request for information on reinstatements now that the election period is over, it is noted that you have not provided the required $30 application fee, or requested a waiver of that fee. However, even if you were to now amend your FOI request to address the matter of the application fee, the AEC would not be empowered to accede to your request, for a number of related reasons.

Firstly, electoral rolls, including "extracts" of electoral rolls, are documents expressly exempted from disclosure under section 47A of the FOI Act. Secondly, requests for information under the FOI Act can only be made with respect to existing documents.

Departments and agencies are not required by the FOI Act to create documents, or compile lists, in response to FOI requests.

Thirdly, the information contained on declaration envelopes, including the fact the elector cast a particular type of vote, or even whether a person voted at all, is personal information for the purposes of the *Privacy Act* 1988 ("the Privacy Act"). The AEC is bound by Information Privacy Principle 11 of the Privacy Act with regard to the disclosure of personal information.

As there is no legal requirement or obligation to disclose the information you have requested, before any such disclosure could occur, the AEC would be required to consult with each and every elector whose personal information is sought by you. Such a widespread consultation process, and the administration involved in the processing and collating of responses, would be an unreasonable diversion of the resources of the AEC under the circumstances.

Accordingly, the AEC is unable to provide you with the personal elector information on reinstated enrolments in the Division of Dickson that you have requested, but reiterates that such information was openly and properly available to scrutineers during the preliminary scrutiny period in that Division.

To assist you as far as the AEC is able in relation to this part of your request for information, I have enclosed a copy of the results for the Division of Dickson by vote type, including the four categories of declaration votes.

You have also asked whether a full recount of votes was undertaken in the Division of Dickson, and for information on the current AEC policy on when recounts are undertaken. There was no recount under section 279 of the Electoral Act requested or considered for the Division of Dickson after polling day.

However, as required by section 273(5)(a) of the Electoral Act, a fresh scrutiny of ballot papers was conducted in all House of Representatives Divisions after polling day, and this resulted in a number of ballot papers, that had been wrongly assessed as informal during counting at the polling booth, being admitted to the count as formal.

There was some media attention given in Queensland to those ballot papers that showed a preference mark for all but one of the candidates in the Division of Dickson. Under section 268(1)(c) of the Act, such House of Representatives ballot papers are "saved" from informality because it is assumed that the blank square represents the voter's last preference. Such ballot papers were correctly re-assessed as formal during the Dickson fresh scrutiny, a process which is specifically designed to allow the correction of early counting errors.

In relation to your question about AEC policy on recounts, section 279 of the Electoral Act reads as follows:

> At any time before the declaration of the result of a House of Representatives election the Divisional Returning Officer may, on the request of any candidate setting forth the reasons for the request, or of the officer's own motion, and shall, if so directed by the Electoral Commissioner or the Australian Electoral Officer, recount the ballot-papers contained in any parcel or in any other category determined by the Australian Electoral Officer or the Electoral Commissioner.

You will note that section 279 is a discretionary power, and accordingly, any request for a recount is treated on the particular merits of the case provided. As a general principle, any request for a recount that did not plead a specific ground would probably be refused, and any request for a recount that did not show specific grounds for supposing that it could change the result of the election would probably be refused.

.

Finally, you ask how many postal votes were returned outside their envelopes to the Divisional Returning Officer for Dickson. There were four House of Representatives postal ballot papers and 37 Senate postal ballot papers returned outside their postal vote declaration envelopes.

Yours sincerely

Bill Gray
Electoral Commissioner

10 November 1998

November 10, 198S

Mr. B. Gray
The Electoral Commissioner
Australian Electoral Commission
PO Box E201 Queen Victoria Terrace
ACT 2600

Dear Mr. Gray,

I acknowledge a copy of your letter of today's day by fax, and would appreciate receipt of the original by ordinary post owing to the perishable nature of fax as soon as possible.

The legal and political implications of your reply will take some time to analyse, so I will make no other response in this area other than to say find it of the greatest interest and thank you for the detail therein.

However I would ask you to note that I am placing on public record in this letter that I did not ask for what you deem to be 'personal information' covered by the Privacy Act as to how these provisional voters voted or whether they voted, as implied by paragraph 4 of page 3 of your answer.

I only asked for what was <u>on</u> the envelope not <u>in</u> the envelope, and confined the request only to the name and address. I knew the envelope and the paper were always kept separate so the information on either was never linked. Therefore the implication in your sentence, that this is not so, is inexplicable.

I particularly take objection to parts of pararaphs 3 and 4 because they completely misrepresent the precise nature of what I requested.
They are
'The information contained on declaration envelopes, including the fact that an elector cast a particular type of vote, or even whether a person voted at all, is personal information … (para 30
and
'As there is no legal requirement or obligation to disclose the information you have requested before any such disclosure could occur…' (para 4)

I reiterate that I made no such request of the sort described in that part of the letter and I consider the implications should be unequivocally withdrawn.

Yours sincerely

Dr Amy McGrath OAM
H S Chapman Society

Dr Amy McGrath OAM
H S Chapman Society
PO Box 737
KENSINGTON NSW 2033

Dear Dr McGrath

I refer to your faxed letter of 10 November 1998 in which you complain that the precise nature of your request of 29 October 1998 in relation to reinstated enrolments for the Division of Dickson has been misrepresented. You state that you did not ask for information about the way in which electors voted, which you say would imply access to the ballot papers, but instead only asked for the names and addresses contained on the declaration envelopes.

In your letter of 29 October 1998 you asked for a list of all names addresses of electors reinstated to the roll for the Division of Dickson compiled within declaration vote categories, as well as photocopies of all relevant declaration envelopes, "with birth-dates obscured if considered privileged information".

Enclosed you will find a photocopy of a blank declaration envelope which shows the range of information that must be provided to the AEC by the elector, and the range of information that is added by AEC officials on the face of the envelope. The following words printed on the envelope are significant in relation to your request: "The personal information you give on this Declaration Vote envelope is used for electoral purposes only and may be viewed by authorised staff and scrutineers."

As explained in my tetter to you of 10 November 1998, the means by which a particular elector casts his or her vote would be discernible from the personal elector information contained on his or her declaration envelope. That is, if an elector's name and address was shown on a declaration envelope, then two conclusions might be drawn about the way in which that particular elector voted: firstly, that he or she did not cast an ordinary vote on polling day at a polling booth, and secondly, that he or she did cast either a postal, pre-poll, absent or provisional vote.

Further, whether a particular elector voted at all might be suggested by the absence of a name and address from the totality of the declaration envelopes for a Division, and could then be concluded by comparison with other elector information, such as the personal elector information on the marked certified lists of voters for that Division (which you did not request, but which have been requested in the past by others).

Finally, the fact that the enrolment of a particular elector was reinstated, indicating, for example, that he or she might have recently moved residence within a subdivision/Division, would be available from the information contained on the declaration envelope. It is noted that this information was the focus of your request.

As advised, the means by which a particular elector cast his or her vote, including whether his or her enrolment was reinstated, or whether that elector voted at all, is considered personal elector information.

As apparent from the attached photocopy, declaration envelopes also contain on their face not only names and addresses, which are available on the public roll, but other information, such as dates of birth (which it is noted you excluded from your request), addresses other than enrolled addresses, dates of moving residence,

phone numbers, and personal signatures. This information is also considered personal elector information.

The Parliament has decided that electors are entitled to privacy with respect to the personal information provided as a legal obligation to the AEC, as well as with, respect to their personal voting habits and behaviour, and the legislative scheme reflects this. The exception to this rule is the access provided during the election period for scrutineers to examine personal elector information. which allows for maximum transparency in the electoral process, and enables those who wish to challenge an election to gather the necessary information.

Yours sincerely

Bill Gray
Electoral Commissioner

12 November 1998

November 11, 1988

Mr. W. Gray
Electoral Commissioner
Australian Electoral Commission
PO Box E210
Kingston ACT 2604

Dear Mr. Gray,

Your letter of November 10 appears to refuse my key request for the number of reinstated enrolments on the electoral roll in each of the four categories - provisional, pre-poll, absent and postals. You have only supplied me with the figure for the first category - provisional.

The reason why you have not supplied me with this figure is by no means clear from your letter. Therefore I would be grateful if you could explain the whole process in detail from creating a supplemental roll to the printed version under Section 90 of the Electoral. In particular, could you answer the following?

1. Are re-instated enrolments in all four categories listed separately by category on a supplemental roll during preliminary scrutiny? Is there such a roll made then?
2. At what point is the 'additions list' of new and amended enrolments which you mention created (page 3, para 1).
3. At what point is the list of re-instated electors merged with 'new and amended enrolments' on the 'additions list?'
4. What steps are taken to verify re-instated voters during preliminary scrutiny as they are not on the electoral roll?
5. Are such re-instated declaration envelopes kept apart from all other postal, absent and pre-poll envelopes so that scrutineers can 'assemble the particulars' as you say they can?
6. What is the information you say 'scrutineers' can examine in this respect? A supplemental roll of names and addresses?
7. Why does the AEC report bury the total of re-instated pre-poll, postal and absent voters in the general total of voters voting by this means, when the two classes of voters are totally dissimilar? The former are not on the roll and thus cannot be checked, as against the latter who can be.
8. Is an electoral officer a proper witness to such claims?

I again request these figures.

Dr Amy McGrath OAM
Convenor
H S Chapman Society

Dr Amy McGrath OAM
H S Chapman Society
PO Box 737
KENSINGTON NSW 2033

Dear Dr McGrath

I refer to your faxed letter of 11 November 1998, and to previous correspondence of' 10 November and 29 October, concerning access to enrolment reinstatement information for the Division of Dickson.

In your latest letter, your first request is for the number of reinstated enrolments for the Division of Dickson by declaration vote category. You say that it is not clear to you why you were not supplied with the number of reinstated enrolments by declaration vote category in response to your first letter of 9 October. You were not provided with this information because you did not request it. Rather, under the provisions of the *Freedom of Information Act 1982*, you requested a list of names and addresses of reinstated electors by declaration vote category, and photocopies of relevant declaration vote envelopes, with birth-dates excluded.

It is noted that you are no longer seeking access to personal elector information in relation to reinstated enrolments in the Division of Dickson, but instead, statistical data by category of declaration vote. For the Division of Dickson, the statistical data on reinstated declaration voters has been compiled as you have requested: there were 48 enrolment reinstatements for absent voters, 2 enrolment reinstatements for postal voters, 18 enrolment reinstatements for pre-poll voters, and 140 enrolment reinstatements for provisional voters.

Your reference to having been provided already with statistics for provisional voters with reinstated enrolments for the Division of Dickson, but not statistics for reinstated enrolments in other declaration vote categories, is not clear. The table attached to my letter to you of 10 November 1998 showed the numbers of votes admitted to the scrutiny in all four categories of declaration votes for the Division of Dickson, including the numbers of provisional votes admitted to the scrutiny (201). It did not show the number of provisional votes for which enrolments were reinstated (140).

The explanation for any difference between the number of provisional votes admitted to the scrutiny and the number of provisional votes for which enrolments were reinstated in any Division, is that some voters are given a provisional vote at the polling booth because their name apparently cannot be found on the Certified List of Voters. Later it is discovered that their name was in fact on the List. That is, not all provisional votes admitted to the scrutiny result from reinstated enrolments.

Your second request is for a explanation of “the whole process in detail from creating a supplemental roll to the printed version under section 90 of the Electoral...” (presumably the *Commonwealth Electoral Act 1918* (“the Act”)), and in particular, responses to a series of linked questions relating to enrolment reinstatements, supplementary rolls, additions lists, preliminary scrutiny procedures, scrutineer access, reporting of statistics, and witnessing. As your questions appear to comprise the detail of the explanation you seek, the following responses are provided for your information:

1. Are reinstated enrolments in all four categories listed separately by category on a supplemental roll during preliminary scrutiny? Is there such a roll made then?

During the election period AEC officials maintain records which show details of those electors who were added to or deleted from the roll. Additions to the roll include reinstated enrolments arising from information obtained during the preliminary scrutiny of declaration votes. Records showing the details of electors who have been added to the roll are emergent documents which are compiled progressively, and the same information that is used to compile AEC records is available to scrutineers present in Divisional Offices during the preliminary scrutiny. There is no administrative requirement for the AEC records to show reinstated enrolments by declaration vote category.

2. At what point is the "additions list" of new and amended enrolments which you mention created (page 3, para 1).

The roll for any Division is amended on the computer on a daily basis by the addition of new and amended enrolments and the deletion of enrolments, as they arise. In each Division a Supplemental Roll, often described collectively as "the additions and deletions lists", containing details of these amended enrolments, is made available for public inspection as required by section 90 of the Act.

The Supplemental Roll is a compilation of periodically published "additions and deletions lists". In some Divisions these lists are published weekly, and in other Divisions they are published monthly, depending on the State or Territory. The main computerised roll, which is not available for public inspection, already contains the net result of the information published periodically in the additions and deletions lists which comprise the Supp1emental; Roll available in each Division.

After any election, the Supplemental Roll for a Division will include enrolment changes resulting from information provided to the AEC during and after the election period, as well as most of the reinstated enrolments for the election. (A small number of electors from these lists may have re-enrolled since polling day so that they cannot technically be "reinstated" to the current roll.) The reinstated enrolments are not separately identified on the Supplemental Roll available for public inspection.

3. At what point is the list of re-instated electors merged with 'new and amended enrolments' on the 'additions list'?

There is no particular point at which AEC records on enrolment changes are "merged" to the Supplemental Roll - it happens progressively with the publication of the periodical "additions and deletions lists".

4. What steps are taken to verify re-instated voters during preliminary scrutiny as they are not on the electoral roll?

The procedures are detailed in Schedule 3 of the *Commonwealth Electoral Act 1918* and Part 28 of the *Divisional Office Procedures (Election) Manual* (copies attached).

5. Are such re-instated declaration envelopes kept apart from all other postal, absent and pre-poll envelopes so that scrutineers can 'assemble the particulars' as you say they can?

No. However, scrutineers are able to view all declaration vote envelopes as well as the computer terminals that are used for the enrolment verification process. They

also have access to AEC officials for particular requests, where reasonable. Scrutineers are permitted to examine the details on all declaration vote envelopes, including those for reinstated electors, and closely watch the enrolment verification process undertaken by AEC officials.

6. What is the information you say 'scrutineers' can examine in this respect? A supplemental roll of names and addresses?

See above.

7. Why does the AEC report bury the total of re-instated pre-poll, postal and absent voters in the general total of voters voting by this means, when the two classes of voters are totally dissimilar? The former are not on the roll and thus cannot be checked, as against the latter who can be.

The AEC is not required by the Act to publish statistics on reinstated enrolments by declaration vote category. On the basis of the very low frequency of requests for such information, there would not appear to be a sufficient public interest in the subject to justify the costs of formally compiling and publishing the statistics. Those who have the most interest in the subject, the candidates at an election, may access the relevant information through their scrutineers at the time of the election.

8. Is an electoral officer a proper witness to such claims?

This question is unclear. There is no requirement for an electoral officer to "witness" an application by an elector for a declaration vote.

Enclosed is a copy of the Scrutineers Handbook for the 1998 federal election, and your attention is drawn to pages 18-20, where the rights and obligations of scrutineers at the preliminary scrutiny of declaration votes are detailed. The practices of scrutineers in obtaining information vary widely, and it is not for the AEC to advise scrutineers on how they should do their job, as long as they do not interfere with or obstruct AEC officials in the performance of their duties. However, the majority of scrutineers that AEC officials have contact with during the preliminary scrutiny are highly skilled individuals, who are well briefed on the procedures, and have a clear idea of what they should observe and how they should collect the information they might require.

The AEC has no reason to believe that the preliminary scrutiny procedures for declaration vote enrolment reinstatements in any way prevent or obstruct scrutineers from obtaining the information that they require to satisfy themselves and their candidates about the integrity of the electoral process.

Yours sincerely

Bill Gray
Electoral Commissioner

19 November 1998

November 16, 1998

Mr. B. Gray
Australian Electoral Commissioner
Australian Electoral Commission
PO Box E20 1
Kingston ACT 2604

Dear Mr. Gray,

Further to my recent letters requesting separate totals for re-instated voters casting postal, pre-poll absent and ordinary votes in the Dickson electorate for the last election, I write to make a further request on the subject of studying re-instated voters at election time.

I have now studied the article of Colin Hughes in a recent issue of the Journal of Politics and History in detail, which you quote in your letter to the Sydney Morning Herald of October 6 as an authority which you consider sound.

I have noted that he quotes a figure for re-instated voters (675) in the 1993 election for the seat of Macquarie but does not state whether it is a total for re-instated voters for all categories or for all ordinary votes admitted to the scrutiny. But even if the former, it is still very high compared to such voters pre-1984.

As it appears from this article you do retain these figures on file, I request the figure for all electorates in Australia both in sum and in the four categories; and the total number for all electorates as an aggregate in the October 3 election.

I believe this request is consistent with your charter to inform and educate the public.

Yours sincerely,

Dr Amy McGrath OAM FRSA
Convenor
H S Chapman Society

Dr Amy McGrath OAM
H S Chapman Society
PO Box 737
KENSINGTON NSW 2033

Dear Dr McGrath

I refer to your faxed letter of 16 November 1998 and to previous correspondence of 11 November, 10 November and 29 October, concerning access to enrolment reinstatement information for the Division of Dickson.

In my letter to you of 10 November, your original request under the *Freedom of Information Act 1982* for a list of all names and addresses of electors reinstated to the roll for the Division of Dickson, compiled within declaration vote categories, as well as photocopies of all relevant declaration envelopes with the birth-dates obscured, was refused because your request was for personal elector information. In my letter to you of 12 November, your complaint that your original request had been misrepresented was addressed, with an explanation that declaration vote envelopes contain personal elector information. In my letter to you of 19 November, statistics were compiled in order to provide you with the information you requested on reinstated enrolments by declaration vote category for the Division of Dickson, and an explanation of the relevant operational procedures was provided.

In your latest letter you make reference to the article by Dr Colin Hughes entitled, "The Illusive Phenomenon of Fraudulent Voting Practices: A Review Article" *(Australian Journal of Politics and History: Volume 44, Number 3, 1998, pp 471-91),* and in particular, you say that Dr Hughes "quotes a figure for reinstated voters (675) in the 1993 election for the seat of Macquarie", and then say that "[he] does not state whether it is a total for reinstated voters for all categories or for all ordinary votes admitted to the scrutiny".

It is assumed you are referring to the passage on page 483 of the article where Dr Hughes says, "In Macquarie 1996 675 provisional votes were admitted to the scrutiny". That is, Dr Hughes was referring to the 1996 federal election, not to the 1993 federal election, and was clearly referring only to provisional votes admitted to the scrutiny, not to reinstated votes for all declaration vote categories, or to ordinary votes admitted to the scrutiny.

From this passage in the article by Dr Hughes, you conclude that "you [the AEC] do retain these figures on file". The figure quoted by Dr Hughes for the Division of Macquarie at the 1996 federal election was published by the Australian Electoral Commission (AEC) in "Election 96 - Divisional Results - Volume 2 - New South Wales", copies of which are available from the AEC and in public libraries, either in print form or on CD-ROM (see attached extract).

You then ask for "the figure for all electorates in Australia both in sum and in the four categories; and the total number for all electorates as an aggregate in the October 3 election". You say that your request "is consistent with your charter to inform and educate the public".

Your request for the numbers of reinstated enrolments by declaration vote category for the Division of Dickson was granted and the statistics compiled, on the assumption that you required this information for specific purposes relating to the election in the Division of Dickson. I do not consider it appropriate to grant your most recent request, which would require a substantial diversion of resources for the AEC to specially compile the same statistics for all 148 Divisions across Australia, particularly as you have not indicated the reason for your request, beyond a generalised reference to the information and education responsibilities of the AEC.

The AEC will be complying with its charter to provide information and education on electoral matters by publishing the statistics for the 1998 federal election in the next few months, possibly early in the new year. This publication will contain the same statistics that were sourced by Dr Hughes for the 1996 federal election.

To assist you in your research, I have arranged for you to receive a complimentary set of the four print volumes plus CD-ROM of the 1998 election statistics.

Yours sincerely

Bill Gray
Electoral Commissioner

20 November 1998