



**Removing partisan bias from Australian  
electoral legislation: A proposal for an  
independent electoral law committee**

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**Discussion Paper 1/08 (January 2008)**

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The views expressed are the authors and do not necessarily reflect those of the Democratic Audit of Australia.

Recent commentators have examined the Howard Government's *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*, and detailed its democratic deficiencies and partisan nature. This is particularly evident in its restrictive enrolment provisions and increased threshold for public disclosure of donations to political parties and candidates.<sup>1</sup> The prioritisation of partisan interests above democratic principles is not a new phenomenon in Australian electoral legislation. Since federation it has been crucial in determining the electoral laws included in the *Commonwealth Electoral Act 1918* (Electoral Act), and those that are neglected.<sup>2</sup> For example, in 1918, farmers' candidates competed against candidates from the governing Nationalist Party in by-elections, causing the conservative vote to split two ways, and allowing Labor to win seats with relatively small vote shares. The Victorian Farmers' Union threat to continue running candidates saw the Hughes Nationalist Government introduce preferential voting.<sup>3</sup> Similarly, the Chifley Labor Government introduced proportional representation in the Senate in 1948 for several reasons, including an attempt to ensure that Labor would maintain its Senate majority after the 1949 election despite an anticipated poor result.<sup>4</sup>

Partisan interest is not the only motivation for governments to alter electoral laws, but among major changes it is almost always a key factor. It should also be noted that governments can maintain their partisan advantage by neglecting to legislate. This has been particularly apparent in Australia's weak campaign finance laws and government advertising restrictions. Furthermore, it must be recognised that Australian

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<sup>1</sup> See for example, Colin A. Hughes and Brian Costar, 2006, *Limiting Democracy: The Erosion of Electoral Rights in Australia*, Sydney, University of New South Wales Press., Marian Sawer, 2006, 'Damaging Democracy? Early Closure of Electoral Rolls', *Democratic Audit of Australia*, <http://democratic.audit.anu.edu.au>., Sally Young and Joo-Cheong Tham, 2006, *Political Finance in Australia: A Skewed and Secret System*, Audit Report No. 7, Canberra, Democratic Audit of Australia.

<sup>2</sup> For a brief yet comprehensive review of partisan interests in Australian electoral reforms up to 1983, see Joint Select Committee on Electoral Reform, 1983, *First Report*, Canberra, Australian Government Publishing Service.

<sup>3</sup> Marian Sawer, 2004, 'Australia: Replacing Plurality Rule with Majority-Preferential Voting', in Josep M. Colomer (ed.), *Handbook of Electoral System Choice*, especially pp. 475-480.

<sup>4</sup> John Uhr, 'Why We Chose Proportional Representation', *Papers on Parliament* 34, 1999, <http://www.aph.gov.au>.

parliamentarians are not unique in this respect; partisanship in electoral laws is a worldwide phenomenon.<sup>5</sup>

This article examines current safeguards against partisanship in electoral legislation, and considers the constitutional and practical possibilities of a new system for creating non-partisan electoral legislation in Australia. Inevitably, this idea will not receive universal support, but the article seeks to promote debate on the possibility of removing this parliamentary conflict of interest, that allows the winners of elections to subsequently alter the rules.

### **Current safeguards**

The partisan nature of electoral amendments is the result of limited restrictions on governing parties. The most formidable restriction on Australian governments is the Senate, but this is only effective as a safeguard when opposition parties perform well enough in elections to prevent government majorities. Conventional wisdom suggested that governments would not control the Senate while there were 12 senators per State, as at half-elections, parties would require 57.3 percent of the preference vote in a State to receive four of the six available quotas, and thus take a majority of senate positions in a State.<sup>6</sup> However, it has become relatively easy for major parties to receive three of the six quotas, as this requires only 42.9 percent of the vote. Thus, with an unremarkable performance at one election, a party could obtain half of the available Senate positions, and then with a particularly strong performance in one state at the next election, could obtain a Senate majority.

This occurred in the 2004 election, when the Liberal-National Coalition, having obtained half of the vacancies in the 2001 election, won a majority in Queensland.<sup>7</sup> The

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<sup>5</sup> Richard S. Katz, 2005, 'Why are There so Many (or so Few) Electoral Reforms?' in Michael Gallagher and Paul Mitchell (eds.) *The Politics of Electoral Systems*, Oxford, Oxford University Press, pp. 57-76., Charles Boix, 1999, 'Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies', *American Political Science Review* 93 (3): 609-624.

<sup>6</sup> See for example Campbell Sharman, 1986, 'The Senate, Small Parties and the Balance of Power', *Politics* 21 (2): 20-31.

<sup>7</sup> See Nick Economou, 2006, 'A Right-of-Centre Triumph: The 2004 Australian Half-Senate Election', *Australian Journal of Political Science* 41 (4): 501-16.

Coalition's success relied in part on the relative strength of minor parties on the left and right of Australian politics. The Australian Labor Party (ALP) is presently unlikely to obtain a Senate majority due to the success of the Australian Greens, which will often take a third left-of-centre vacancy ahead of the ALP, preventing it from winning half of the Senate positions, let alone a majority. The current lack of a minor party with similar appeal among right-of-centre voters, virtually guarantees that the Coalition will obtain at least half of the available senate positions, allowing it to obtain a majority with a strong performance in one State.<sup>8</sup>

The prevention of senate majorities also depends on the existence of two competitive major parties. If either major party weakened to the point that it was no longer able to approach 42.9 percent of the Senate vote, the other party would likely take a senate majority, and be unrestrained in its ability to legislate on electoral and other matters.

However, the existence of these two strong major parties also guarantees senates in which the major parties can create or retain laws that assist them collectively at the expense of the minor parties. Furthermore, this two-party dominance allows the remote possibility of an opposition senate majority. This situation may prevent the governing party from redressing existing imbalances against it. This occurred in 1973–74 when the Whitlam Labor Government struggled to pass its bill for more equal population sizes among electoral divisions, eventually requiring a joint sitting of parliament to do so.<sup>9</sup>

The only other safeguard against government misuse of electoral legislation is the committee system, specifically, the Joint Standing Committee on Electoral Matters (JSCEM). This Committee has been broadly successful in providing the Australian Electoral Commission (AEC) with a mechanism to obtain alterations to the Electoral Act where it feels they are required for the smoother administration of elections, and in allowing the public, parliamentarians and parties to make submissions and provide

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<sup>8</sup> Although Tasmania and South Australia provided exceptions to this rule at the 2007 federal election, with each state giving four of its six vacancies to left-of-centre candidates, leaving only two for the Coalition.

<sup>9</sup> Gough Whitlam, 1985, *The Whitlam Government, 1972–1975*, Ringwood, Penguin, pp. 673–74.

evidence supporting alterations in electoral laws and procedures.<sup>10</sup> However, governments have often ignored the evidence the JSCEM has gathered from sources other than government submissions. This was particularly notable in the JSCEM review of the 2004 Federal Election, which preceded the Howard Government's Electoral Integrity Bill.<sup>11</sup> As an example, the JSCEM recommended a ban on prisoner voting despite the fact that 52 submissions opposed such a ban, and only three supported it, with two of these coming from the Government.<sup>12</sup> Deputy chair of the JSCEM, the ALP's Michael Danby displayed similar disregard for the committee evidence process. Prior to the 2007 election, when asked if a future Labor Government would overturn the 2006 amendments to enrolment provisions, Danby responded, 'Yes, as quick as we can; probably as a recommendation of the 2007 JSCEM report.'<sup>13</sup>

The dominance of parliamentarians' views in JSCEM matters is also evidenced by its reluctance to examine issues beyond those of specific interest to parliamentarians. The JSCEM has not attempted to understand negative public attitudes towards Australian politics or repair public trust in the party system, nor has it attempted to encourage greater public participation in politics beyond voting in elections once every three years.<sup>14</sup>

### **Limiting government power within parliament**

The partisan misuse of electoral legislation could only be eradicated by reducing governments' virtually untrammelled ability to legislate in its own interest. To limit this power through parliamentary processes would be difficult. Governments with senate majorities have complete legislative power within the bounds of the Constitution. The only way to limit such governments within parliament would be to require something

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<sup>10</sup> John Uhr, 2003, 'Measuring Parliaments Against the Spence Standard', in Graeme Orr, Bryan Mercurio and George Williams (eds.), *Realising Democracy: Electoral Law in Australia*, Sydney, The Federation Press, p. 76.

<sup>11</sup> John Warhurst, 2006, 'When Democracy Meets Politics', *About the House*, 26: 31.

<sup>12</sup> Norm Kelly, 2006, 'Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005, Commentary for the Democratic Audit of Australia', *Democratic Audit of Australia*, <http://democratic.audit.anu.edu.au>, p. 3.

<sup>13</sup> Michael Danby, 12/9/2007, Interview conducted by the author.

<sup>14</sup> Uhr, 'Measuring Parliaments Against the Spence Standard', pp. 77–79.

more than a majority to pass electoral legislation. While the use of a supermajority, such as a two-thirds majority, is feasible and would reduce government power to legislate in its own interest, it would also exclude minor parties from the process. This would allow the major parties to legislate in their common interest on matters such as campaign finance and political advertising, where the major parties, which raise considerably more money than minor parties,<sup>15</sup> are each favourably served by limited regulation.<sup>16</sup> This measure would likely result in an unalterable two-party system, and make rapid legislative change difficult, no matter how necessary it may be.

### **Limiting government power with existing bodies outside parliament**

Given the inadequacy of existing parliamentary safeguards to prevent government misuse of electoral legislation, the use of a body outside of parliament should be explored. Using an existing external body would be administratively simpler and less expensive than creating a new body, but no appropriate body exists. Judicial bodies such as the High Court should not be involved in the legislative process as they would then adjudicate on laws they had created.

The Australian tradition of neutral and impartial bureaucratic electoral administration,<sup>17</sup> suggests that the AEC may be suitable. Although it largely maintains independence from government ministries, the Commission does not have ‘responsibility for policy decisions relating to the electoral process’,<sup>18</sup> and therefore does not meet the International Institute for Democracy and Electoral Assistance criteria for classification as an independent electoral management body.<sup>19</sup> Despite this, and government control over the

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<sup>15</sup> Joo-Cheong Tham, 2003/2004, ‘Money politics: Corporate contributions to political parties’, *Dissent* Summer, p. 25.

<sup>16</sup> Andrew Murray, 2006, ‘Guaranteed failure—it’s never the right time for funding reform’, *Political Finance & Government Advertising Workshop, Democratic Audit of Australia*, <http://democratic.audit.anu.edu.au>, p. 1.

<sup>17</sup> Colin A. Hughes, 2001, ‘Institutionalising electoral integrity’, in Marian Sawer (ed.) *Elections: Full, Free & Fair*, Sydney, The Federation Press, p. 156.

<sup>18</sup> Alan Wall, Andrew Ellis, Ayman Ayoub, Carl W. Dundas, Joram Rukambe and Sara Staino, 2006, *Electoral Management Design: The International IDEA Handbook*, Stockholm, International IDEA, p. 7.

<sup>19</sup> Norm Kelly, ‘Australia’s Electoral Management Bodies—Degrees of Independence’, *Paper presented at the 2007 APSA conference, Monash University*, September 24–26, 2007, p. 5.

Commission's finances, the AEC is not subject to widespread government interference in its administration of the election process.

The Australian population and politicians accept AEC decisions on elections. In many other countries, the losing candidate and her or his supporters do not trust electoral administrators, and do not peacefully accept their results. Australians trust the AEC partly because of its non-political nature. To provide it with political responsibilities such as designing legislation would force it to favour the views of one or other side of politics in policy decisions. This would diminish the AEC's independence and ability to conduct elections.

The AEC also lacks the popular legitimacy of Parliament, whose members are elected. Electing members of the AEC for this purpose would afford legitimacy, but this would politicise the AEC, making it partisan rather than making electoral laws impartial, defeating the purpose of the reform. Thus, it appears that no existing body is capable of diminishing the power of governments to legislate on electoral matters, and the possibility of a new body must be examined.

### **Other nations as precedents**

While Australia lacks a precedent for such a body, some newer democracies, like Costa Rica and Jamaica have used non-parliamentary bodies to limit government power over electoral legislation. While Australia usually does not seek to replicate measures implemented by these nations, newer democracies in less stable parts of the world often find urgent action necessary to safeguard their electoral procedures, resulting in highly advanced electoral administrations. Conversely, established democracies where civil disturbance is unlikely to result from a highly contested election often neglect to make improvements to their administrations. The United States exemplifies this with the confusion in Florida during the 2000 presidential election, where the decentralisation of

electoral administration allowed ballot papers that bewildered voters and vote counters alike, leaving the entire election result in doubt for weeks.<sup>20</sup>

In Costa Rica, the legislature must consult the Supreme Electoral Tribunal – Costa Rica’s version of the AEC – on proposed electoral legislation. If the Tribunal disagrees with a proposed law, the bill requires a two-thirds majority of the legislative assembly rather than a simple majority.<sup>21</sup> Costa Rica’s tribunal cannot design legislation, but it does provide a significant check on power, and prevents a single party from legislating in its own interest. Such a system is not ideal for Australia, as the supermajority requirement in the legislature would allow the major parties to control matters on which they broadly agree, and because it again raises the problem of involving the AEC in political decisions.

From 1979 to 2006, Jamaica operated two separate electoral management bodies, the Electoral Office of Jamaica (EOJ), which administered elections much as the AEC does, and the Electoral Advisory Committee (EAC), which oversaw policy and legislation in electoral matters. While the EAC did include parliamentarians in its membership, these did not have voting rights, so it was effectively a non-parliamentary body. Despite its advantages, Jamaica always considered this two-bodied approach to be an interim measure, and in late 2006, the EAC and EOJ merged, forming the Electoral Commission of Jamaica.

Before the merger, the EAC functioned to protect ‘the electoral process from the immediate direction, influence and control of the Government, which may influence its functioning to the detriment of persons with opposing views’.<sup>22</sup> While the 1979 Representation of the People (Interim Reform) Act that created the EAC did not explicitly provide it with power over electoral legislation,<sup>23</sup> a convention emerged under

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<sup>20</sup> See Alan Agresti and Brett Presnell, 2002, ‘Misvotes, Undervotes and Overvotes: The 2000 Presidential Election in Florida’, *Statistical Science* 17 (4): 436–40.

<sup>21</sup> Ruben Hernandez Valle, 2006, ‘Case Study: Costa Rica’, in Wall et al, *Electoral Management Design: The International IDEA Handbook*, p. 77.

<sup>22</sup> Electoral Office of Jamaica, [www.eoj.com.jm/eac/index.htm](http://www.eoj.com.jm/eac/index.htm).

<sup>23</sup> Representation of the People (Interim Electoral Reform) Act, 1979, [www.moj.gov.jm](http://www.moj.gov.jm).



which parliament passed the Committee's unanimous decisions without debate.<sup>24</sup> This could involve alterations to the various acts governing electoral matters.

Recently, this convention has been ignored. In June 2007, the Jamaican Senate amended bills proposed by the new electoral commission. Director of Elections, Danville Walker repudiated this breach of the convention, but Attorney-General, Senator A.J. Nicholson argued that as the supreme legislative body, parliament was entitled to effect whatever amendments it chose.<sup>25</sup> This elucidates the need for statutory protection of such a body's legislative function.

### **Parliamentary supremacy in Australia**

To replicate the Jamaican system would provide no legal difficulties in Australia, as the EAC was only an advisory committee; it was convention that saw its recommendations accepted without debate. The situation is less clear when such a body is to have statutory protection for its legislative functions. This raises the important issue of parliamentary supremacy.

Australia's parliament is supreme rather than sovereign. A sovereign parliament is subject to no limitations on its exercise of legislative power, whereas a supreme parliament holds a claim to legislative authority superior to that of any other institution but may be subject to legal limitation, such as through judicial review by a high court.<sup>26</sup> It is possible to maintain parliament's superior claim to legislative authority by setting up an independent body to design electoral legislation as long as parliament establishes it and retains the ability to abolish it.

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<sup>24</sup> Electoral Advisory Committee, 1998, *Report to Parliament on Electoral Reform 10 November 1998*, <http://www.eoj.com.jm>.

<sup>25</sup> Jamaica Gleaner, 2007, 'Commission to respond to new electoral bills', <http://www.jamaica-gleaner.com>.

<sup>26</sup> David Kinley, 1994, 'Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law', *Political Theory Newsletter* 6 (1), p. 54.

## Delegated legislation and the constitution

Many Australians would be surprised to learn that the process of parliament delegating legislative authority to other bodies is common, with delegated legislation accounting for almost 2000 legislative instruments enacted per year.<sup>27</sup> Parliament allocates legislative power over specific areas to each of these bodies. Usually, this comprises laws below statute level such as regulations and ordinances, but parliament has delegated the power to amend acts on several occasions. It was common practice during wartime, with the Governor-General often delegated power to amend acts such as the *Re-establishment and Employment Act 1945*.<sup>28</sup>

The power of parliament to delegate legislative authority is constitutionally very broad. This was examined by the High Court in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan Informant*, Dixon J considered that as parliament could repeal the enabling statute, thus preventing all delegation of legislation, it would still hold ultimate control over any legislation delegated no matter how broad the power given.<sup>29</sup> Evatt J believed the restrictions were slightly stronger, stating, ‘the Parliament of the Commonwealth is not competent to “abdicate” its powers of legislation.’ Not because parliament must perform its legislative powers or functions, and not because the separation of powers prevents parliament from granting authority to other bodies, but because the Commonwealth may only legislate on the specific areas delineated by the constitution. The constitution does not specifically permit the parliament to give away all of its legislative power, so it cannot do so.<sup>30</sup>

Parliament certainly has power to delegate legislative power for electoral matters. The Constitution uses the phrase ‘until parliament otherwise provides’ for most electoral provisions contained within it, conferring sweeping legislative power to parliament, which it can then delegate elsewhere if it so desires. Only a handful of constitutional

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<sup>27</sup> Dennis Pearce, 2004, ‘Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation’, *Papers on Parliament*, 42, p. 86.

<sup>28</sup> Dennis Pearce, 1977, *Delegated Legislation in Australia and New Zealand*, Sydney, Butterworths, p. 7.

<sup>29</sup> Owen Dixon J, 1931, in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan Informant*, HCA 34, 46 CLR 73.

<sup>30</sup> Herbert Vere Evatt J, 1931, in *Dignan*.

restrictions apply, such as that at s24, which requires that the members of the House of Representatives be chosen directly by the people.<sup>31</sup> The dispute that remains after *Dignan* is over how much power Parliament may cede to other bodies. For Evatt J, no law may have as its sole purpose the delegation of legislative power over a given subject; it must also be a law with respect to that subject.<sup>32</sup> Conversely, for Dixon J, a law delegating legislative power over a subject constitutionally afforded to Parliament, is a law with respect to that subject.<sup>33</sup>

### **The delegated legislation process**

For Dixon, parliament retains its supremacy as long as it has the power to repeal the Act allowing delegated legislation, but for many, this allows an uncomfortable amount of power to pass to bodies that were not created to design laws.<sup>34</sup> Such bodies lack the legitimacy to exercise this power as they were neither elected nor designed to do so. Thus, parliament maintains a system to oversee delegated legislation.

The process for parliamentary oversight of delegated legislation under the *Legislative Instruments Act 2003* includes the tabling of all legislative instruments in each house of parliament within six sitting days of the registration of the instrument.<sup>35</sup> This can occasion a significant delay if the legislation is created at a time when parliament is not in session. During this time, the legislation is in force, thus the parliament's ability to disallow delegated legislation is in fact an ability to repeal it.<sup>36</sup> A disallowance motion takes little effort to succeed. Within 15 sitting days of a legislative instrument's tabling, any parliamentarian can give notice of a motion to disallow the instrument. For the instrument to survive, the Parliament must actively reject the disallowance motion within

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<sup>31</sup> Gerard Carney, 2003, 'The High Court and the Constitutionalism of Electoral Law', in Graeme Orr, Bryan Mercurio and George Williams, *Realising Democracy: Election Law in Australia*, Leichardt, The Federation Press, pp. 174–75.

<sup>32</sup> Evatt J in *Dignan*.

<sup>33</sup> Dixon J in *Dignan*.

<sup>34</sup> Administrative Review Council, 1992, *Report to the Attorney General: Rule Making by Commonwealth Agencies*, Report no. 35, Canberra, Australian Government Publishing Service, p. 5.

<sup>35</sup> *Legislative Instruments Act 2003*, s38 (1)

<sup>36</sup> Pearce, 'Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation', p. 84.

another 15 sitting days of the notice. If it either votes to disallow the instrument, or does not resolve the disallowance motion at all, then the law is repealed.

The Senate Regulations and Ordinances Committee is also crucial to the parliamentary review of delegated legislation. It considers four principles: whether the delegated legislation is made in accordance with the statute and is within the authority given to the delegate, whether it trespasses on personal rights and liberties, whether it makes rights dependent upon administrative decisions that are not subject to independent review and whether the delegated legislation contains matters more appropriate for parliamentary enactment.<sup>37</sup> For our purposes, it is this last principle that is the most important. Under the guidelines the Committee uses, it would potentially consider that delegated legislation on electoral matters such as campaign finance provisions ‘fundamentally changes the law’,<sup>38</sup> and therefore determine that it is more appropriate for parliamentary consideration.

However, judgments of what is appropriate for parliamentary action should also consider the potential for conflict of interest in matters such as parliamentary allowances – presently delegated to the Australian Government Remunerations Tribunal<sup>39</sup> – and electoral matters. While parliamentarians’ ability to gain personally from travel allowances and other such benefits is an easier link to draw, many sitting members will feel that alterations to electoral laws threaten their seats. This seems to be a far greater conflict of interest; most parliamentarians would be more interested in keeping their seats than their travel allowances. This explains why partisan bias has been so evident in electoral legislation and suggests that electoral legislation is not more appropriate for parliamentary consideration.

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<sup>37</sup> Senate Regulations and Ordinances Committee, *Guidelines on the Committee’s application of its Principles*, <http://www.aph.gov.au>.

<sup>38</sup> *Ibid.*

<sup>39</sup> Australian Government Remunerations Tribunal, <http://www.remtribunal.gov.au>.

### **Proposal for an independent electoral law committee**

So how could a non-partisan body responsible for electoral law be established? An independent electoral law committee (the Committee) would be introduced by statute, allowing parliament to retain the ability to abolish the Committee, and thereby maintain its supremacy over legislative authority. Parliament would delegate its legislative power over electoral matters to the Committee. The independence of the Committee should be encouraged by guaranteeing it a certain percentage of the budget, rather than having major parties seek its favour with financial promises. Although parliament could abolish or curtail the Committee's powers, this would be a politically difficult step, as it would likely provoke public discontent.

The complete delegation of electoral matters would potentially be subject to a High Court challenge. While Dixon's J judgment from *Dignan* would support it, Evatt's J requirement that a law delegating legislative power also be a law regarding the delegated subject may not. Although Dixon J allows parliament to apportion legislative power to other bodies as long as it retains the ability to repeal the act that delegated power, the *Dignan* ruling did not concern an example in which parliament removed its own power to repeal delegated legislation. This provision although not unique appears to be untested in Australia.

### **Appointments**

The Committee would consist of seven members. A parliamentary committee such as the JSCEM should nominate potential Committee members to parliament, allowing detailed scrutiny of each nominee. A two-thirds majority in each house of parliament must approve appointees to the Committee, preventing a government from dominating appointments, and conferring legitimacy indirectly through the Parliament. Legitimacy is enhanced by the fact that the body is designed to consider legislation and its members are appointed by parliament, which considers appointees competence to perform the legislative function.

The use of such a supermajority would have the drawback of disadvantaging minor parties and independents, whose votes would usually be irrelevant in determining the membership of the Committee, potentially allowing the major parties to ensure that appointed members broadly support major parties. However, the non-partisan nature of the Committee should ensure that it considers minor party interests in its determinations.

Members of the Committee should have a four-year term. This is slightly longer than one electoral cycle, allowing each member to review one election, but keeping their tenure short enough that individual members' do not maintain strong influence over electoral matters for long periods. Members should not be reappointed, as this would allow parliamentarians to reward certain members for favourable law making. For this reason, parliament should not be able to dismiss individual members either.

### **The decision-making procedure**

The Committee should receive submissions and evidence from the public, parliamentarians, parties and the AEC much as the current JSCEM does, and use this as the basis for determining any amendments it creates. To ensure public confidence, the highest standards of transparency must apply. All submissions must be publicly available, as must all transcripts of evidence sessions. Again, this is currently standard practice for the JSCEM. All alterations to the law should be accompanied by a majority report explaining why a particular amendment has been created, while dissenting members could choose to issue minority reports. Similarly, the Committee should explain decisions not to alter a law. While minority reports may provide ammunition to those who wish to oppose legislative decisions, this would be preferable to a potentially scandalous situation in which a Committee member's opposition was publicised through a press leak.

An absolute majority—that is, four votes out of seven—should be sufficient for the Committee to approve an amendment. Requirements of unanimity or a supermajority would potentially create difficulties if urgent reforms were needed in a contentious area. While some may consider a vote of four to three insufficient for creating legislation, the supermajority requirement for appointments is likely to produce a conservative, centrist

Committee, meaning that radical decisions are highly unlikely even with only an absolute majority requirement.

Unlike most other delegated legislation, parliament should not be able to use the disallowance procedure. If disallowance were possible by a majority, it would allow governments to prevent changes to laws that did not suit them. If it were possible by supermajority, it would allow the two major parties to prevent any legislation that was not in their joint interest. Section 44 of the Legislative Instruments Act distinguishes 44 specific instruments that are not subject to parliamentary disallowance.<sup>40</sup> Although most of these are specific, relating to laws made under certain sections and subsections of an act, it shows that the procedure is already in place to bypass the parliamentary disallowance system.

Parliament must confine the Committee's legislative power to electoral matters. This would restrict it almost exclusively to measures within the Electoral Act, although other specific measures that fall outside the Act but are of electoral significance could be delegated to the Committee on a case-by-case basis.

The Committee would make its final determination on the electoral law long before each election, allowing the public sufficient time to understand changes. Australia's lack of a fixed election date presents a complication, but an appropriate solution would be to give the Committee a maximum of two years after each election to change the law for the next elections. After this time, the Committee would continue examining future reforms, but could only implement laws as an emergency provision if authorised by two-thirds of Parliament.

### **Committee accountability**

One option for maintaining Committee accountability would be to give it a charter of the values that it is expected to uphold in delivering electoral law. This would provide a judicially reviewable set of guidelines that the Committee could not ignore, for fear that

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<sup>40</sup> *Legislative Instruments Act 2003*, s44 (2).

its laws would be considered invalid. Such an approach would prevent major abuses of legislative power.

Creating such a charter would be difficult. Allowing parliament to devise it would likely see the governing party's values dominate. It is unlikely that both major parties would be willing to accept a common view on a number of issues, such as the priorities for electoral roll management, with Labor consistently demanding greater openness of the roll, and ease of enrolment, while the Coalition argues for greater roll integrity, and preventing fraudulent enrolments. These two views are often incompatible, as measures to prevent fraudulent enrolment generally make enrolling more difficult. A community-designed charter would be more able to achieve bi-partisan support, and would allow the public an opportunity to discuss the proposed Committee. A Royal Commission similar to that in New Zealand in 1986 which, in its investigation of that nation's electoral system, took public submissions and held public meetings would seem appropriate.<sup>41</sup>

Another accountability issue is that of the Committee's processes. As a non-parliamentary body, the Committee must be subject to administrative law review. This would not cover its final determinations, as delegated legislation itself is exempt from such review.<sup>42</sup> However, administrative decisions of the Committee, such as its decisions on whether to hold hearings, and its consultation methods would need to accord with the *Administrative Decisions (Judicial Review) Act 1977*. Broadly, this Act would require the Committee to abide by the provisions of the Act that creates it, and abide by rules of natural justice,<sup>43</sup> such as affording potentially aggrieved citizens the opportunity to put their case, being free from bias in its decisions and providing evidence for its decisions. The procedures of the Committee already discussed should be adequate to ensure that the Committee meets its administrative obligations, but the possibility of the major parties using their wealth to mount frequent legal challenges to administrative matters when they dislike decisions must be acknowledged. The negative effect of this can be minimised by

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<sup>41</sup> Report of the Royal Commission on the Electoral System, 1986, *Towards a Better Democracy*,

<sup>42</sup> Robin Creyke and John McMillan, 2005, *Control of Government Action: Text, Cases and Commentary*, Chatswood, LexisNexis Butterworths, p. 269.

<sup>43</sup> *Administrative Decisions (Judicial Review) Act 1977*, especially s5.



using the Act that creates the Committee to specify committee procedure for administrative decisions.

## **Conclusion**

Perhaps the greatest difficulty for such a system is winning the parliamentary approval to initiate it. It is almost paradoxical that a government which engages in partisan bias in electoral matters would then decide to delegate electoral legislation to an independent body. There are probably only two reasons that a government would do this. The first would require a massive popular outcry, pressuring the government to accept such a measure. This is extremely unlikely given the limited public reaction to the Howard Government's 2006 amendments. Furthermore, even the most scandalously biased legislation would probably only result in a public determination to vote the perpetrators out, rather than a popular movement for the reduction of parliamentary power.

The second reason for a government to introduce such a measure would be that it perceives some partisan advantage in it. This may mean that it stands to gain in terms of votes from the measure, or that it is likely to limit expected electoral damage through the introduction of the measure. This would require some level of popular support for the change, but it would not have to be as widespread as in the first scenario, and a campaign to limit the power of parliamentarians is likely to find some favour amongst Australians. Recent experience of major changes in electoral laws in other nations shows that royal commissions have helped to create and foster public momentum.<sup>44</sup>

The Constitutional uncertainty in the creation of this system should not be seen as a discouraging factor. A High Court challenge should be welcomed, as it would clarify the standing of this system and the limits of legislative power in Australia. While the system may be found to overreach the bounds of the Constitution, a similar system delegating effective legislative power over more limited areas such as campaign finance or political

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<sup>44</sup> See for example the New Zealand experience in introducing mixed-member proportional voting in 1993, Jack H. Nagel, 2004, 'New Zealand: Reform by (Nearly) Immaculate Design', in Colomer, *Handbook of Electoral System Choice*, pp. 475–86, and Canada's strict electoral reforms after the Gomery Royal Commission, Royal Commission on Electoral Reform and Party Finance, 1991, *Reforming Electoral Democracy*, Minister of Supply and Services Canada.

advertising may be acceptable. This would still remove a parliamentary conflict of interest and allow legislation in these areas to improve.

The need for the Independent Electoral Law Committee arises from governing parties' consistent misuse of electoral legislation for partisan advantage, and the lack of adequate safeguards against this practice. While there is no such thing as an impartial electoral system,<sup>45</sup> and Committee determinations would reflect the values of its members, this procedure would nevertheless encourage fair electoral competition by preventing one side from skewing the electoral system to its own advantage. In addition, this system would allow citizens to have greater faith in parliamentarians and the electoral process, as the difficulties of conflicts of interest in electoral matters would essentially be eradicated. This proposal is unorthodox, and as such, will attract criticism, but its advantages for fair electoral competition would be extensive.

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<sup>45</sup> See for example Gerard Newman and Scott Bennett, 2005-06, 'Electoral Systems', *Parliamentary Library Research Brief* 10, <http://www.aph.gov.au>.