REPORT OF PROCEEDINGS BEFORE

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

REVIEW OF THE PARLIAMENTARY ELECTORATES AND ELECTIONS ACT 1912 AND THE ELECTION FUNDING, EXPENDITURE AND DISCLOSURES ACT 1981

At Sydney on Friday 24 August2012

The Committee met at 12.00 p.m.

PRESENT

Mr J Rowell (Chair)

Legislative Council	**Legislative Assembly**
The Hon. R. Borsak	Mr. A. Fraser
The Hon. T. Khan	Mr P. Lynch
The Hon. Dr P Phelps	Mr D. Maguire
The Hon. P. Primrose	Mr G. Ward

CHAIR: Thank you everyone for joining us for the second part of this public hearing, which relates to the Committee's review of the Parliamentary Electorates and Elections Act and the Election Funding, Expenditure and Disclosures Act. The purpose of this afternoon's roundtable discussion is to examine the Electoral Commission's proposals for reforming our electoral legislation. I ask the roundtable participants to speak one at a time during the discussion as that will greatly assist Hansard in transcribing the proceedings. It will also be of great assistance to Professor Orr, who will be joining these discussions via teleconference.

ANIKA GAUJA, Department of Government and International Relations, University of Sydney,

JENNI NEWTON-FARRELLY, Electoral Specialist, South Australian Parliamentary Research Library, and

ANNE FRANCES TWOMEY, Sydney Law School, University of Sydney, sworn and examined:

GRAEME ORR, Professor in Law, University of Queensland, before the Committee via teleconference, affirmed and examined:

CHAIR: Dr Gauja, in what capacity are you appearing before the Committee?

Dr GAUJA: I am a lecturer in Political Science at the University of Sydney. I am appearing as a private citizen.

CHAIR: Ms Newton-Farrelly, in what capacity are you appearing before the Committee?

Ms NEWTON-FARRELLY: I am the Electoral Specialist at the South Australian Parliamentary Research Library. Because the library does not have any view on the issues that we will be discussing I am here in a private capacity.

CHAIR: Professor Orr, in what capacity are you appearing before the Committee?

Professor ORR: I am a professor in Law at the University of Queensland and I mainly specialise in the law of politics. I am appearing in a private capacity but I think I am here because I wrote an underlying position paper for the Electoral Commission, which partly their report was based on.

CHAIR: Professor Twomey, in what capacity are you appearing before the Committee?

Professor TWOMEY: I am a professor of Constitutional Law at the University of Sydney and I am appearing in a private capacity.

CHAIR: I take this opportunity to thank our four witnesses for appearing today. To get things underway I will ask each of you briefly to summarise what you consider to be the strengths and weaknesses of the Electoral Commission's proposals. We might start with Professor Orr on the phone.

Professor ORR: My understanding is that because you have reached the centenary of what is now an old and musty Act, the Electoral Commission is interested in exploring possibly new ways of style and format of the legislation—my underlying report was about that kind of drafting. I see they have also made some submissions about the structure of the New South Wales Electoral Commission. My report was not about that, but I do not want to go into the details of any of that just now; I will just wait until the discussion.

CHAIR: Dr Gauja?

Dr GAUJA: What I can offer, I suppose, to this Committee is a political science perspective. I have some law background but I do not hold out to be an electoral or a constitutional law expert. Rather, my background in academia is in the study of political parties as organisations and also in Australian politics and the shifting nature of political participation in Australia. So from that perspective I think one of the key strengths of this submission is very much the timeliness. I think it is a perfect opportunity—the centenary of electoral legislation—to reconsider the legislation, at a time in which political participation in Australia is changing.

We are seeing a decline in what is known as formalised forms of participation—disinterest with the electoral system, a shift to more individualised forms of political participation, a decline in party memberships—which I think is very important for reconsidering this legislation. So at that particular point in time I think that any attempt to modernise the legislation to make the legislation clearer, much more accessible to the public and in that way to publicise the activities of the Parliament and what we want to see both the Parliament and political parties achieve into this century is a key strength of the report.

I have some concerns with not so much the report itself but the issues that are raised, which I think we can address in the discussion as well, as to how we ought to conceive the role of political parties in the next

century and this century, how that can be accommodated within the electoral legislation that the Committee amends or continues drafting, and also particularly the notion of party membership and how some of the suggestions to incorporate elements of the Queensland Electoral Act will actually act as a disincentive or may, in fact, hinder the abilities of political parties to innovate with new forms of political participation, particularly community preselections.

Ms NEWTON-FARRELLY: You were asking about the strengths. I think that obviously it is a good time to review to Act, partly because you have got a commissioner here who in my understanding has a background in this kind of legislation from Victoria, so you have got someone to guide you through it. The way that I have been looking at the material that you have sent is to look basically for areas that I think will be a bit messy when that is done. There are two of them.

One of them is in relation to—well, let's just get back a step. Essentially the beauty of an Act that is already in place is that it is agreed. As soon as you step back from that and say, "Let's mess around with this", there will be problems with gaining agreement on what you do. So I think that the first area where there is the potential for some messiness is in deciding or agreeing what is a standard and what is a rule. I do not think anybody is going to have problems with the principles, but dividing things up into standards that go into legislation and rules that remain with the commission I think there will be room for disagreement.

The second area is really the respective roles of the commissioner, the Committee and the Parliament. Whether the Committee will speak as sort of showing the view of the Parliament and in that way will be able to approve rules that the commission puts into place, whether the commission itself will be able to say that we have made this rule and unless the Committee revokes it, it stands. Those sorts of areas I think might be a bit messy. But perhaps that is the sort of thing that this meeting can speak about.

Professor TWOMEY: In terms of strengths I heartily agree with the idea that it is time for the Parliamentary electorates and elections Act to be reviewed. I think it is right that it is a terrible mishmash particularly in terms of language and style. You have got old bits, you have got new bits, it has all been lumped on top of each other and it does not really have any sort of good sense and order to it. Where I come in at the more critical stage—and I suspect I am going to be bad cop to everybody else's good cop here—is that I do not at all support this notion of the principles in the Act and the election commission gets to make the rules.

The Hon. Dr PETER PHELPS: I am with you there, Professor.

Professor TWOMEY: Okay, well, there are the four main areas, and we can get into this in more detail later. First of all, I would contend that it results in a lack of clarity rather than improving clarity. People when they look for rules look in the laws. They will look in the Act, they will see the principle, half of them will not know that there is anything else and they will just think: That's the principle, I interpret it this way, I think what I'm doing is right. Then they will discover later on that what they have done is wrong. It just makes it so much harder for people who just want to apply the rule. Okay, you found the Act, you find the thing, there is a principle, you don't know what it means, and then you have to go on and find there are some directions on some website somewhere and there could be 352 different ones and they have been drafted by someone who is not Parliamentary counsel and they are probably all inconsistent and half of them are probably ambiguous. As a legal practitioner I just think that is a complete nightmare and I never want to go there.

The second problem with it is it seriously undermines the separation of powers. I could direct you to a part in the submission which I think is sort of pretty spectacular in the way it merges into the Electoral Commission all functions. This is at pages 20 to 21 of the submission where it starts off with saying first of all it is the Electoral Commission that makes the law effectively, because the Parliament is just doing the general principles but the Electoral Commission is making the rule. Note that it is very, very coy about how they say it. They just say that the Electoral Commission does the implementation. Well, it is not just implementation. They are actually legislating. They are making the rules that bind political parties. That is serious stuff.

So you are giving your Electoral Commission legislative power. Then you give them the executive power because they are the ones that are administering the Act and implementing it. Then when you go over to the next page it says and, by the way, this Electoral Commission is going to be one that does the enforcement and the interpretation and is going to come out with a whole lot of directions and findings and precedents and now it is being a court as well. You are effectively giving the one body legislative, executive and judicial power. I find that quite shocking.

Just to go back to the basic principles, the reason why we have separation of powers is that you do not want to put all the power into the one body because if you do put all the power into the one body—all of us here accept that the Electoral Commission at the moment is an integrity body, it is independent, there are no problems with that, but once you give a body all those powers the real risks of corruption or the perception of corruption are there and there is an incentive for all the political parties to be going out there trying to get their people in there and trying to influence the decisions that the Electoral Commission makes. It puts a huge amount of political pressure on what should be an independent body. So the next point there is that it really politicises the Electoral Commission in an enormous way.

The final point from this introductory stage where I have a real concern about this is in terms of litigation. This is, if you are an electoral lawyer, litigation heaven because the law, which is not contestable, says, "Here are the principles", but the Electoral Commission in making its directions and rules and everything like that has to do it within the scope of the principle. At the moment when you have got all that stuff in the law you cannot challenge it unless for some reason the law is itself unconstitutional and there are only minor possibilities of that with manner and form. So the law is the law. If you do not like it and you are a political party you just have to live with the law or get Parliament to change it. That is the current situation.

You go to this position of having Parliament sets out principles, Electoral Commission makes the rules, then every one of those rules has to be within the power granted to the Electoral Commissioner under the Act. You might try to stick in a whole lot of privative clauses to stop people from challenging every single one of the rules that they don't like, but the problem is that recently in the High Court in the Kirk case and the Public Service Association case in the High Court has said that the Supreme Court has to have the power of judicial supervision so that it can deal with jurisdictional error.

That means that if the Electoral Commission has acted outside of its power in making each one of these zillion little rules that it is going to make then that is something that you can challenge in court. So any rule that a political party does not like—and I am betting there is going to be a lot of them—they can go to court and they can challenge it and there is nothing the Parliament can do to stop that from happening. So the amount of litigation that would likely be produced by this sort of approach would be let's just say extremely lucrative for the bar. There you go. I will stop there but I am sure we can go into these points more

CHAIR: Thank you everyone for those opening comments. I think there are a diverse range of views that will no doubt lead to a lot of discussion so we will keep it rather informal for this session. Professor Orr, if there is something you want to say just pipe up and we will ensure you get your opportunity. I will open it up to the Committee members if they have got some questions.

Mr ANDREW FRASER: I will just make a comment. Ms Newton-Farrelly—

Ms NEWTON-FARRELLY: Jenni will be fine.

Mr ANDREW FRASER: I am little intrigued about your comments in relation to Committee versus commission versus Parliament. Coming back to what Professor Twomey was saying, I tend to agree with you totally. I think we are a Parliament who makes laws and in the past the Acts Interpretation Act said that if something goes to court the second read can be taken into account and it was decided on in a judicial process. Surely on your submission, the Act, the regulations and therefore the Parliament's decision would be where the decision would be made or where it would be defined. I am interested in that three-tiered structure.

Ms NEWTON-FARRELLY: I think that is one of the messy bits, one of the bits where perhaps this Committee would really have to work to get some sort of agreement about which were the bits that the commission could decide and could actually authorise in its own right, or whether in fact the Committee might say the commission can formulate the rules, then they have to at least notify the Committee and allow the Committee to disallow it before it goes into effect. In a sense if you are just rewriting the Act then essentially the things that would normally go into regulations we will give to the Committee. In terms of that deciding line, I think that is the messy bit. When Professor Orr tried to illustrate the distinction between standards and rules he used the redistribution provisions which I understand is not within the realm of the Committee. I disagree with his interpretation of whether those things were standards or rules.

Professor ORR: There has been some misunderstanding. I cannot talk for Colin Barry, the Electoral Commissioner, but it does not seem to me this is a grab for power. Mr Barry was inspired by what was done with the iVote system and there are a lot of examples across electoral law where there is too much detail that is

set down, such as Antarctic voting. In Mr Barry's submission you will see all the essential rules should be set by Parliament, including in relation to redistribution, qualification for candidacy, voting and so on. It is the technical detail that is in regulations and other times it is left to commission's discretion. The regulations would be drafted by the New South Wales Electoral Commission and this Committee could have oversight over that process.

The Hon. PETER PRIMROSE: Professor Twomey, do you have a comment?

Professor TWOMEY: There is a fundamental underlying issue here where some people seem to have a view that just because an Act is long that is bad. I do not have that view. It is not like you sit and read the whole thing from beginning to end. If an Act is long I flick through the table of contents and find the part that is relevant to what I am doing. I am not going to read the part about Antarctic voters unless I have an issue about Antarctic voters. It does not matter to me that it is in the Act. That general view to begin with, that there is a problem with having detail in the Act and the Act being long, I do not see as a problem.

I find it much more helpful for it to be in the Act rather than scrabble around finding regulations. Even if it is in regulations I would much rather it was in a regulation than a direction from the commission because at least a regulation goes to Parliament and it is a disallowable instrument. You have that democratic accountability aspect. If the Parliament wants to disallow it, it can. I worry about an Electoral Commission making those sorts of decisions when—obviously a Parliament can later override by legislation—they are not regularly being seen. There is no committee. I do not know whether New South Wales still has one but do you have a committee that deals with regulations as they go through?

Mr GARETH WARD: The Legislation Review Committee.

Professor TWOMEY: You have mechanisms that exist under the current system for delegated legislation to deal with that and I do not see why we should be taking them away. I think they are good. I think it is important to have parliamentary accountability.

Professor ORR: That is not the intention.

Professor TWOMEY: I think it is important that rules are clearly made in Acts of Parliament or at the very least in regulations that are accountable to the Parliament as disallowable instruments and it is all done in a public way.

Professor ORR: Absolutely.

Professor TWOMEY: Someone mentioned this and it was one thing that came to mind; one of the advantages of having this in legislation is that when there is ambiguity you at least have the second reading speech, you have the parliamentary debate, you have an explanatory memorandum and you have stuff to put it in context. If the Electoral Commission is just making rules you have no context, it is stripped bare, you do not know where to go beyond the words that come out in the direction. I think that is problematic.

The Hon. ROBERT BORSAK: Like tax office rulings.

Professor TWOMEY: Yes. That was one of the, I thought, somewhat ironic examples put in there. That brings you back to the other problem—the tax office has had enough problems with corruption, with people selling private rulings and the rest of it. That indicates where you go with that sort of approach.

The Hon. Dr PETER PHELPS: Dr Orr, is there a middle point? Throughout my career I have had a lot to do with the Commonwealth Electoral Act and there is some merit in the idea that the degree of detail is not necessary: For example, the placing into schedules of forms in the Commonwealth Electoral Act. So many times we would have to amend the schedules which meant the layout of a form which was used would have to go through as an Act of Parliament. That is the sort of level which I would suggest probably does not need to be enacted and probably could be done by rule. Is that really the level that the Electoral Commission wants? I know the Australian Electoral Commission wanted to get rid of that need to schedule every damn form but they also wanted far greater play in what they could do in terms of the conduct of elections and a whole range of things where they found the Act constrictive. I am happy to have, if you like, sensible reform—sensible is always in the eye of the beholder—but really small bits which are unnecessary to be enacted could be disposed to the various commissions. How far do you want to go?

Professor ORR: The classic example that is given in my report, and the Electoral Commission repeats, is the Commonwealth Act, and your Act as well, specifies that there have to be pencils in the polling station. If the commission needed to use pens they would be in breach of the law. There is inflexibility in relation to that that Professor Twomey has not picked up on. So many details very often need to be changed and Parliament cannot be expected to respond every time the Electoral Commission thinks there might be a problem with excessive prescription of details in some of these laws.

We have seen at the Commonwealth level that committees like yours often get bogged down in the minutiae stuff that would be better left to the discretion of the enunciated regulatory making power of the commission, subject to disallowance or subject to prior approval by the Committee. You have the perception that you guys sit around the table and spend a lot of time dealing with detailed stuff that must be fascinating because it is part of a process of politics but would be better left to the independent integrity agency, which is the Electoral Commission.

We are not suggesting the German model where there are only 60 sections in their Electoral Act and a huge amount is left to the Electoral Commission and the ministry itself, which is admittedly a different civil model where you have trained jurists who work within the ministry. I do not think that anything that Colin Barry is suggesting is going to that level of broad principles, as Ms Newton-Farrelly fears. It is about leaving the implementation and detail of the iVote regulation, Antarctic voting, aspects of postal voting and registration of electors to more flexible mechanisms that will still be publicly available and can be controlled by the Parliament or the Committee process.

Mr ANDREW FRASER: Surely that can be done by way of regulation?

Professor ORR: Yes. I agree with Professor Twomey in this regard; you do not want the commission sticking stuff on its website which is like a public version of their internal manuals and having debate about where do I find that and how does it all fit together in a patchwork way. You already have a patchwork. You have a Constitution that entrenches some aspects of the electoral system and some aspects that should not be entrenched at all, as Anthony Green has pointed out. You also have an Act that needs to be modernised and overhauled because it is the second worst Act in Australia after the West Australian Act, and you also have some regulations. We are not talking about changing the mix of that in any sense.

Mr GARETH WARD: Can I ask Professor Twomey to respond. I suppose it is where you draw the line as to what should be in the legislation and what the commission determines?

Professor TWOMEY: I agree. I have no problem with the forms being determined by the Electoral Commission. I think regulations are fine. I have to say in my past life I worked for the New South Wales Cabinet office and we were responsible for the Electoral Commission. I have had interaction with the Electoral Commission. I can give you one example where we had a crisis. You might remember the tablecloth ballot paper in 1999. I had the Electoral Commissioner on the phone to me just before the election saying that if one more party registered there was no printing company in the whole of Australia that could print a ballot paper that was large enough to do the election and the election could not happen.

You might remember above the line voting. We had to have three lines of above the line voting to fit the ballot paper and we had to change a regulation to do that. Yes, that was a crisis. But, if you need to amend a regulation quickly to deal with that sort of thing, you can. It was not a drama to that extent. I appreciate issues of practicality. On the other side of it, Professor Orr talked about flexibility and yes, in some ways flexibility is good, but if you had a situation where the Electoral Commission could just change the rules—you look up the rules on Wednesday and by Friday they have been changed—that is not good either. You need some kind of formal, publicly acknowledged process to get there. Just leaving it to a single body to decide on the spur of the moment that a law that exists one day does not exist the next day without anyone knowing is problematic.

I think the mix we have at the moment is okay. I have no problem with there being long provisions about Antarctic electors being in the Act. I do not think the rules about Antarctic electors probably change all that often and there is no real problem with leaving that sort of stuff there. But certainly when it comes to forms and things like that, there are real issues and I have no problem with those sorts of things being left to the Electoral Commission. Most other things, I think, should be left in the Act and if they cannot be in the Act and you need to be a bit more flexible, it should be in the regulations.

Mr ANDREW FRASER: If you have a regulation made by the commissioner, I would suggest, it may be contrary to what the Parliament intended? So you are coming from the bottom up rather than Parliament making legislation, approving the regulations—which, as you identified, can be disallowed—and going back down for the commissioner to work with. But for them to make a regulation and send it up the chain, to me is really almost anti-Westminster.

The Hon. TREVOR KHAN: But if you have a regulation that is, in the example used, the three lines, hardly what you would describe as a publicly available process? One of the issues with regulations is that they can pop in, and essentially very few people know they exist.

The Hon. Dr PETER PHELPS: Very few parliamentarians know they exist.

Professor TWOMEY: But you do still have a formal process and a number of eyes that look at it. With a regulation you have to go to the Governor, you have to go through the Executive Council meeting, there are a whole lot of formalities involved and it has to be published in the *Government Gazette*. I agree probably nobody in their right mind reads the *Government Gazette* most of the time, but there is a formal process where a number of eyes look at things. I know from time to time people say you should get rid of the Executive Council altogether, what does it do? My response to that is it is really important to have those sorts of formalities and processes to make sure that everything is done properly along the way. The Executive Council is important for achieving that.

The Hon. TREVOR KHAN: What oversight of regulation is there, say, from the December prior to an election until the election?

Professor TWOMEY: There is also an issue of being in caretaker mode. Once you are in caretaker mode there would be problems with—

The Hon. TREVOR KHAN: You are not in caretaker mode from December.

Professor TWOMEY: No, just from the point at which Parliament is dissolved prior to the election. But during the caretaker mode you could not make regulations that change it. From the December onwards you still have a government that is allowed to govern. It can make regulations, so we can change things.

The Hon. TREVOR KHAN: But there is no parliamentary oversight of the regulations.

Professor TWOMEY: You are right. The difficulty is that Parliament would not, unless it is sitting, be able to disallow a regulation. So someone would have to recall Parliament to deal with it.

The Hon. Dr PETER PHELPS: And with the executive making the regulations, they are highly unlikely to recall Parliament.

Professor TWOMEY: That is true. You are right, there is a theoretical problem in the—

The Hon. TREVOR KHAN: There is a practical problem, not a theoretical problem. It is a straight practical problem.

Mr ANDREW FRASER: I would rather the executive making a decision rather than the Electoral Commissioner making a decision that we do not see.

CHAIR: The other suggestion the Electoral Commissioner suggested to us at our last meeting was that this Committee becomes a statutory committee. What would be the views of our witnesses in relation to that and the problems that may pose?

Professor TWOMEY: One possible ramification of becoming a statutory committee rather than an ordinary committee is that if Parliament is prorogued you can still sit. So that sort of helps. I cannot see much difference otherwise, to be honest. You also of course have the stability of ongoing status. But on the whole, I do not know that it makes a lot of difference.

The Hon. Dr PETER PHELPS: Can I ask Dr Guaja, the merits or otherwise of having a nominally independent but ultimately appointed Electoral Commissioner formulating rules as opposed to having Parliament make the rules?

Dr GAUJA: There are arguments for and against it. The argument for me is that the Electoral Commission is a trusted agency and there is a perception generally in the eyes of the public that these agencies are trusted more so than politicians.

CHAIR: But that is not your view?

Dr GAUJA: Not today. It depends on which day you ask me that. In terms of a democratic deficit that might occur, that is probably not an issue in that sense. On the other hand, you have the argument that it is an unelected body, it is an appointed body, so what can we legitimately delegate to them? My issue with the submission is the question of where you draw the line as to what can be delegated and what cannot be delegated. In paragraph 36 the Electoral Commissioner does that in issues where there is no real consensus and a real potential for conflict of interest involving the Electoral Commission should not be left with discretion. He then goes on to list the whole heap of provisions which, I think, form the substance of electoral legislation.

Electoral legislation by its very existence is inherently contentious. Because it is so contentious and so partisan, the beauty of it is that you are the only committee that is making the laws for your own existence. I think that needs to be done in a very public way. I would personally err on the side of leaving it more so to Parliament and ideally coming up with a legislative document that is principles based, that has the standards in there, and then perhaps delegate the minutiae of the electoral procedure to the commission. Thinking about how you can really define where there is consensus, what is the general principle and where various potential for conflict of interests.

The Hon. Dr PETER PHELPS: On that point, is the relative lack of power not part of the respect which the Electoral Commission has? In other words, because it is in the position at the current time purely of administration rather than rule making, it can honestly say we are not doing this, we are implementing what has been tasked to us to do, and the moment you start giving it significant rule-making power would be the time when it is going to open itself up to criticism because it is unusual for any rule to change without there being some criticism directed. The criticism would then move from those damn parliamentarians, those damn politicians, to that of Electoral Commissioner, and the implication that there is some sort of favouritism being shown, which would undercut the quite good perception of the commission of being an independent body above politics.

Mr ANDREW FRASER: Currently, the Electoral Commissioner, if it proposed any changes, would come back to government anyway? It has happened in the past.

The Hon. TREVOR KHAN: Can I ask Professor Orr and Professor Twomey a question, and it relates to this talk about the committee having some oversight of decisions and rules set by the commissioner. Do we know of any other parliamentary committees that have some form of veto powers over rules and regulations?

Professor TWOMEY: The only ones I know of that have veto powers have veto powers over appointments. We certainly have that here. I do not know of any committee that has a veto power over rules. Normally those sorts of things are disallowable instruments and it is Parliament that does that, not a committee.

Professor ORR: I did a Queensland parliamentary workshop about a week ago when this issue came up about the fact that portfolio committees generally do not necessarily see executive proposals for delegated legislation in advance. That is the problem with a disallowance after the event, and so on, and Parliament being so busy. In his report Commissioner Barry did two things. One, he suggested that you guys might have some role to play in appointing Electoral Commissioners to ensure a greater level of perception of independence and non-partisanship. And he also accepted that a committee like this or a suitable body might have some in advance role to play in scrutinising any proposals for the machinery of administrative minutiae and stuff that could be regulated.

I see that as a potential way through some of the thickets and concerns that have been legitimately raised-but overstated-here about a loss of some sort of responsibility or accountability in government. Changing the Electoral Commission from nothing but a kind of mechanical administrator to be in part a regulator, which is a very common thing if you look at the Federal electoral commissions in the United States, Britain and New

Zealand, particularly in relation to matters to do with election finance, is not such a huge step. What we are going from is a situation in Australia where we have an excessive regulation and minutiae of detail being laid down in statute that would be considered anywhere else in the world quite unnecessary. We are only talking about moving back to a position where someone like the Electoral Commissioner in New South Wales would be given a little more power and discretion to deal with details of regulation and implementation of things.

You can look at section 125 in its current form-if you can make sense of it-and say, "Why is Parliament telling the Electoral Commissioner how to seal ballot papers and so on?" We are not in the nineteenth century any more when we did not have a trusted agency to run proper, free and fair elections. As I understand Mr Barry's submission, he is not asking for a massive amount of extra power; he is simply asking for the kind of flexibility to do a lot of the detailed administrative stuff that would be done anyway by his office.

The Hon. TREVOR KHAN: I understand what you are saying. I am asking: Are you able to point me to any other parliamentary committee in any parliament in Australia where the committee has some form of veto or oversight of actual rules, regulations or the like?

Professor ORR: No but I think it would be a good thing if a committee like this did have that kind of oversight in relation to any regulations that might be able to be made in relation to elections. So it would be a positive development.

Mr ANDREW FRASER: On that basis I suggest you would have the government of the day with the numbers on a committee, so it would be partisan where it should, in my book, have an opportunity to be disallowable by way of regulation. I agree: The minutiae with regard to pencils was probably written before ballpoint pens were commonly available.

Professor ORR: No, it was not, sorry.

Mr ANDREW FRASER: Whatever. They are minor things which I think even if they went to court and someone had recorded a ballot with a ballpoint pen rather than pencil, it would be arguable in court and I do not think they would uphold the fact that it was a biro, not a pencil. The reality is that the commissioner now has the opportunity to advise the Government in relation to issues that he or she may find difficult. The Government then has the opportunity to put legislation forward. If the Government does not want to, I suppose there is always private members' bills that could be done, et cetera. To me, reversing the situation we have now on electoral legislation would give rise to demands that other legislation, for example, a regulation in relation to child care and the Department of Community Services, could undergo a similar evolution, which therefore defeats the purpose of a parliament.

Professor ORR: I will give one example. Currently you already have across Australia electoral commissions that have regulatory power. Their handbooks in relation to what is a reasonable excuse for not turning up to vote are not public documents. They have been refused access under freedom of information, and I think the courts have upheld that. That is one thing that might go right to the heart of the question of compulsory voting and so on but we say we trust the electoral commissions to develop internal standards and rules about what is a valid excuse or not and we do not even make them publish those documents. That is one example where for a long time we have trusted the commissions to do that kind of implementation.

Mr PAUL LYNCH: The problem with your example is that if someone is then prosecuted for not turning up, it then goes to court and there is an entirely separate level of oversight on that sort of example.

Professor ORR: But someone can always challenge the regulation, as Professor Twomey suggested, yet said that might be a weakness of the system. It might be a good thing in the system if people were able not to know but to challenge electoral commission internal handbooks which are already there, they are already effectively a regulatory mechanism in relation to the rules when you are entitled to not turn up to vote.

Mr PAUL LYNCH: But the handbooks are just part of the prosecutorial discretion for those particular offences. That is a very small part of this debate.

Professor ORR: If you are looking at electoral commission handbooks, particularly in the Australian Commission, they are quite detailed documents about implementation. For all intents and purposes, they are the rules and unless someone comes along to an administrative court and challenges them—and almost no-one goes along to administrative courts and challenges electoral matters in Australia parliaments because we have good,

trusted and independent agencies. Can I go back a step? In my report I noted the comments of Michael Maley from the AEC saying that some electoral commissions like the idea that everything they do they are told to do exactly by the Parliament, including committees like yours, as that means that they feel they are somehow purely mechanistic operations. Mr Barry is more than a forward thinking regulator and he is saying there are some areas in which it is ridiculous to require Parliament to set levels of minutiae and detail and that we have ended up with a very anal style of drafting in Australia which would be uncommon across most of the rest of the world.

The Hon. TREVOR KHAN: Dr Gauja, I ask you to go back to the issue you raised and that is your concern that the proposals may hinder innovation by political parties. Would you like to explain how you see that occurring?

Dr GAUJA: I am basing this on the 2012 reforms to the funding Act and the way in which member subscriptions to political parties are treated as donations and the associated suggestion that the commissioner makes that we adopt the provisions of the Queensland Electoral Act. This relates to party constitutions and the requirement that you provide a political party's constitution in order to be registered. For the most part there is very little detail as to what is contained in these constitutions and that has created a significant problem, I think, for the judiciary and also for political parties themselves, those starting up, looking for guidance as to how to formulate their internal affairs. Queensland is interesting because it contains a provision that preselections, which is a very contentious topic, need to be conducted in a democratic manner.

The Hon. TREVOR KHAN: Gosh.

Dr GAUJA: Yes. In Queensland and New Zealand. The research I have done on both of these democracies, compared to jurisdictions where you do not have that provision, it makes no difference to the candidate selection mechanisms that are implemented by political parties. Last year the Queensland Electoral Act was amended to flesh out what was meant by the principles of free and fair elections with respect to preselection. I am not sure that I have the exact phrase in front of me but one of those provisions was that only party members could participate in preselections. For those political parties that have experimented with community preselections, this poses a fundamental problem because the whole idea behind a community preselection is that non-members can participate. In a climate of declining party memberships, what I was suggesting at the start of this session is that we need to think a little more fluidly about what we mean by party memberships and whether it is still appropriate to have a very narrow financial definition of a party member.

Constricting preselection participation to party members would hinder things like the community preselection that has been trialled by The Nationals and by New South Wales Labor. Also, if we think about the question of what we want political parties to do for us in democracy, the way in which this report and the way in which most people tend to think about parties is exclusively in electoral terms. But I would argue that political parties provide a very important avenue for participation for people who cannot vote. For example, what would happen to the youth organisations of all the political parties if you cannot join up as a member of a political party because you are not on the electoral roll? How will Young Labor and Young Liberals participate in party decisions?

Mr ANDREW FRASER: What about the Young Nationals?

Dr GAUJA: My point is that what the Act is doing is conceiving of party membership in a narrow way that ties it to a requirement to be on the electoral roll, which disadvantages non-citizens but it also disadvantages non-members and parties innovating to that effect.

Mr ANDREW FRASER: Often parties, for example in community pre-selections, which The Nationals were the first to trial, amended their constitutions to allow that to happen.

The Hon. Dr PETER PHELPS: This is a problem which lies with the definition within the Act in Queensland and that is by interfering in the internal processes of a party, what you have effectively done is create a stricture on what those parties can do, in this case preselection.

The Hon. TREVOR KHAN: Can I ask Professor Orr in regards to that? Professor, was the Queensland position as a consequence of One Nation?

Professor ORR: No, it goes back around the time of what we call the Shepherdson Inquiry, it was after One Nation was first set up. The Beattie Government responded in a classic way to a scandal in relation to some rorting of Australian Labor Party internal preselections by students who were enrolling themselves on the electoral roll at the wrong address and so on just to rort internal party ballots, and he brought in this provision, which was largely window-dressing, as Dr Guaja has said. It is another example of how sometimes parliaments as a reason to respond to scandals or as a reason to just meddle, get things wrong and can create inflexibilities and the legislation becomes padded out with stuff that should not necessarily be there.

Another classic example is in your electoral Act in relation to child sex offences, candidates and so on. That is a classic example—and I will not use "that" word again—but a kind of meddlesome style of drafting, of trying to be prescriptive about things and not even thinking about the consequences of it. It sometimes happens when you have politicians making up rules about politicians.

The Hon. Dr PETER PHELPS: Can I just ask a broader question and that is, if we are in the mood for some centenarianism—and it is 100 years—and we do not go down the road of devolving much power to the commission itself, is there a good argument for a general complete sweeping clean-up of the Act?

Professor ORR: Can I indicate before I have to leave in about 10 minutes, but yes, in my report, which again has been adopted in part 5 of the Electoral Commission's there are a whole lot of areas in which you can say you need not just plain English drafting but modernisation, cleansing out some old unnecessary provisions. Compare it to the Victorian and Tasmanian legislation. You could also think about structuring the format of the legislation and whether in a modern Act you would not put the right to vote upfront, for example, rather than the establishment of an Electoral Commission, which is a very bureaucratic way that we do things in Australia—and in my report there are a whole lot of suggestions in that regard. As a minimum I think that is what you would be wanting to do, otherwise why are you bothering?

CHAIR: Professor Orr, I am conscious of the time. Do you have any closing remarks that you would like to give to the Committee?

Professor ORR: No. I always enjoy appearing before the Committee even by scratchy teleconferencing. If all the powers were given to the Electoral Commission there would not be these wonderful opportunities.

Mr ANDREW FRASER: So you are arguing against yourself!

Professor ORR: Even though sometimes you appear, you make submissions and then the exact opposite get taken up, like on the issue of prisoner voting in the 90s.

The Hon. Dr PETER PHELPS: It is good to see that I am disagreeing with you again. I got worried when I was agreeing with you last time.

CHAIR: Thank you very much, Professor. If you want to stay on the line until you need to go, that is fine. We will continue the discussion, but I wanted to give you that opportunity. Thank you very much for your involvement with us today.

The Hon. Dr PETER PHELPS: I ask about the South Australia situation. What is the situation down there? What are the respective Houses? Are they comparable to New South Wales, that is, they are purely administrators of a law thrust upon them?

Ms NEWTON-FARRELLY: I might need to be a little bit careful here. It seems to me that electoral commissioners are like members in the sense that each one is different. They take their job very seriously but they have a different focus and that often reflects their experience. For example, during the time that I have been at the parliamentary library Andy Becker was the Electoral Commissioner and then he later became Deputy Australian Electoral Commissioner and later Australian Electoral Commissioner. Steve Tully was the next one and he later became the Victorian Electoral Commissioner and we now have Kay Mousley, who came to us from the Australian Electoral Commission.

Her focus is very much on running a good, clean election. We do not have finance legislation, so the research focus and the broader policy focus that the two previous commissioners had is not something that she sees as particularly necessary at the moment, so her focus is different. It seems to me that the commissioner here

has an ability to look more broadly, based on his experience, and it may well be that this Committee wants him to do that and if that is the case he is probably a good bloke to do the job that he is proposing to do but if you do not want him to do that, that is another question again. In terms of responsibilities in South Australia, we do not have an electoral matters committee. When I did suggest that once, both the members and the commissioner went very quiet, so I do not think even the members want one.

The Hon. Dr PETER PHELPS: No, I am talking about is there a concern that there is an overprescription of the electoral law—

Ms NEWTON-FARRELLY: No.

The Hon. Dr PETER PHELPS: —or are they happy with the status quo of Act implementation?

Ms NEWTON-FARRELLY: Our electoral Act was revised quite a lot and it is probably a lot cleaner than the New South Wales one.

The Hon. Dr PETER PHELPS: That wouldn't be hard.

Ms NEWTON-FARRELLY: Back in 1985. People are saying now, "Well, it is getting a bit long in the tooth; perhaps we should have a look at it." But nobody is saying, "This is archaic and unworkable."

The Hon. Dr PETER PHELPS: I do not think ours is archaic and unworkable, it is just messy. The electoral Acts I have dealt with, the Commonwealth and the State ones, are just a patchwork quilt of layer upon layer, which overlap and do not have joins. Both of them could do with a thorough makeover.

Ms NEWTON-FARRELLY: Yes, that is absolutely true and I am sure that people from any other State electoral commission would agree with you when they look at the New South Wales legislation but whether you actually want to go to this kind of review is another question.

The Hon. Dr PETER PHELPS: That leads to my next question and that is, if we were to have a review of the Act, to what extent do you think the Act should look at the internal activities of political parties?

Dr GAUJA: I think that is an area which is fraught with some difficulty. I think that the freedom of association of political parties really does need to be respected and that links into the comments made earlier about allowing political parties the scope to innovate. That is one argument. The other argument is that you, perhaps more strongly, unintentionally legislate for the internal activities of political parties with any reforms that you make to electoral and finance legislation; that is quite clear. Even if you are not consciously thinking about what you are doing, in terms of party organisation it does have a very clear and resounding effect.

If you want to look into the internal affairs of political parties the question you then need to ask is: What do you want them to look like? Do political parties need to be internally democratic? Do they not need to be internally democratic? There is an argument for internal democracy in that political parties are being seen more as institutions that are inherently linked to elections and linked to the States, important public institutions, so there is an argument on that front but that needs to be balanced by the association on integrity.

Mr ANDREW FRASER: And the membership will decide the constitution of the party; it should not be dictated to it by Parliament?

Dr GAUJA: Arguably, yes, or it should not be dictated to them by the executive of the party as well, or one party leader. There is a whole spectrum of the way in which parties can be structured.

Mr ANDREW FRASER: Or how you are you meant to cope with that?

The Hon. Dr PETER PHELPS: Well, Jenni from South Australia would know Clarke's case quite well. What about your view if we were to do it—or alternatively there should be, if you like, a primitive clause which says that the internal activities of parties are non-judiciable.

Mr ANDREW FRASER: An Ethics Commissioner.

Ms NEWTON-FARRELLY: I don't know. My background is not law so I am probably the wrong person to answer this question. But if you want me to answer it, I will go back to the business of messiness that I spoke about in the beginning, and agreement. It seems to me that, if you are going to be reviewing the Act, you will come up against enough problems of disagreement without introducing another mammoth one. That might just be a really effective way of sinking the whole enterprise, if you introduced another big question.

Professor TWOMEY: I do not know, is the answer generally. I am pretty queasy about Parliament getting too involved in political parties, for obvious reasons. But I am also conscious of the fact that, in some ways, Parliament does and has. I remember, in particular, after the tablecloth ballot paper we had the issue of numbers of members of parties in order to be able to register to be above the line. And again this actually flowed back to the problem that the Electoral Commissioner had with not being able to print a bigger ballot paper. There were rules that, first of all, you had to register at least 12 months before so that we did not end up with that problem again. But there were also rules that—I think originally the Government said 1,000 and then the Parliament said 500 and we negotiated it to 750—you had to have 750 members to get above the line. So that partly dictates to parties what they need to get certain things.

There are other conditions that you have as to what you need to be able to get funding, what you need to be able to get tax deductibility status, and in particular the most recent changes where you have that stuff about the parties and whether people from other organisations are involved in choosing your candidates. That then affects how your money is worked out for your expenditure limits. So, all those things affect the internal workings of parties. As a general principle, I would probably say that in some areas you may need to but, to the extent you can avoid getting into internal party politics, it is probably a good thing.

Mr PAUL LYNCH: I think also professor, it is true to say that, over the years, the courts have intervened far more frequently in political parties than they used to. Cameron v Hogan is long dead and entirely irrelevant now.

CHAIR: We might quickly go around the table in order to give everyone an opportunity and then we will take some closing statements. I will start with the Deputy Chair.

The Hon. ROBERT BORSAK: I find the whole concept—regardless of whether it is the Electoral Commissioner or anybody else that is involved in the administration of law—of looking for or perhaps suggesting wider areas and of having more discretion in terms of, effectively, setting the law. This is coming from a member of Parliament with my background where the members who support my party are heavily regulated and controlled by certain parts of the bureaucracy in this State, to the point where they are continually appearing in front of the Administrative Decisions Tribunal and other places, to have administrative decisions decided.

It is very hard for me to grasp and accept that the Parliament should be granting more power to, in this case, the Electoral Commissioner and, if anything, I would be leaning the other way and looking for a more granular approach by Parliament to the detail of what is in the Act and also the detail of what ends up in regulations. I do not see a problem—although I also have difficulties, because I am not a lawyer, in following both the Acts that you are talking about. But I take that as part of the glad cost of having a democracy that is represented, as imperfectly as it is, by the people around this table and members of both Houses. If anything, I would be leaning more the other way in relation to these matters.

Mr PAUL LYNCH: I have no further questions.

The Hon. PETER PRIMROSE: Mr Khan asked a similar question to the one I was going to ask, so thank you.

The Hon. Dr PETER PHELPS: Professor Twomey, surely there is a strong argument now for removing the provisions relating to elections from the Constitution, isn't there?

Professor TWOMEY: Oh yes, I would be more than happy to get rid of that schedule up the back, it is a pain in the neck. I will give you one example of where we have a ridiculous law as a consequence of it and that is, when we did change the electoral laws so as to have optional above-the-line voting, the problem was that the Constitution says that you have to vote for at least 15 people and the risk was that people voting above the line would put "1" in one box and not fill out any of the other boxes. If that party did not have 15 people in it, then the vote would be invalid. So we ended up having to put in a requirement that every party that was above

the line had to have 15 members. It is stupid. Then we had the problem of, what if one of your members dies in the election campaign? So we had to put in a "death of a candidate" provision so that each party has to nominate somewhere for their vote to flow if one of their members dies. Those sorts of absurdities follow from the stuff that is entrenched in the Constitution.

The Hon. Dr PETER PHELPS: And all of which are now entrenched through manner and form.

Professor TWOMEY: Yes, they are entrenched in manner and form provisions and it does mean that it is difficult getting it out.

The Hon. Dr PETER PHELPS: But it should be gone.

Professor TWOMEY: It should be gone. I would be very happy to vote for it to go. It is really inappropriate and it should not be there. If you want me to, I could have a look to see whether there is any possibility that you could get it out without a referendum but it is probably fairly well-entrenched.

The Hon. Dr PETER PHELPS: In closing, can I say that from my own experience, I do believe that there should be a great degree of flexibility for the minutiae—and literally the minutiae—of electoral administration. However, even as a Government member, I think the preponderance of power in the Executive in this State, where we have a whole series of Star Chambers exercising quasi-judicial authority, the last thing I want is to create yet another executive power structure that exercises, not only legislative but quasi-legislative and quasi-judicial authority. I am quite happy to see the proper place of Parliament maintained.

The Hon. TREVOR KHAN: I am happy.

Mr GARETH WARD: I think that sometimes the best test of a law is how much time you spend in court debating it. But I think that if Parliament can spend—

The Hon. TREVOR KHAN: I don't think that is a good test at all.

Mr GARETH WARD: You cannot replace the role of Parliament with officers all the time but I think that the Electoral Commission is appointed for a reason. The problem comes with complexity and there is so much complexity, which I think Professor Twomey was talking about before. I am really looking forward to re-reading the Hansard because I think there has been a lot of productive discussion over this particular session and I am looking forward to analysing that further.

Mr DARYL MAGUIRE: I think it has been a very productive morning, thank you everyone. I have enjoyed the dialogue.

Mr ANDREW FRASER: Thank you for coming. It has been productive. It is an area of interest for me and I think this morning has been good. Like my colleagues, I am interested to go back and read the Constitution Act and a few other Acts, to have a look at where we are and where we need to go.

The Hon. Dr PETER PHELPS: And of course, Professor Twomey's excellent annotated guide to the Constitution, available from Federation Press at a minor price, all of which is claimable on your Logistic Support Allocation.

Professor TWOMEY: And if you want to change the Constitution so that I need to put out a second edition, I am more than happy.

CHAIR: Are there any further comments that any of our witnesses would like to make, any recommendations you would like us to have a look at or any other suggestions?

Dr GAUJA: A brief statement and this is a simple suggestion, that if you do, in fact, re-draft the Act, it seems an obvious thing but connecting the basic principles to the legislative detail will go a long way towards increasing public confidence in the document. Some provisions are extraordinarily detailed and because they are so detailed, there is a perception that they serve partisan interests. That may or may not be the case. For the purposes of today I am going to say it is not going to be the case. But putting the underlying principles will not only help increase public confidence but it will also help in the administration and interpretation of the Act.

The Hon. TREVOR KHAN: I would like to ask a question of particularly Professor Twomey but maybe of Professor Orr as well. Could you consider whether it is possible to get the electoral material out of the Constitution Act, and whether it is possible to do that in an essentially two-stage process of unlocking the provisions from the Act?

Professor TWOMEY: It comes down to this: there are two issues here. One is whether the stuff entrenched in the Constitution is only entrenched by the Australia Acts and not by anything else. My view is that it probably is only the Australia Acts. So, if we say that is right for present purposes, then the next question is: Would a law taking out those provisions be a law for the constitution, powers and procedures of the Parliament, or not? So the big question then is: Do these electoral laws amount to laws with respect to the constitution of the Parliament, that is, how you make up the Parliament? There is a fairly good argument that an electoral law is about how you make up the Parliament; and so it is pretty likely that those ones are entrenched. Whereas regarding many other provisions that are purportedly entrenched in the Constitution—say, for example, the whole part on the judiciary—it would be very hard to say amending the bit on the judiciary was a law with respect to the constitution, powers and procedures of the Parliament.

So there is a lot of stuff in the Constitution that is probably not effectively entrenched. But, when it comes to the voting provisions down the end, there is at least a fair argument that those provisions about voting are provisions with respect to the constitution of the Parliament, because by voting you are choosing the members and that is how you constitute the Parliament. In many cases, I would be pretty bolshie about saying: yes, there are certain things you can get rid of that are purportedly entrenched that are not really entrenched; and probably with those ones you really would need a referendum to get rid of them.

Professor ORR: I will bow to Professor Twomey on the constitutional issue. Dare I say, you may also have a political problem if any single political activist or group would want to say: "You're trying to get rid of stuff when there was meant to be a referendum, it's a threat to democracy", even if it is the absurd stuff that is in the seventh schedule that I mentioned earlier as a classic example: too much setting of detail at the wrong level. That precisely relates to the point that Colin Barry was trying to make about the setting of the right level of detail. You have got an example there in New South Wales where you are a little bit snookered.

Professor TWOMEY: I should add that Queensland is the only place that has ever done that; it actually removed an entrenched provision from its constitution without doing the referendum. So Queensland has been game enough to do it. But no-one ever challenged it, so we did not get a view on that. That was about appointments to the public service.

CHAIR: We might wrap up there. I take this opportunity to thank all four witnesses. The discussion has been very thorough and has raised a number of issues that the Committee is interested in looking at. All members of the Committee have valued the discussion we have had. So I thank each and every one of you.

Should you wish to provide some more information, you are more than welcome to do so by way of official submission. The Committee may wish to send you some additional questions in writing, the replies to which will form part of your evidence and made public. Would you be happy to provide a written reply to any further questions?

ALL WITNESSES: Yes.

CHAIR: I take that as a unanimous yes. Thank you very much for your attendance.

(The witnesses withdrew)

(The Committee adjourned at 1.13 p.m.)