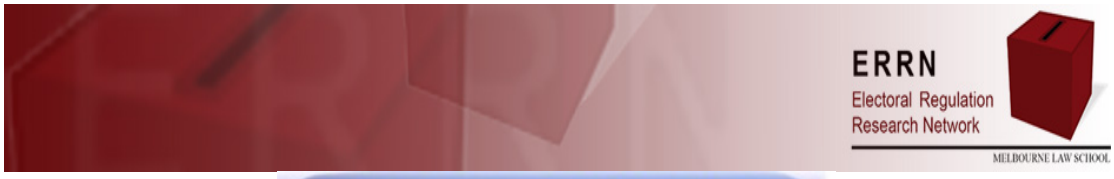

ELECTORAL REGULATION RESEARCH NETWORK/DEMOCRATIC AUDIT OF AUSTRALIA JOINT WORKING PAPER SERIES

A VICTORIAN'S RESPONSE TO THE DISCUSSION PAPER: "DEVELOPING A LEGISLATIVE FRAMEWORK FOR A COMPLEX AND DYNAMIC ELECTORAL ENVIRONMENT" BY MALEY AND ORR[1]

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[1] This working paper is based on a presentation given at the Electoral Regulation Research Network workshop on 'Developing a Legislative Framework for a Complex and Dynamic Electoral Environment' held in at the Melbourne Law School in October 2019.

Abstract

This paper provides a response to the discussion paper prepared by Michael Maley and Professor Graeme Orr (see Working Paper 64).

Introduction

As public institutions, electoral commissions are inherently creatures of statute. The roles electoral commissions perform on behalf of their respective jurisdiction expand and contract according to the will of their Parliament and governments-of-the-day. At the same time, electoral commissions commit to a deeper principle than ordinary public service; we overtly have a fundamental responsibility to deliver democracy to citizens and to do so independently from political interests. This dichotomy creates friction between the legislative frameworks governing electoral commissions, those responsible for determining that framework, and the expectations of the electoral systems electoral commissions administer.

This paper provides my response to the discussion paper by two thought-leaders in Australia's electoral systems – Michael Maley and Professor Graeme Orr. In their discussion paper, the authors consider models for the establishment and maintenance of electoral frameworks, including the role of electoral commissions in that process. They compare and contrast the merits of a system that includes detailed and prescriptive electoral law, as opposed to a more principles-based approach that would provide electoral commissions with greater flexibility to develop and adjust operational procedures within a set of established principles and standards. How to get the balance right between these two options was a focus of the discussion paper.

My reply includes some general comments on the ideas put forward in the paper, then considers these in the Victorian context, in particular, highlighting the challenges of establishing and maintaining a more principles-based approach for electoral legislative frameworks.

To begin with however, I note that my thoughts are my own and do not reflect a formal position of the Victorian Electoral Commission (VEC).

General observations

The authors put forward the observation that there is an increasing expectation that electoral commissions are actively engaged with the improvement and modernisation of election conduct, and that this has contributed to a perception that commissions are able to make policy directly, or to exercise more administrative discretion than is actually the case.

This perception reflects the challenge of articulating where 'the line' is for electoral commissions in contributing to electoral reform, and the varied levels of discretionary powers that exist for commissions across different jurisdictions in designing the operational aspects of election delivery.

As experts in the delivery of elections, electoral commissions should be, and are important contributors to designing and enhancing their respective electoral frameworks, but only to the extent that this contribution does not distract from their independent conduct of elections.

Electoral commissions understand (and ought to promote) the practicalities of reform proposals, always in the interests of enhancing and protecting our delivery of democracy - ensuring proposals are consistent with the fundamental principles of independent and fair election conduct. We can play an important role to assess and balance policy proposals, advising and informing against proposals that are too prescriptive or impractical to the extent that they remove the flexibility that is an essential part of managing a dynamic electoral environment.

In considering the merits of different models for the development and enhancement of electoral legislation, the authors note a number of advantages that are inherent in a principles-based approach. One key advantage is the increased flexibility that can be achieved by removing administrative elements from the principal legislation, allowing electoral commissions to more quickly respond to changing electoral environments and expectations of contemporary service delivery.

In the Australian context, there is a further advantage - which is the increased opportunity for harmonisation across jurisdictions while maintaining the flexibility for local solutions to local problems. Many barriers to harmonisation are due to mechanical and administrative differences between jurisdictions that reside in the principal legislation. Removing these barriers provides the opportunity for greater consistency across jurisdictions in procedures, definitions and potentially election management systems.

In addition, having a clearly defined set of principles and standards on which all electoral legislation is based would enable departures from best-practice and/or harmonisation to be visible and intentional. For these reasons, I would recommend that 'harmonisation as an aspiration' be considered an additional principle for any Australian electoral framework.

The authors also discuss the challenges associated with adopting and maintaining 'delegated rule-making', through subordinate instruments. To highlight this point, I will turn to the Victorian context and look at how the regulatory framework has evolved over time.

The regulatory framework for Victoria's electoral system

Victoria's electoral system is governed by the *Constitution Act 1975*, *Electoral Act 2002* (Electoral Act) and *Electoral Boundaries Commission Act 1982*.

The Electoral Act includes subordinate legislation relevant to the direction, management and operation of parts of the above through the Electoral Regulations 2012 and determinations issued by the VEC pursuant to the principal act. The former is set by the Governor-in-Council and the latter is delegated to the Electoral Commissioner.

In addition, the Electoral Act allows for Victoria to maintain a joint enrolment procedure with the Commonwealth, which is articulated in more detail in an agreement between the Governor-General of the Commonwealth and the Governor of Victoria. The current agreement was executed in 2005, although a joint enrolment procedure between the two jurisdictions was codified from the 1920s. This joint procedure is particularly relevant to the discussion on harmonisation, as the Electoral Act cross-references the *Commonwealth Electoral Act 1918* for managing specific enrolment circumstances and provides for a joint roll partnership that operates under the laws of two jurisdictions.

The joint roll arrangement is a useful example of the principles of harmonisation and flexibility within the regulatory framework governing Victoria's electoral system. The arrangement provides for administrative and operational efficiencies for joint enrolment processing on behalf of both jurisdictions, which ultimately benefits Victorians and simplifies their obligation to enrol for Commonwealth and Victorian elections. There are, however, areas where the two jurisdictions do not align, and the flexibility of Victoria's legislative framework offering but not insisting on the joint enrolment procedure compensates for these areas where variations exist.

The Electoral Act itself establishes the Victorian Electoral Commission and provides for the following functions:

- the appointment of the Electoral Commissioner, Deputy Electoral Commissioner, election managers and election officials, and the employment of staff,
- the responsibilities, functions and powers of the VEC,
- the enrolment process, including the establishment, maintenance and updating of the Victorian register of electors, as well as the collection and dissemination of enrolment information,
- the registration of political parties,
- election procedures and arrangements for holding elections (and by-elections), who is entitled to vote and how voting may occur,
- the scrutiny and counting of votes,
- the Court of Disputed Returns to hear disputes for an election,
- offences in respect to an election or an activity of the VEC, including compulsory voting, and
- public funding for eligible participants of an election, as well as the extent of permitted political donations and the audit and disclosure requirements for donations.

While these functions are appropriately covered in the principal legislation, some detail can be more prescriptive than necessary and be more appropriately placed in the subordinate legislation.

The Electoral Act replaced *The Constitution Act Amendment Act 1958* (TCAA Act) following a recommendation from the VEC after the 1999 Victorian State election. This was at a time when electoral commissions were looking to better utilise advancing technology to support election conduct.

When the Electoral Act was first introduced in 2002, the then minister's second reading speech lauded the legislation for its greater accountability and flexibility, especially compared with the TCAA Act. Specifically, the minister noted:[2]

[2] Hansard: Victorian Legislative Assembly Thursday 21 March 2002

> "The act has never been thoroughly revised, yet has been amended on numerous occasions. The result is that Victoria's electoral legislation has a number of deficiencies:
>
> > It is extremely prescriptive in some areas and lacking in detail in others
> > It is written in difficult language and is poorly organised
> > It does not provide for modern election management practices; and
> > In some cases, it is out of step with current electoral practice and community expectations."

For example, the TCAA Act included:

> S. 251 (1) Every person not being duly authorized who wears, carries or has on or about his person any gun, pistol, sword, bludgeon or other offensive weapon at any election, shall be liable to a penalty of not less than Two nor more than Twenty pounds.

I note that the first version of the Electoral Act was around half the size of the previous TCAA Act, with pages reducing from 321 to 169. The new Electoral Regulations 2002 were also less prescriptive – for example, prescribing only content for forms, leaving design and layout to the commission.

Seventeen years on and the Electoral Act has continued to change through numerous reforms. The VEC's contribution to these changes has been mixed, as I will soon discuss. The irregularity of reform and society's rapidly changing expectations mean that the Electoral Act – considered modern in its time – now lacks some relevance for more contemporary challenges. As an example, the Electoral Act specifies certain methods of delivering election information, be it to or from electors by post (e.g. postal votes) or broader audiences through newspaper advertising. Even since the passage of the Electoral Act, the community's expectations have changed to the point where many may not use, or even have, mailboxes, and printed news consumption continues to decline.

While the intention in 2002 was to take a more principles-based approach to the design and maintenance of the electoral legislation, this has been difficult to maintain over time.

VEC contribution

The VEC has had mixed success in influencing regulatory change. The Electoral Act imposes a requirement for the VEC to report to the Victorian Parliament after a state general election and, more generally, to promote public awareness and to conduct and promote research into electoral matters that are in the public interest. It has been generally through these formal instruments, at the direction or under the auspices of the Electoral Act, where the VEC has advanced changes to the legislative framework.

In almost all cases, the recommendations advanced through these reporting methods were prompted by practical or technical issues with the existing framework. This is symptomatic of

the history of minor pieces of reform, where practical issues within the regulatory framework have generally been addressed piece-by-piece.

One way to measure the success of the VEC's contribution to electoral reform is to track the status of recommendations made by the VEC over time. Figure 1 shows the result of an analysis of recommendations made by the VEC in its reports to Parliament since 1989, when the independent statutory office of the Electoral Commissioner was established. Of note is the average time period of 5.4 years for realising a legislative outcome resulting from a recommendation. In effect, this is two electoral cycles.

Total recommendations since 1989	116	(11 were repeated)
- Addressed, wholly/partly	95	82%
- Not addressed	21	18%
- Addressed by *Electoral Act 2002*	26	22%
Average time for legislative response to recommendations	5.4 years	

Figure 1 – Outcome of VEC recommendations for legislative change

The VEC's formal reports, however, are not the only way the VEC will contribute to policy proposals. In addition to inquiring into state elections, the Victorian Parliament's Electoral Matters Committee will ordinarily hold several inquiries during each parliamentary term. The VEC is often called to make a submission, provide evidence and make recommendations on the topic before the committee. These inquiries have led to some changes in the framework governing Victoria's electoral environment, including the introduction of direct and on-the-day enrolment as a result of the Committee's 2009 Inquiry into Voter Participation and Informal Voting. Other proposals have been less successful. For example, the Electoral Matters Committee's Inquiry into Electronic Voting in 2017 made recommendations that did not resolve the immediate pressures on the VEC, to offer an internet voting solution for a specific cohort of electors who face barriers in recording an independent and secret vote via traditional voting channels.

If we look at the election cycle and the activities that inform electoral reform, we gain some insight to the length of time between recommendations and implementation.

If we accept the core purpose of electoral commissions is to administer election events, their capacity to contribute to and effectively implement legislative reform must always be a consideration. For instance, Victoria has a state-wide electoral event every two years — either a state general election or local government general elections — and the VEC administers both. The lead-in time for state and local government general elections is similar, approximately 18-months before election day in total; although velocity increases for the calendar year of the election and then increases again two or three months out from the election. The capacity for electoral commissions to implement major reform without risking these peak election events is therefore limited to the reduced 'in between' times.

From the other perspective, the ability for these electoral activities to inform and enable policy development is also limited. The post-election evaluation period is the best opportunity to identify future improvements and recommend policy or process changes. The VEC is required to report to Parliament on the conduct of the election within 12 months of the election – this report usually includes recommendations for legislative change. In addition, the Victorian Parliament will conduct its inquiry into the conduct of the election through its Electoral Matters Committee which will propose recommendations for electoral reform via its inquiry report. The Government then has six months to respond. Additional time is then needed for recommendations supported by the Government to pass through the Cabinet and drafting processes, which often overlap with the period when the electoral commission is preparing for the next electoral event (see Figure 2).

Consequently, the ability to implement changes to the principal legislation within one election cycle is limited.

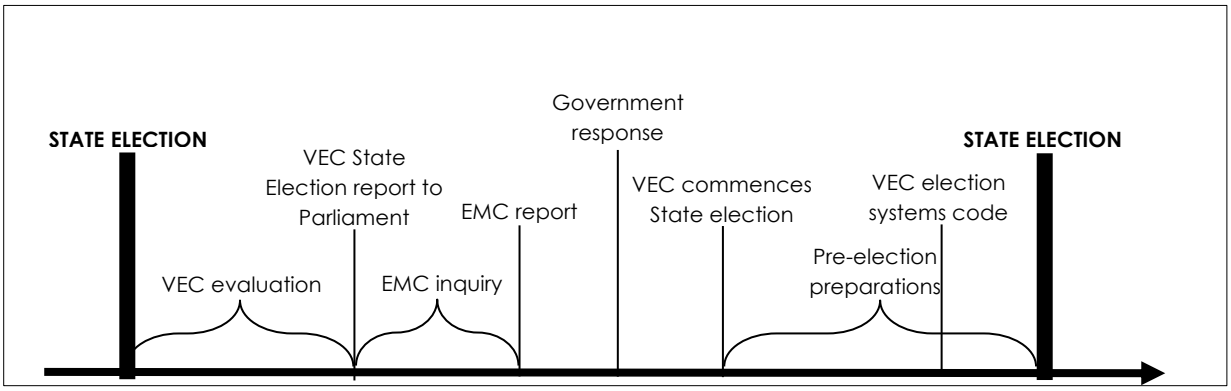

Figure 2 – Planning timeline between two State elections.

Electoral commissions would be able to improve systems and processes in a more timely way where regulatory frameworks are designed to delegate the mechanical and technical elements of election processes to subordinate legislation or instruments.

Political funding and disclosure laws in Victoria

Victoria's new political funding and disclosure laws were introduced into the Electoral Act in August 2018, having been slated by the state government in November 2017. The Victorian State election was held in November 2018, so the passage of legislation through Parliament was very late in the election cycle. Eventually, and helpfully for practical purposes within the VEC, a phased timeline was passed by the Parliament to on-board the new funding and disclosure laws, which are now fully implemented.

The drafting and decision-making were led by the government and, while consultation with the VEC did occur, the extent to which the VEC was able to influence these decisions was limited by the VEC being at arm's length from the reform.

A desktop review of the funding and disclosure provisions inserted into the Electoral Act through this process will show that the level of technical prescription in the principal act appears to be out of step with the original intention for the Electoral Act back in 2002. To

illustrate this point, I note that the 14 pages that previously comprised Part 12 'Electoral Expenditure' of the pre-amendment Electoral Act was replaced with a new Part 12 'Electoral Expenditure and Political Donations' measuring some 88 pages in Victoria's statute books. Interestingly, there is just one regulation and six determinations included in the subordinate instruments. The principal Act still prescribes amounts, caps and thresholds that were out-of-date within eight months of their 'go live' date because of the indexation requirements built into those amounts.

This example may demonstrate the notion that the political appetite for a more principles-based approach may be lower for significant reforms not yet tested in a particular jurisdiction, and secondly that maintaining such an approach is more difficult when reform is being pursued late in the election cycle when time pressures are extreme.

Conclusion

Victoria observed a significant and intentional step to remove outdated and overly prescriptive electoral legislation with the introduction of the Electoral Act and its subordinate instruments. Since then there have been incremental policy changes providing examples of slow but steady maintenance of the electoral system. The introduction of an electoral funding and disclosure regime in 2018 represented a significant policy change, but the level of prescription included in the Electoral Act appeared to be at odds with the more principles-based approach adopted in 2002. This may change as these reforms are more fully tested within the protection of the principal legislation.

This cements my contention that a more principles-based approach to the development and maintenance of electoral frameworks has many advantages, and more so if pursued nationally. Agreement on the subjects and areas of electoral law that could be appropriately delegated to subordinate instruments or electoral commissions may be difficult to achieve but would benefit the Australian context. This arrangement would:

- provide greater clarity on 'the line' for electoral commissions to stop pursuing changes to electoral policy as part of their independent role
- drive harmonisation across jurisdictions allowing for greater consistency in election systems, procedures and ultimately, elector experience
- provide a strong baseline so deviations from agreed principles and standards can be made transparently and intentionally
- enable the level of prescription provided in the principal legislation to remain more consistent over time and
- allow changes to procedures within delegated elements to be implemented more seamlessly, allowing commissions to be more responsive to changing elector expectations and the emergence of enabling technologies.

I thank the authors for framing this important discussion. I look forward to the ongoing challenge of ensuring Australian electoral services continue to improve and advance with the elector clearly in focus, while still maintaining the fundamental principle of independent election conduct.