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**RESEARCH AND ELECTORAL REGULATION**

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*The views expressed in this paper are my own and do not necessarily reflect those of the electoral jurisdictions with which I have worked or been associated as an electoral administrator.*

My work has been mainly with smaller electoral commissions that have more limited budgets and resources for research per se. The larger commissions have more defined research agendas and a larger resource base on which to draw.

The common business objectives for the electoral jurisdictions are the three Es - enrolment, election conduct and electoral education, all of which are targeted by the electoral commissions for research.

The paper will concentrate on the regulatory environment for parliamentary elections in Australia and the interface with research - what, why, when and how.

Excluded from the discussion will be four areas:

- Industrial ballot regulation – increasingly formalised according to electoral best practice, often advocated by the electoral administrations which conduct a number of government enterprise agreement ballots and elections in the non-government sectors;
- The legal framework for boundary redistributions – largely the province of the independent committees set up to review and determine electoral boundaries and set out in either electoral or constitutional statutes;<sup>1</sup>
- Local government (LG) legislation - of relevance to all jurisdictions apart from the ACT, where there is no local governance structure, and the Australian Electoral Commission (AEC), which has no legislative responsibilities for LG matters unless by appointment;
- Lastly, regulation in overseas jurisdictions.

Nevertheless, awareness of practices, procedures and developments in these sectors and any debates on electoral matters can have a bearing on, and may be used as a point of reference or even as a test environment for, new methodologies if circumstances permit.

## 1 What do we mean by research

According to the Shorter Oxford English Dictionary: To study closely, investigate, enquire into a matter or subject.<sup>2</sup>

## 2 And regulation?

The act of regulating or the state of being regulated. A rule prescribed for the management of some matter or the regulating of conduct; a governing precept or direction.<sup>3</sup>

Regulations (plural) are an addendum to the principal statute that can add detail to the main act. The regulations were, and some still are, quite prescriptive – for example outlining the forms to

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<sup>1</sup> The NT and Commonwealth Electoral Acts contain sections on redistribution committee composition and proceedings; in SA, the SA *Constitution Act 1934* contains redistribution criteria.

<sup>2</sup> *The Shorter Oxford English Dictionary*, 1975. 3<sup>rd</sup> edition.

<sup>3</sup> Ibid

be used and their wording. Such details may no longer be prescribed, which allows the commissions today to more readily modify and update forms in the light of contemporary use of language and modern formatting to make them more user friendly.

Regulations are changed more easily than opening up the principal act to debate and discussion. The latter demands a commitment of parliamentary time as well as concentrated effort by the commissions and their staff to assess what could be a number of iterations until debate has concluded or lapsed. Both require careful drafting.

‘Electoral law is a major cornerstone of our democracy’. These are Andy Becker’s words, former Electoral Commissioner for South Australia and Australia, written in his foreword to the first book examining aspects of electoral law in Australia, *Realising democracy*.<sup>4</sup> The flyleaf of that book states quite elegantly:

*Electoral law defines and shapes the rights and obligations of every aspect of elections, from core elements such as the franchise and voting system, to the minutiae of the administration of elections. To understand Australian electoral law, its history and its contours, to identify and question its failings and to propose its reform, is to come to know the essential features of Australian democracy.*

Colin Hughes, in a paper in that same volume reminds us that the procedures laid down by statute ‘often carry severe penalties for breaches that constitute offences.’<sup>5</sup> This paper will not examine electoral law that may require redress (e.g. non-voting and non-compliance with matters such as disclosure, advertising and authorisation regimes).

The electoral legislation administered by the commissions may not, in all cases, prescribe the qualifications of members of parliament, the term of the parliament and boundary redistribution matters. These may be contained in constitutional statutes. However the commissions need to encompass those considerations in their regulatory environment.

The ACT and NT do not have the status of the states, and in some instances their legislation has a nexus with the *Commonwealth Electoral Act 1918* (CEA) which provided the base for their electoral legislation when self-government was granted. Not all jurisdictions have funding and disclosure provisions and the regulatory framework for each has unique aspects.

### 3 What research do the commissions carry out vis à vis their regulatory environment?

The electoral commissions are NOT regulators; they do not ‘make’ electoral law. That is the role of the legislators in the parliament. The commissions administer and implement the law and may:

- Suggest or recommend changes to the law as it stands

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<sup>4</sup> *Realizing democracy, Electoral Law in Australia*. Edited by Graeme Orr, Bryan Mercurio, George Williams 2003. Annandale, NSW: The Federation Press

<sup>5</sup> Colin Hughes. 2003. The Independence of the Commissions. In *Realizing democracy, Electoral Law in Australia*. Edited by Graeme Orr, Bryan Mercurio, George Williams. Annandale, NSW: The Federation Press

- Provide feedback/information on request to legislators, responsible ministers, select and standing parliamentary committees.

The parliament, the regulatory body, does not have to accept or accede to any recommendations placed before it and may pursue an initiative of its own.

Jenny Brock, journalist and TV Anchor who hosts *Insight* on SBS, said in relation to preparation for her programs that ‘Research gives you confidence.’<sup>6</sup>

Research for the electoral commissions supports historical and contemporary understandings of their business and provides pointers to the future:

- Understanding the past – from early colonial electoral regulation in this country, in the 1850’s, how it has progressed and why. The past can provide benchmarks for the future – recognition of what needs to be safeguarded in relation to the franchise, access by electors to facilities to vote and the democratic principles on which elections are held;
- Monitoring and evaluating the present - what elements of the system are working, what needs refinement, identifying where the law needs to support changes in practice and provide enforcement to modern procedures so that in the hurly burly of an election the likelihood of a challenge to those procedures does not occur. It is not always a case of ‘if it’s not broke, don’t fix it.’ Law-makers are in the main cautious in their response to change and reflective in discussions on change and there needs to be solid groundwork to research and prepare a case for change;
- Looking to the future - at electoral and ITC developments and seeing if and how these can be modified or adopted for electoral administration in a cost effective and efficient manner and be countenanced in law;
- Research also means constant reference and regard to the community, the young, the elderly, indigenous, ethnic and other minority groups: how best to serve and engage them, elicit a response to enrolment, education and election campaigns via you-tube, SMS messaging, facebook and other emerging interactive technologies, as well as conventional advertising and learning methodologies; how to network with the education sectors and the media to promote interest in electoral matters, while at the same time staying at arm’s length from their discourse.

Research in one sphere of operation can have spin-off effects for another jurisdiction (e.g. the AEC undertook the research and development necessary to introduce a computerised system for counting votes in Senate elections). The new system was field tested in 1985 in SA on the upper house count before being used in a Commonwealth election. PDAs (also known as palmtop computers/personal data or digital assistants) for elector roll checks and netbooks for marking electors off the roll (the latter used initially in Tasmania) had been successfully used interstate before they were trialled at local government by-elections in the NT. Amendments were suggested last year to NT parliamentary and local government electoral legislation. One of the amendments that was supported was to allow the Electoral Commissioner to approve electronic

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<sup>6</sup> *The Weekend Australian Magazine*, 2012 April 07-08, p12

or other automated systems for specified purposes, provided proper notice is given of their adoption and implementation<sup>7</sup>. Testing in this case preceded endorsement in law.

#### 4 Why do the electoral jurisdictions undertake regulatory research

Following the repositioning of many of the electoral agencies as commissions with independent commissioners, commencing in the early 1980's, many were tasked with a statutory obligation to conduct research.

Given the resources available, the focus is largely on operational evaluation as the commissions review:

- Their own and their counterparts current practices and programs to assess whether they are working well and meet contemporary demands;
- Developments here in Australia and overseas.

Their investigations are likely to lead to further fact finding and investigation of new methodologies in relation to program management and possibly recommendations to regulators to update the regulatory framework so that the law has currency and reflects emerging practices.

On the other hand, commentators, from academia, the media and other interest groups, may draw attention to electoral issues and question their relevance, suitability or the outcomes being achieved. Those same commentators may also question the law as it stands. Such commentary may itself lead the commissions to undertake research or be asked to investigate a matter.

In the 1980s/early 1990's, the AEC undertook research for a compendium to assess similarities and differences in electoral law amongst the various jurisdictions, using its own resources. Competing priorities in its workload and the difficulty of maintaining up-to-date cross-jurisdictional data resulted in the project lapsing. The current interest in harmonisation of electoral law may make such a project easier.

In December 2002, mindful of the lack of research on electoral law in Australia, the commissions, with strong leadership support from Steve Tully, the then SA Electoral Commissioner, and funding from the Australian Research Council (ARC) sponsored a conference and examination of Australian electoral law, that resulted in the first book in Australia to focus on the law relating to elections<sup>8</sup>. It brought researchers and practitioners from a number of disciplines and the industry together.

Differences in legislation and practice amongst the jurisdictions has led to discussions on the desirability and practicalities of achieving uniformity in electoral regulation, so as to minimise confusion for electors and facilitate cross-jurisdictional comparisons and implementation of electoral requirements. The 2008 and 2009 Green Papers, which contained data from all jurisdictions, promoted discussion of electoral reform and harmonisation of electoral law,

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<sup>7</sup> NT *Electoral Act* s85A

<sup>8</sup> *Realizing democracy, Electoral Law in Australia*. Edited by Graeme Orr, Bryan Mercurio, George Williams 2003. Annandale, NSW: The Federation Press.

discussions that are still being pursued. Substantial progress will require the support of responsible ministers and co-operation from the commissions themselves. It has and will continue to engender much interest by analysts and commentators in the fundamentals of the system (e.g. uniformity in modern enrolment capacities, party registration criteria, funding and disclosure requirements).<sup>9</sup>

## 5 When do the electoral jurisdictions carry out research

The commissions never stop reviewing and examining their practices and procedures or their regulatory framework. The commissions have a three to four year business cycle and use the time between elections to strategically review, investigate and plan programs for the next round of elections.

In the wrap-up after elections, particularly after general elections that test the robustness of the electoral system, there is a focus on the legal framework to see if it withstood the demands placed on it.

For some jurisdictions, recommendations for change can be brought to the attention of the responsible minister, for example the Attorney-General in SA, the Speaker of the Legislative Assembly in the NT, in a report on a particular event that may contain critique of, and recommend changes to, the legislation.

The AEC's recommendations are put to and discussed by an all-party committee of parliamentarians - the Joint Standing Committee on Electoral Matters (JSCEM) that may also examine matters not specifically raised by the AEC.

The government of the day may flag an intention to open up the legislation for review. Proposed changes are not necessarily tabled between all general elections.

Even if research relating to amendments has been timely, and changes are passed, sometimes enactment and assent occur very close to an election with little time to implement appropriate procedures, or consult adequately with stakeholders. Changes approved late in the cycle may be subject to delayed implementation or present risks to their successful introduction.

Some operational changes need the support of the law, but are non-controversial and do not need any investigative work. For example, the number of postal and pre-poll votes lodged is now nearly one-fifth of all votes lodged. The volume of these mean they can no longer be stored in ballot boxes, as was required by law but are locked in cabinets or other secure facilities. This has not been a controversial change for which to seek endorsement, merely a matter of practicality

That same volume of pre-poll votes has also led to some commissions asking for regulatory changes so that these votes can be lodged straight into ballot boxes rather than enclosed in envelopes, which take time to open. The commissions' accountability extends to investigating

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<sup>9</sup> Electoral Reform Green Paper. *Donations, Funding and Expenditure*, Commonwealth of Australia 2008 and Electoral Reform Green Paper, *Strengthening Australia's Democracy*, Commonwealth of Australia 2009.

appropriate mechanisms for implementing any changes: the equipment, processing methods and training.

Other changes like enrolling on-line, automatic enrolment, internet voting are more contentious, and may be debated at more length in separate legislation. Manual procedures for maintaining the roll, processing postal votes and vote counting and preference distribution in multi-member elections have long been replaced with automated computer systems. Such changes require endorsement in law to ensure compliance without challenge and interruption to the electoral processes, particularly during the tense and time critical election period.

In this country, for government elections, electors still generally use pencil and paper to mark their vote. In some jurisdictions, provisions exist for electronic voting (by internet and telephone and at kiosks) for the sight impaired, language disabled, defence personnel, Antarctic voters and, on a more limited basis at the moment, for the general public. The technology exists, in some instances the supporting regulation is in place, but the capacity to resource such an undertaking universally is lacking with, at this stage, no cast iron guarantees of full system integrity in a cost effective environment.

Major reforms to electoral processes require detailed discussion, procedural and system planning and testing in order to gain support in legislation. Current moves to have on-line enrolment, or voting in line with public expectations to use web technologies, must be matched by maintenance of parallel systems for the non-technically proficient or for locations where web technologies are not readily or reliably available, as in many remote areas.

The commissions use special occasions to celebrate aspects of the electoral system and consolidate research. The historical significance of the 1894 enactment of women getting the vote and being able to stand for parliament in SA was revisited in 1994, 100 years later.

The occasion was also used to focus on the franchise in general, to publicise the fact that Aborigines had never been denied the vote in SA, to explore the gradual widening of the more restricted upper house franchise to war veterans and a broader range of occupational classes, up to parity with the lower house being legislated in 1973.

The then State Electoral Office, the SA parliament, and researchers from the SA History Museum all came together, having sourced funding from outside the normal budgets, to gather information and mount displays on what had been a momentous change to the franchise. These facts were also picked up by the media and given space in the press and on-air. This year, 2012, the AEC is celebrating 50 years of the indigenous vote in Commonwealth elections. Such occasions provide opportunities to revisit known material and incorporate more recent information gathered by other researchers.

Referendums, infrequent as they are, are another opportunity to update the legislation and for researchers to review material on previous events and make comparisons with referenda, CIR and plebiscite developments elsewhere. By-elections can be a testing ground for innovative procedures that can subsequently be given force in legislation.

Besides special events, a jurisdiction might investigate a matter in response to an issue in the public domain e.g. the AEC has examined material contained in the 2012 Fair Work Australia

report relating to disclosure of campaign donations by the NSW branch of the Health Services Union. It has been indicated that the JSCEM will review the AEC findings to see whether changes in the law might be appropriate.<sup>10</sup>

Petitions to a court of disputed returns require thorough investigation of the matters being challenged. A judgment in one jurisdiction may also lead to legislative change in another: most candidate material is now required to carry the authoriser's and printer's names and addresses so that the contents cannot hide behind the mask of anonymity. This follows cases, for example, in SA<sup>11</sup> and Queensland.<sup>12</sup>

## 6 How do the jurisdictions carry out and progress research?

The what, why and when of research for the commissions are in the main determined by business imperatives. The 'how' may be of more interest to commentators and analysts of the system:

- \* Individually the commissions will undertake research, depending on the where they are in the electoral cycle, their business agenda and budget. They may fund research from the recurrent budget, special funding allocations or external sources;
- \* Collectively research can be promoted via:
  - \* The Electoral Council of Australia (ECA), at which representatives of the AEC and state /territory commissions discuss key matters such as enrolment;
  - \* State and Territory Electoral Commissioners (STEC) forums which discuss and investigate issues that are of concern to those jurisdictions and which might promote ITC resource and knowledge sharing, capacity building and staff development opportunities;
  - \* Alliances with universities and research funding bodies;
  - \* Global comparisons and fact finding missions with overseas agencies, both other electoral commissions and international agencies such as IFES and IDEA.

ECA and STEC can pool resources to fund research ventures. Academics and independent consultants may be requested to undertake a particular piece of research. The jointly sponsored ECA/ARC examination of electoral law, is an example. The Electoral Commission in SA has on several occasions funded research to which the agency was not able to dedicate its own resources due to workload commitments. The budget was often allocated across more than one financial year, and the project carefully phased to see it through to completion.

Glynn Evans, a political science researcher now at Adelaide University, was engaged to examine the SA electoral legislation from colonial times to the present day. He painstakingly compiled a legislative index that is capable of being maintained. As far as can be ascertained, no other jurisdiction has one. That information was later used by Dean Jaensch in his research to examine

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<sup>10</sup> The Australian Electoral Commission (AEC) analysis of the information contained in the Report of the Delegate to the General Manager of Fair Work Australia – “Investigation into the National Office of the Health Services Union under section 331 of the Fair Work (Registered Organisations) Act 2009” (the FWA Report) dated 28 March 2012 against the reporting obligations contained in the *Commonwealth Electoral Act 1918* (Electoral Act).

<sup>11</sup> *King v Electoral Commissioner of South Australia* (5 March 1998, Prior, J)

<sup>12</sup> *Carroll v Electoral Commission of Queensland and Reeves* (21 September 1998, Mackenzie, J)



community access to the parliamentary processes in South Australia<sup>13</sup>. It has ongoing practical application as it can be used to answer ad-hoc legislative queries that could otherwise take many hours to research.

Research ‘farmed out’ to outside analysts:

- Bridges the gap between the specialised world of the electoral industry and the political scientists, legal practitioners and others who assess and analyse many of its outcomes;
- Provides the commissions with a source of expertise and skill sets which they may not have themselves;
- May spark debate and discussion as insight is provided by observers of, as opposed to participants in, the processes;
- Can engender debate by analysts in areas where administrators are unwilling to tread as they may cross over the boundaries into policy debate.

Government and/or parliament itself may raise matters for investigation e.g. what would be the impact of funding and disclosure (F&D) legislation on a smaller jurisdiction, an increase in the amount required to register a party, or lodge a nomination. Penalty adjustments in legislation are generally as a result of across the board changes to penalty rates.

Comparisons are often sought as to what is the current status of legislation in other jurisdictions. Before the recent round of legislative review in the NT in 2011, the NT Electoral Commission (NTEC) approached all jurisdictions to ascertain their most recent legislative changes and what might have been recommended following any recent election. Equipped with that knowledge, the Commission was able to assess with more confidence where the NT legislation might need updating to bring it into line with practice and developments elsewhere and determine what might be appropriate for a smaller administration with more limited resources.

A particular concern for the NTEC was high informal rates in many remote areas, assumed to be non-intentional and due partly to poor literacy and numeracy skills amongst indigenous voters. There was a reluctance to change vote marking requirements as this would make directions on the ballot paper inconsistent with federal legislation. A solution was to investigate the saving device of making a tick ✓ and a cross ✕ on a ballot paper the equivalent to a number 1, provided all other markings are consistent with the formality requirements. The NTEC revisited the research it conducts after each election into informal ballot papers and provided data to support the proposed change. It was able to indicate how many ballot papers might be accepted into the count when a voter did not use a number 1 as directed on the ballot paper, but chose a quite clear alternative first preference. Similar legislation in the ACT and in SA was cited in the submission. The formality change was incorporated in the bill before the parliament and was subsequently approved and received assent.

Questions may arise during the drafting process, to check facts and outcomes, review the wording used. It is easy to gloss over a word to which another reader may attribute another meaning or nuance. Close word review ensures that the administrators’ sense of what is meant

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<sup>13</sup> Jaensch, Dean. 2002. *Community Access to the Parliamentary Electoral Processes in South Australia since 1850*. State Electoral Office: South Australia

for inclusion can be applied in practice, is implicit in the draft wording and that it conveys the intention of the regulators. The 2<sup>nd</sup> reading speech and the debates on the respective bills can be revisited, at a later point in time, to clarify the intent of the law to aid in its interpretation if necessary.

Where one piece of electoral legislation has a prohibition, and another closely related piece of legislation is silent in the same jurisdiction, the commissioner may well take the view that the intent of the legislators would be the same, so as not to cause anomalies in execution of the electoral processes. That commissioner may seek expert legal advice to affirm his/her position.

Matters referred to legal advisers may result in a formal legal opinion, possibly containing reference to case law. Both legal opinions and case law become a repository of knowledge on which commissioners can draw when carrying out their functions.

Another issue is to update the vernacular in which the legislation is written – e.g. presiding officers may now be called polling place managers, pre-poll voting may be referred to as early voting. Formalities of language used in regulation of any kind are prone to ending up as jargon with the meaning apparent only to ‘insiders’. An ongoing challenge is to present the language of the law in plain terms. It can be frustrating to have legal advice that appears overly cautious in approving more simple terminology for use in the public domain. Those advisers are reluctant to cause the commissions to front a challenge should any paraphrasing be contested or misconstrued.

## 7 In Conclusion

The regulatory framework provides certainty in operation and a known business environment for all stakeholders to function – electoral administrators, electors, candidates, parties, the courts, commentators, analysts and interest groups. The community expects efficient, unbiased election conduct by the commissions in accordance with electoral law.

The commissions administer that law, have a responsibility for safeguarding the democratic principles that it enshrines, investigating its relevance, and have a watching brief as independent umpires to make sure that the electoral arena is level for all those participating in its activities, and that involvement takes place according to the rules.

Electors, academics, law professionals and other stakeholders can add value to discussions on electoral regulation by their own examination of those rules.