LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: ACT Electoral Commission Report on the ACT Legislative Assembly Election 2008 and Electoral Act amendment bills 2011)

Members:

MRS V DUNNE (The Chair)
MR J HARGREAVES (The Deputy Chair)
MS M HUNTER

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 10 AUGUST 2011

Secretary to the committee:
Dr B Lloyd (Ph: 6205 0137)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 9 August 2011

The committee met at 10.33 am.

CORBELL, MR SIMON, Attorney-General, Minister for the Environment and Sustainable Development, Minister for Territory and Municipal Services and Minister for Police and Emergency Services

FIELD, MS JULIE, Executive Director, Legislation and Policy Branch, Justice and Community Safety Directorate

THE CHAIR: Good morning, and welcome to the first hearing of the Standing Committee on Justice and Community Safety inquiry into the Electoral Commission's report on the 2008 election, the Electoral Legislation Amendment Bill 2011 and the Electoral (Casual Vacancies) Amendment Bill 2011. I welcome the Attorney-General and his officials. Attorney, you are aware of the privilege statement and the implications thereof. Attorney, would you like to make an opening statement in relation to this inquiry and your submission?

Mr Corbell: Yes, thank you, Madam Chair. Good morning, committee, and thank you for the opportunity to appear before you this morning. I want to make a couple of brief comments in relation to the bills currently before the committee for inquiry. I welcome this inquiry. It is important that we utilise the cross-party mechanisms of the Legislative Assembly through the committee process on a range of matters, but most importantly on those matters that affect the operation of the territory's electoral laws and system, given the importance of maintaining a strong consensus of support for the operation of our electoral system.

Obviously, this process is a result of the government's consideration of the ACT Electoral Commission's report into the 2008 Legislative Assembly election. The commission's report highlighted a range of technical, legislative and administrative issues arising from that election in relation to the operations of the Electoral Act 1992. The government remains committed to a strong, open, accountable and robust electoral system for the territory. The Electoral Commission's report is an important avenue for exploring and identifying issues for continuing improvement in the operation of our electoral system.

As a result of the commission's report, the government has introduced two bills into the Assembly—the Electoral (Casual Vacancies) Amendment Bill and the Electoral Legislation Amendment Bill. The government is supportive of the majority of the recommendations in the Electoral Commission's report on the 2008 Assembly election. The government has supported eight of the 16 recommendations in the commission's report.

I turn to the bills that are before the committee for inquiry. The Electoral (Casual Vacancies) Amendment Bill is a particularly important bill. It is designed to strengthen the operation of the Electoral Act by maintaining the balance of party representation in the Assembly as determined by the ACT community at the most recent election. I note that there has been some comment made about the motivations behind this bill, with some suggesting that it is motivated by partisan political interests. Nothing could be further from the case. In fact, the provisions in this bill are

a direct implementation of recommendations made by the Electoral Commission itself in its report into the 2008 election.

The intent of the bill is to preserve the proportionality of multimember election outcomes at a general election. In this respect, they mirror the approach adopted in other multimember parliaments and houses of parliament such as the Senate, where efforts are made to maintain the proportionality of party representation following an election where casual vacancies occur. Obviously, these provisions are expected to only be used on rare occasions, on those occasions where party candidates are not available to fill the vacancy of a retiring party member. This has not yet occurred in the history of the Legislative Assembly since the Hare-Clark system was introduced, but the prospect of it potentially occurring and the serious ramifications it could potentially have on balance of power arrangements within the Assembly are matters that the government believes the Assembly should have regard to. I would be happy to discuss this issue further, after the presentation this morning.

Turning to the second bill presented by the government, the Electoral Legislation Amendment Bill, this bill introduces a range of amendments to the Electoral Act that implement a range of recommendations made by the commission in its report. These include lowering the age of entitlement to provisionally enrol to vote from 17 years to 16 years, consistent with reforms that have been introduced in the Commonwealth Electoral Act, and limiting the number of candidates that may be nominated in an electorate to no more than the number of members of the Assembly to be elected for that electorate.

This is a particularly important amendment. We saw at the last election both major parties foreshadowing that they were giving consideration to nominating more candidates than vacancies existed in one or more of the Legislative Assembly's multimember seats. The practical implication if such an approach were to have been adopted would have been that the Electoral Commission would have had to dramatically increase the printing run for ballot papers to ensure that the Robson rotation principles were adhered to. That would have been a significant logistical exercise for the Electoral Commission. It also has implications for the size and presentation of ballot papers. The government supports the Electoral Commission's view that it would be desirable to avoid such complications by making it clear that parties can only nominate the same number of candidates as there are vacancies in an electorate at a general election.

This bill also removes the requirement for a person to sign as a witness when a voter is casting a postal vote. We know that those who do cast postal votes are often isolated in their home. They have challenges, for example, with mobility, and it is often difficult to secure even one person to go and sign as a witness for that postal vote. And that can act as a discouragement for people to cast a postal vote in those circumstances. So the government supports those proposals.

This is an important inquiry. I have not touched on all of the matters covered by the bills or the government's response to the Electoral Commission's report, but I am happy to discuss those issues in more detail in the hearing this morning. I thank the committee for the opportunity to make an opening statement.

THE CHAIR: Perhaps we can deal firstly with the Electoral Legislation Amendment Bill and then move on to the casual vacancies bill—or do you want to do it the other way around? Which way would members prefer?

MR HARGREAVES: The way in which the terms of reference put it. With the commission's report, we can do that later on when the commissioner is here.

THE CHAIR: So if we go to the Electoral Legislation Amendment Bill first, attorney, there were a number of recommendations—eight of the 16 recommendations—that you did not support. Could you outline the reasons for not doing that? There are two which are currently under inquiry by this committee—or one, actually, in terms of findings. Would you like to go through the reasons why you did not accept the recommendations about increasing the penalty for the offence of defamation of a candidate—those sorts of issues?

Mr Corbell: I can go through each one of them, if you wish, Madam Chair.

THE CHAIR: Yes, thank you.

Mr Corbell: Turning to those two that you mentioned, in relation to the defamation of candidate provisions that are currently in section 300 of the Electoral Act, the commission has again recommended in its report that these provisions be repealed. The commission recommended that in its report following the 2004 election as well. Members may recall that the government did propose an amending bill in an earlier Assembly. The government has previously attempted to repeal that provision. That has not been supported by a majority of the Assembly and the government has taken the view that we will not seek to reprosecute that matter.

As a matter of principle, we accept the commission's view that there is no need for a separate defamation provision specifically for candidates in the Electoral Act. The government's position is that existing defamation law is sufficient to deal with these matters, but that has not been the view of other parties in the Assembly. So we are not seeking to reprosecute that matter.

In relation to recommendation 14, the penalty for failure to vote, the current penalty is $20. The commission recommended that it be lifted to $25. The government took the view that the penalty should be retained at $20, simply because that is the same level as the penalty for failing to vote in a commonwealth election. So for reasons of consistency, we felt it was reasonable to maintain the current level.

Turning to the other recommendations that have not been adopted, recommendation 5—

MS HUNTER: Madam Chair, can I just pick up on that? I just thought, as you were going through them, that it might be worth while also asking some questions.

THE CHAIR: Yes.

MS HUNTER: You talked about the fact that you feel there should be consistency between the penalties at the commonwealth and the ACT level. I note that other states

have a different penalty rate than that imposed by the commonwealth and it does not seem to create too many problems. That is not my main focus here. It is more around, given that you do not agree with an increase in the penalty, what initiatives government is following or pursuing to ensure compliance and that people do vote. Are there certain initiatives you are undertaking or are you just relying on the penalty?

Mr Corbell: The penalty—

MS HUNTER: A lot of people just pay the penalty, I note.

Mr Corbell: This is a matter of balance. As a matter of policy, the government supports the proposition that the franchise should be universal and that all citizens have an obligation to express their view during an ACT election—indeed during any election. It is a matter of principle. Compulsory voting provides for a broad assessment of the community's views on the adequacy or otherwise of candidates and that lends a strong sense of legitimacy to the election outcome. Whereas in other jurisdictions internationally, if you only have a turnout of less than, say, the eligible voting population, that raises questions about the legitimacy of the election outcome and the government that is elected as a result. So compulsory voting has, in the government's view, considerable benefit.

As to the use of a penalty, it is not designed as a mechanism to compel action, but it is, I think, recognition that citizens have an obligation to vote, and unless they can give good reason as to why they did not vote a penalty that indicates some level of sanction is appropriate. The important steps to take, I think, on this matter are not about the use of penalties but about continual electoral education to continue to build an informed citizenry who can understand the importance of voting, and overwhelmingly in the ACT we have a very high turnout rate at elections and a high participation rate. There is a proportion of the population who do not vote and who do not give a good reason as to why they did not vote. In those circumstances a fine can be issued. We think that the current penalty regime is reasonable having regard to all those issues.

MS HUNTER: And you are satisfied there is enough resourcing in the education that you were talking about?

Mr Corbell: I think we can always do more around electoral education, but these tasks are limited by the availability of resources within the government as a whole. I think the Electoral Commission and indeed the Assembly itself, through its electoral education processes, does a very good job, particularly in informing younger voters about their obligations and the opportunities available to them as citizens.

THE CHAIR: Would you like to proceed on the recommendations?

Mr Corbell: Thank you, Madam Chair. It is going to be a bit lengthy if I do it this way. I am happy to do it by exception, but if you insist. Recommendation 1, which proposed amendments to section 121—

THE CHAIR: You have agreed to that.

Mr Corbell: I am sorry, I am reading the wrong page. The government does not agree to recommendation 5, which was about amending the Electoral Act to explicitly provide for the format of the ballot paper where parties' candidates are split into two columns. The government took the view that this was not needed to be adopted as it may lead to unnecessary restrictions and raise objections on purely technical grounds.

THE CHAIR: That would also be obviated by the successful amendment to limiting the number of candidates.

Mr Corbell: That is correct. Given that we were going to limit the number of candidates to the number of seats there was not a need to adopt this recommendation.

In relation to recommendation 9, the Electoral Commission stated in recommendation 9 that if recommendation 8 was not accepted—this is a recommendation in relation to postal voting—this recommendation would need to be implemented. Obviously we accept the recommendation so that recommendation is consequential.

THE CHAIR: Can I just clarify—and this may not be something that you can answer; perhaps the Electoral Commissioner can answer it, if you cannot, minister—for postal votes, does the witness have to be an elector on the ACT roll or just an adult?

Mr Corbell: No.

THE CHAIR: Okay; thank you.

Mr Corbell: As the government has adopted recommendation 8 there is no reason to adopt recommendation 9.

As to recommendation 10, the commission noted in its report an increasing number of people tending to vote at pre-poll centres and by post. This has been a trend over the last few ACT elections. At the 2008 election approximately a quarter of all votes cast were pre-poll postal votes. Currently these early voters are required to declare that they are unable to vote on polling day in order to qualify to vote at a pre-poll centre.

The commission recommended the removal of this requirement. The government does not agree. The reason for that is the government believes there is considerable merit in maintaining the concept that there is an election period with voters making a decision on election day. To do so otherwise potentially undermines the way parties and candidates present their policies and the timing and presentation of their policies in the lead-up to election day and really turns the election day into an election month or—

THE CHAIR: An election of three weeks, yes.

Mr Corbell: Or election weeks. That, I think, presents a whole range of concerns about whether voters are voting having been fully informed of all of the policies and positions of the relevant parties and candidates. Therefore, we took the view that if you needed to vote before election day you needed to have a valid reason to do so, not just because it was convenient. That is why the government did not accept that

recommendation.

In relation to recommendation 11, the commission recommended that consideration be given as to whether there should be an amendment to the authorisation provisions to address the issue of double-sided stickers. A range of double-sided stickers were used during the last ACT election, including one used by the Labor Party, which was adhered to the front page of an edition of the *Canberra Times*. Some complaints were received about that sticker by the Electoral Commission because the authorisation was only on one side and it was on the rear side of the sticker which could be peeled off the paper.

The government took the view that the current authorisation provisions are sufficient and that it was quite clear if voters viewed the material that they would see that it was an electoral advertisement and that it was duly authorised, so we did not see the need to provide for authorisation on both sides.

Defamation of a candidate I have dealt with and the penalty provisions I have dealt with. There were a couple of other recommendations—13 and 16—that dealt with the size of the Assembly, recommendation 16, and also recommendation 13 that dealt with disclosure provisions for political donations. Obviously recommendation 13 is being dealt with in a separate inquiry so the government has taken the view that that matter is best addressed by that process.

In relation to the size of the Assembly, the government maintains its in-principle position that it is desirable for an increase in the size of the Assembly and that the power to determine the size of the Assembly should be vested in the Assembly itself. Obviously these issues relate to relations and considerations between the ACT and the commonwealth and these are matters that we continue to pursue wherever practicable.

THE CHAIR: Can I just note for the record that your submission, attorney, says at paragraph 18 on page 4:

> The remaining 2 recommendations, Recommendation 13 and Recommendation 16, have been left for the Standing Committee to review …

What do you mean by that—that the standing committee is not currently reviewing the size of the Assembly, or would you anticipate that this committee may form a view about the size of the Assembly in the course of this inquiry?

Mr Corbell: The government took the view that it was open to the committee to do so should it wish to.

THE CHAIR: When I first read that I read it as an indication that the committee was already looking at it in some other inquiry.

Mr Corbell: No, in relation to this inquiry.

THE CHAIR: I was just wondering what you meant by it. Thank you.

Mr Corbell: Yes, in relation to this inquiry.

THE CHAIR: As there are no further questions on the electoral amendment bill, we will move on to the Electoral (Casual Vacancies) Amendment Bill. In this, attorney, you are proposing a radical departure from the current Hare-Clark system and you note it is sufficiently radical that we will also have to deal with the entrenchment provisions that are on the ACT statute book. You said in your comments on this bill that the aim of this was to maintain the balance established at the most recent election. The intent was to preserve the proportionality and that it mirrors—this is a summation—what happens in other houses, such as the Senate. But it does not mirror what happens in Tasmania, does it, which is where we have adopted our electoral—

Mr Corbell: No, it does not.

THE CHAIR: In addressing this did you have a mind for what actually happens in Tasmania and the fact that the ACT legislation is drawn closely and is almost a mirror image of the Tasmanian legislation, and that was what was put to people in the referendum in 1992? I have to put on the record—I have discussed this with my colleagues—that I was actively involved in the yes case for the Hare-Clark campaign in 1992.

Mr Corbell: Obviously the government has regard to what happens in a range of jurisdictions. I am advised that in relation to Tasmania a by-election can be held if a party candidate is not available. So the provision is available under the Tasmanian Electoral Act for that to occur. I am also advised that that has never occurred.

Turning to the issue more broadly, there are a range of interests represented in a general election in the election of candidates as members of the Assembly. One of the considerations that the government believes is important to have regard to is the stability of the operations of the Assembly. People elect both candidates in their own right, but they also elect people to represent the views of different political parties in the Assembly. If people choose to vote for a party they are voting for the individual candidate but they are also voting for a political brand. They are also voting for a particular political philosophy if they choose to support a party candidate. The parties present themselves on that basis. The parties go to the electorate and say, "Vote for us because we will, as a collective entity, do certain things."

The voters are not simply electing individuals. They are also, if they are voting for party candidates, voting for parties and seeking for those parties to have representation in the Assembly. Obviously, as a result of that, those parties—one or a combination—end up forming government in the Assembly. We believe that in the circumstances where there is a casual vacancy it is desirable, if the vacancy is caused by the retirement of a party candidate or the resignation of a party candidate, a party member, that the vacancy be filled by a person from the same party. That is desirable to maintain the proportionality of the representation of that party in the Assembly and, therefore, maintain the balance of power in the Assembly and the general representation of the parties as determined at the last general election. This is not an unreasonable proposition. People do not just vote for individual personalities. They also vote for corporate identities, corporate party brands, when it comes to the election in the Assembly.

So we do not see this provision as a provision which undermines the operation of the Hare-Clark system because in practice the Hare-Clark system has been returning party members filling the vacancies of the retiring candidate from that party. That has been the experience both in the Labor Party and in the Liberal Party. It has not happened for the Greens at this time—they have not been in this circumstance—and it has not happened for other smaller parties in the Assembly. Indeed, I myself am a consequence of a count-back process where a Labor member resigned—

THE CHAIR: I would not put it quite as fatalistic as that.

Mr Corbell: Well, right time, right place! I replaced Rosemary Follett as a Labor member of the Assembly. But there is the small possibility that there will be a circumstance where there is, for example, no party candidate available, should, say, a Liberal or Labor member resign or retire from the Assembly. The difficulty with the count-back provisions is that it really asks unsuccessful candidates to potentially put their lives on hold not just for the period of the election but potentially for the full term of the Assembly, a full four years. People's lives change. People move interstate. People's life circumstances mean they are potentially no longer available to be a candidate. In those circumstances, rare as they may be, is it unreasonable to say that in those circumstances, just because there is not a candidate available, the seat should fall to a person or a candidate from some other political persuasion or orientation? The government's view is that, no, it should not. Wherever practicable, it should be a person from the same party.

These provisions already exist in the Electoral Act in relation to circumstances where it is not feasible to conduct a count-back. There are already provisions in the ACT's Electoral Act where, if it is not feasible to conduct a count-back, either because ballot papers have been destroyed through some accident or misadventure or where there simply is no-one else available, the Assembly can determine who fills that vacancy. So this provision already exists in the Electoral Act but it is for rare circumstances. The government takes the view that these are equally rare but potential circumstances that the Electoral Act should make provision for, having regard to preserving the proportionality of the outcome of multimember elections. So that is why we have adopted the view.

I need to be very clear about this. This is not a proposal initiated by the government. It is a proposal initiated by the commission in its report. The government has had regard to it and we agree with the commission's conclusions in relation to this matter.

THE CHAIR: I would put forward, minister, that the intent of the legislation and the intent that was taken to the referendum in 1992 was that this is a matter that is entirely in the hands of the electors—and I am speaking from experience here—and that it would be envisaged—and this is really not just about the major parties—that because there would be uncertainty about independents and minor parties as to whether they could have someone available for a count-back two years afterwards, it should be in the hands of the electors who voted on polling day. What was the government's consideration of that view?

Mr Corbell: We did have regard to that. I think it is important to recognise that this matter links with the recommendation regarding the number of candidates that are

eligible to be nominated. The reason, it would appear, why parties were considering nominating more candidates than vacancies existed was to have a sufficient pool of candidates potentially available in the event that members retired or resigned mid-term. That was at least one consideration that it would appear parties were having regard to. Because parties were anticipating that it was not reasonable to expect that there would just be one or two people who would always make themselves available for the full four years after an ACT election, a bigger pool to draw upon would be desirable, to ensure that there was a party candidate available should a vacancy occur.

THE CHAIR: There are practical difficulties, aren't there, though, in having more than the number of candidates, in terms of the ballot paper, which is a disincentive?

Mr Corbell: Yes, and that is why the government has agreed with the commission's recommendation that the number of candidates should be restricted to the number of vacancies available. But the consequence of that is that I think we have to have regard to one of the factors that is driving parties to nominate or consider nominating more candidates than there are vacancies, and that is issues around count-back. Therefore, we believe that these two recommendations work hand in hand. If you say to the parties, "You're only allowed to nominate the same number of candidates as there are vacancies," I think it is reasonable to say to the parties also that voters have voted for a Labor member or a Liberal member or a Greens member and if that Liberal, Labor or Greens member retires, resigns, dies in office or whatever it may be—which fortunately has not happened in this Assembly but you could not rule out the prospect of someone, for example, dying in office—then the voters who voted for that candidate realistically would have expected another party candidate to fill that spot.

THE CHAIR: What if that person were an independent or from a small party?

Mr Corbell: In those circumstances you choose from the pool of other independents or small parties, and the count-back provisions make provision for that. If there was a circumstance where there was no-one available to nominate, the existing provisions or these new provisions would apply.

I think it is worth making the point that the electors do not just choose the individual. If they are voting for a party candidate, they are also voting for that party. And the voters' intention I think has been clear in the past in relation to the outcome of count-backs. It has been candidates from the same party who have filled those vacancies. So people who vote for party candidates clearly are wanting that person to be replaced with a person from the same party. And should that intention be thwarted simply because those candidates are not available to be nominated for a count-back? In the government's view, the voters' intention should not be thwarted in those circumstances.

MR HARGREAVES: Is it not true, attorney, that the Assembly make-up in fact is by party—that the standing orders actually provide that the government of the day is made up by that party which has the majority of seats or enjoys the confidence of the house through the election of a Chief Minister, and that the Leader of the Opposition in fact is the person who leads the party which has the greater number? It is not an elected position; it is a position because of the appointment of a person leading a party within the Assembly. Thus when people cast their vote for an Assembly election, they

do so in two ways. One is to choose somebody to put forward their interests in the parliament, and the other is to elect a government of the day, which is a party of the day.

When you look at the constitution of the current Assembly, we have a minority situation, and there have been people who have cast their votes for the Greens quite specifically to create a balance of power and minority government position. They have not necessarily voted for a candidate; they voted for a party to make sure that there was a minority government position. Therefore, if the current provisions were allowed to prevail, does this not disadvantage those parties, those smaller parties, who cannot afford to field more than two candidates, let us say, in a 17-member electorate, if one of those candidates was to retire, resign or die in office? That party therefore would not have the pool of people in the candidates list to call on because they could not afford to field them in the first place. The provision that you propose to accept that the commissioner has put forward would address that issue, would it not?

Mr Corbell: Yes, it would. That is exactly right. In relation to what the standing orders say, the standing orders are actually more explicit in relation to the position of Leader of the Opposition than they are about the Chief Minister. The position of Chief Minister is set out in the self-government act and it is quite clear that whoever is Chief Minister is the person who can command a majority of votes on the floor of the Assembly—

THE CHAIR: There is no reason why that could not be a minor party person or an independent.

Mr Corbell: Technically, theoretically, it could be an independent. It could be anybody. It could be a person from another political party which does not have a majority of members in their party. In fact, that has obviously been the norm for the Assembly. But in relation to the standing orders, the standing orders recognise that the next largest party—it sets out the process by which a Leader of the Opposition is determined. That is actually also recognised in the Remuneration Tribunal determinations and so on.

The fact is that we do not have a system which is just based on individual candidates. We have a system that is a mixture of people choosing individual candidates and also a party system that overlays that and sits within that. We think the electoral system should reflect both of these realities in a sensible and balanced way. As the government has said previously, we believe this provision would be rarely, if ever, utilised but provision should be made available. Madam Chair, can I turn to the issue of some of the mechanics around this—

THE CHAIR: Good. That is where I was going next.

Mr Corbell: because this is an important matter. The proposed change to the casual vacancy rules is subject to the Proportional Representation (Hare-Clark) Entrenchment Act 1994 which requires that any law that is inconsistent with the principles set out in that act can only become law through either a vote, a special majority provision in the Assembly—a two-thirds majority of members passing that legislation—or alternatively a majority of electors at a referendum. The government's

advice on this matter is that if this bill was defeated in the Assembly for lack of a special majority, even if it, say, gained a simple majority, the bill would automatically be referred to the Electoral Commission as a matter to be put in a question at the election.

MR HARGREAVES: An automatic referendum.

Mr Corbell: Yes.

THE CHAIR: There is an automatic referendum as a result of the entrenchment legislation?

Mr Corbell: Yes. The effect of the operation of the entrenchment legislation means that should the bill be defeated, regardless of whether or not it achieved a simple majority—

THE CHAIR: If it achieves a simple majority but not a special majority.

Mr Corbell: That is right. If it achieves a simple majority but not a special majority, it would be referred to the Electoral Commission and the Electoral Commission would be obligated to put the question to a referendum. It is not the government's intention to pursue a referendum on this question. So it will depend on what the views of the parties are in the Assembly as to whether or not this bill comes on for debate.

THE CHAIR: What you are saying, attorney, is that if you receive an indication that you could not get a special majority in a vote in the Assembly, you will not be bringing this forward—

Mr Corbell: The government would not intend to pursue the matter.

THE CHAIR: because you have no intention of referring this to a referendum?

Mr Corbell: That is right.

THE CHAIR: Does anyone have questions on the casual vacancy legislation?

MR HARGREAVES: No.

THE CHAIR: To round this off, as members do not have any substantive questions on it, in the government's submission you say at paragraph 3 that the two bills "represent minor and primarily technical adjustments to an already strong electoral system". I do not think there is any debate that we have a strong electoral system. In what sense is the casual vacancies amendment bill a minor or technical adjustment?

Mr Corbell: It is minor in so far as it simply, in the government's view, preserves the way the system currently operates in practice.

THE CHAIR: But the thing is, attorney, that—

Mr Corbell: I think perhaps, Mrs Dunne, it is a debating point. But in the

government's view it was minor in that it effectively preserves the way people understand the system to operate at the moment, which is that if a candidate from a particular party resigns from the Assembly mid-term, someone from the same party replaces them. If you were to ask the punter on the street, they would generally expect that that would be the outcome—

THE CHAIR: But in 1995—

Mr Corbell: and they would be quite surprised that there was the potential even for perhaps the government to change simply because a candidate had resigned from the Assembly mid-term and could in rare but not completely impossible circumstances be replaced by someone from another party.

THE CHAIR: Currently, if a government member in the commonwealth parliament resigned and there was a by-election, the government might change. It is not unusual. But given the fact—

Mr Corbell: Well, it is unusual in the ACT context.

THE CHAIR: that in 1995 the ACT electorate, by 60-odd per cent, agreed to entrench a whole range of these provisions, including the issues in relation to count-back, and we have just discussed the need for a special majority to pass this legislation or a referendum, how is that a technical amendment?

Mr Corbell: It is technical insofar as it puts in place a mechanism that reflects current practice.

THE CHAIR: Okay. We will probably disagree on that one.

Mr Corbell: It is a debating point, I am sure, Mrs Dunne, but that is the government's view.

THE CHAIR: Yes. Ms Hunter, you had questions on other aspects of the legislation.

MS HUNTER: Yes; thank you. I just wanted to go back to the issue around defamation. You spoke about that earlier, attorney. Given there are some difficulties with the provision that has been raised, has the government done any further work to address those issues or develop other alternatives to ensure that there are good protections in place for candidates to ensure that there is fairness during campaigns?

Mr Corbell: No, we have not because the government's view is that candidates for election should be protected by the same defamation laws that exist for the community at large. We do not understand why the Assembly insists on special protections for candidates for election different from those of ordinary citizens when it comes to the issue of defamation.

MR HARGREAVES: Is it possible that there is a different treatment in defamation for the average citizen as opposed to an elected representative? I was under the impression that there is and that elected representatives are expected to be able to cop a little bit more in the way of defamatory language in the public arena than the

average citizen would by virtue of choosing that particular profession. I am wondering whether or not there needs to be a provision for candidates in the exercising of that choice to have a protection. If they become elected then the current situation exists. If they do not get elected they go back to having the same privileges an ordinary citizen might have, but in that interregnum where they are a candidate is there a need to have any special protection, I guess?

Mr Corbell: That is the argument that has been made—that in the hothouse of an election environment there is particular harm potentially able to be done to a candidate by circulating material or information that may be potentially defamatory of a candidate during the election campaign and there is no ability for timely recourse to deal with that matter before the election is held if you simply rely on the provisions of the Civil Law (Wrongs) Act.

I think the government takes the view that, in practice, this provision has never been exercised and, therefore, it is effectively redundant in any event. These provisions were put in place in 1992 so their operation is nearly 20 years old. They have never been used. As a matter of principle, why should citizens who stand for public office have some special provisions relating to defamation law that are not available to ordinary citizens, including citizens who are in high profile positions and equally have the potential for harm to be done to their character and reputation?

I think that those two things combined bring the government to the view that there is no need for this provision. But the government is not arguing about this. The Assembly has expressed a view. We are not seeking to prosecute the matter again. We believe the Assembly has reached a position on this matter. The provision remains and the government is not proposing that it change.

MR HARGREAVES: In the 1995 federal election my memory is that a candidate was defamed through push polling and took action for that defamation, won that case and received damages because of that defamation. Was that under—

Mr Corbell: It was not under any special—

MR HARGREAVES: It was not under a special thing. The point that you made was the time line is the big issue, isn't it, where it could affect the outcome of an election?

Mr Corbell: That is the argument against removing the provision. The government previously has not agreed with that argument. That debate has been had, as I have said. In relation to the matter you raised, Mr Hargreaves, that was in relation to a candidate for office in a commonwealth election.

MR HARGREAVES: Yes, I am aware of that.

Mr Corbell: It was a by-election, actually, as you know. I think the action was taken under the common civil law available to all citizens.

MR HARGREAVES: I guess where I was coming from was the timeliness of the issue, because it seems to me that, as much as a defamatory statement could affect the outcome of an election, so too could the bringing of action on defamation have an

effect on an outcome of an election. Also, if you have not got a chance of having the matter heard before the election is held then the issue of the potential defamation can be an election tool in any event. Does that contribute to the government's view that it is a redundant provision?

Mr Corbell: Yes, we believe it is a redundant provision.

THE CHAIR: Anything else, Ms Hunter?

MS HUNTER: Yes. It was just about limiting the number of party candidates on the ballot paper. You have spoken about this earlier in your evidence and you have responded to the scrutiny of bills committee's concerns. You respond to the scrutiny of bills on page 11 of the government's submission. You are saying that it might be possible for the commission to correct mistakes. Do you think it would be better to make it very clear in the legislation what mechanisms are available and, further, why it would not be more desirable to simply invalidate the nomination of additional candidates rather than all candidates?

Mr Corbell: I will ask Ms Field to assist you with that.

Ms Field: What you have proposed has actually been suggested by the Electoral Commissioner.

THE CHAIR: That is the Electoral Commissioner's—

MS HUNTER: Yes, but the government has rejected it.

Ms Field: I am sorry, the new proposal by the Electoral Commissioner? No, we do not reject that. We think that sounds like a sensible idea. Well, we do not think it is necessary. The issue is that when a nomination is made by an authorised officer, the authorised officer knows how many people they are nominating and, really, it is a question of the authorised officer being able to count to however many—

THE CHAIR: Seven of a max.

Ms Field: Yes. So if an authorised officer—

MR HARGREAVES: That is not necessarily the case, Ms Field. There are some people out there who just can't count. That is why the good Lord only put five fingers on your hand instead of seven.

Ms Field: I guess we do not see the need for it because we think that you should be able to count to five and seven. Because it is an all-up thing, we should not need it. But we are certainly looking at the Electoral Commissioner's suggestion.

THE CHAIR: As there is nothing further, thank you very much, attorney, Ms Field and other officials.

GREEN, MR PHILLIP, Electoral Commissioner, ACT Electoral Commission

MOYES, MR ANDREW, Deputy Electoral Commissioner, ACT Electoral Commission

THE CHAIR: Welcome, Mr Green and Mr Moyes, to this hearing. I point you to the now blue privilege statement, slightly amended from the once buff privilege statement. I understand that you are aware of the implications. Mr Green, would you like to make an opening statement on behalf of the Electoral Commission?

Mr Green: Thank you. I had not intended to make an opening statement. It is probably a better use of time for me to focus on particular issues that you are concerned with. There were a couple of things that had arisen in the discussion with the Attorney-General that I would like to elaborate on.

THE CHAIR: Would you like to set me straight on what actually happens in Tasmania?

Mr Green: Yes.

THE CHAIR: I have obviously been labouring under a misapprehension.

Mr Green: We did discuss this in the report on the election, on page 77. I will bring you up to date on that one. In the Tasmanian House of Assembly, if a casual vacancy occurs and none of the candidates who were included in the same registered party group as the vacating member are available to contest the vacancy, the registered officer of that registered party may, by notice in writing to the Electoral Commissioner no later than 24 hours after the close of nominations for the recount, request that a by-election be held to fill the vacancy. That has never been invoked. That has never happened but it has been there from since before we adopted the Hare-Clark system.

MR HARGREAVES: What is the story in the upper house?

THE CHAIR: They are single-member electorates.

Mr Green: They are single-member electorates in their upper house, so if they had a vacancy, they would have a by-election. Another issue that came up during the previous session was the question about authorised witnesses for postal votes, as they currently are. The current provision is that in Australia any person who is on any commonwealth roll anywhere in Australia can be an authorised witness. For someone who is overseas, any person who is over the age of 18 can be an authorised witness.

The commission has recommended and the government has put in the electoral bill a proposal to not require voters to have their postal voting certificate witnessed. One of the reasons that we have recommended that is that it is a fairly common mistake for people to make when they are filling in their postal votes. They do not get them witnessed. So they will have signed it. We have got proof from their signature that they are who they say they are but because the vote was not witnessed we have to

reject that vote and not count it. So it is including the vote in the count that we are really aiming that recommendation at.

MS HUNTER: What percentage of the informal vote would that make up?

Mr Green: It never gets counted as an informal vote because it is a rejected vote. It is never included in the count. We have included figures in the report on how many votes are concerned. It is not a large number but it is tens of votes rather than just a handful, so it is a reasonable number, and every vote counts.

THE CHAIR: How many people would lodge a postal vote?

Mr Green: In the 2004 election, we rejected 73 postal votes because they were not signed by a witness.

THE CHAIR: Out of how many postal votes?

Mr Green: In 2008, that number was 45. The total number of postal votes—

MR HARGREAVES: In 2008, postal votes, all-up in the ACT, 9,599.

Mr Green: That is right.

MR HARGREAVES: So you are saying it is tens of votes in that category.

THE CHAIR: So it is 40 out of 9½ thousand?

Mr Green: Yes. So the number is not large but there are 40 people who have tried to vote.

MR HARGREAVES: It is significant for the person who cast their vote.

Mr Green: Exactly.

THE CHAIR: Could we go through, in systematic terms and briefly, why you made each of the recommendations.

Mr Green: We have made recommendations in the report that we submitted to the Assembly on the 2008 election. In our submission to this inquiry, we have made some additional recommendations, some to address issues that have arisen since we have made that report. Would you like me to go through both sets of recommendations?

THE CHAIR: Yes, thanks.

Mr Green: Starting with the recommendations made in the 2008 election report, the first recommendation, which the government has accepted and included in the bill, is to include an elector's year of birth and gender on the certified list of electors used in polling places. The intent behind that is to make it more certain that the person's name we are marking off the roll in the polling place is actually that person. We do find that there are people with exactly the same names but different addresses. Sometimes you

get exactly the same name at the same address. For example, a father and son with the same name might live in the same place. What we find sometimes—and, again, the numbers here are not large but they do occur—is that one name will be marked off twice and the other name will not be marked off at all, simply because they have gone to two different polling officials and they have found their first name and they have each marked the first name that they have found. So that person shows up as a multiple voter and as a non-voter, whereas in fact it is two different people. So putting the year of birth and the gender should help to sort that out.

THE CHAIR: It also eliminates the "vote early and vote often" principle. If I turned up and said I was John Hargreaves, it would be easy—

MR HARGREAVES: People would know that.

THE CHAIR: People would notice more easily.

MR HARGREAVES: People would pick that one.

THE CHAIR: Discrepancy in our age, Mr Hargreaves, would be enough.

MR HARGREAVES: Indeed.

Mr Moyes: We also find that in a father-son situation, it may be a similar name but one of them is on the roll and the other is not. If they both go along to vote, they might vote at different places or be marked off on a different roll.

MR HARGREAVES: It would also assist, would it not, with those first names which can be either gender and you cannot necessarily pick it?

Mr Moyes: That is right.

MS HUNTER: You mention on page 19 that details are not included on the rolls provided to registered political parties or MLAs—the details around year of birth and gender details. Currently, you give over a list of names with an address but it does not have gender or birth date details.

Mr Green: That is right.

MS HUNTER: I am quite interested about that because I know there is a current sitting member who sends birthday cards to people on their 21st birthday. I had always assumed that that information had come from the electoral roll.

Mr Green: I think what you will find is happening is that under the ACT Electoral Act, members are only entitled to receive name and address, but under the Commonwealth Electoral Act, federal members are entitled to get much more detail, including information that is not available publicly, and that includes date of birth. So I suspect they are getting that information from their commonwealth members.

That brings us to recommendation 2, which was to provide explicitly that the year of birth and gender details would not be given to parties, to be consistent with the current

situation where only a name and address is provided.

MS HUNTER: Which I think is a good thing to do. I think that should be kept. I am interested that the commonwealth does release that detail because it can be a little bit disconcerting for a person to receive a birthday card when they do not know the person sending it to them. They find it quite creepy.

MR HARGREAVES: I must admit that I share the same concerns as Ms Hunter around the year of birth. I must say that the gender is particularly helpful. There is nothing worse than receiving correspondence with the wrong salutation on it: "Dear Ms Hargreaves"; "Dear Madam Chair"—that kind of thing. That really pisses me off, actually.

THE CHAIR: Unparliamentary words, Mr Hargreaves.

MR HARGREAVES: Nonetheless, there have been people who have complained to me because they have received something with the wrong gender in the salutation. So I am not keen on seeing the gender one removed. But I am not going to make an issue out of it.

Mr Green: Recommendation 3 is to allow the commission to provide candidates with electronic copies of the roll. Currently the Electoral Act only allows us to give paper copies of the roll to candidates. The world has moved on since that clause was drafted, so we thought that was a reasonable thing to provide.

MR HARGREAVES: Does that include online provision or just the provision of a disk?

Mr Green: We would be providing it on disk. We would not be providing it online. There is a security issue with providing it online.

Recommendation 4 is related to who a candidate deposit is returned to when a deposit is returned because a candidate or a party has received the threshold needed to get the deposit back. Under the Electoral Act currently, the deposit is returned to the candidate, regardless of whether or not the candidate has stumped the money up in the first instance. In most cases, particularly with the larger parties, the candidate deposits are paid by the party. I think at the commonwealth level, the Commonwealth Electoral Act provides that the money is returned to the party if the party is the body that paid it. So we are wanting to mirror what goes on in the commonwealth.

Mr Moyes: That mirrors the commonwealth's provision.

MR HARGREAVES: Your description of "the deceased's personal representative" includes their estate, I would imagine?

Mr Green: Yes, it does. The recommendation went into detail about deceased persons but when we asked parliamentary counsel to draft that, they said that the law as it currently stands would cover that situation without having to specifically provide for that.

Recommendation 5 is one of the recommendations discussed earlier with the Attorney-General in terms of the changes proposed to the casual vacancy rules. It is recommending that if we do have a situation where more parties are nominated for an electorate than there are vacancies in the electorate, if that situation is to continue, the way that the Electoral Act is currently phrased it requires, say, if six candidates are nominated for a five-member seat, that that be split into two columns of three. But when that was foreshadowed before the last election and we actually looked at the design of the ballot paper, the Electoral Act was not prescriptive about how that would look and feel. So we want to put clarity in the Electoral Act if that was to happen, just to clarify exactly how the ballot paper would look in that situation. We have recommended in our later submission that if the casual vacancy changes do not get up, we should be looking at retaining the ability to nominate more candidates than there are vacancies and that we should be looking at explicitly providing for how the ballot paper would look.

THE CHAIR: What you are actually saying is that if the casual vacancy provisions fail, the parties should be able to maintain the option of fielding more than the required number of candidates and therefore you would need to amend the Electoral Act to make it sure, because currently there is a disincentive to run six candidates in a five-candidate electorate because of the layout of the ballot paper?

Mr Green: We are not recommending that that scheme would alter. We are still recommending that if you nominate more candidates than there are vacancies that you would split the column into two, or however many you need to ensure that in a five-member seat no column was longer than five. Because of the way Robson rotation works, Robson rotation is predicated on there being no more than five candidates in a five-member seat and seven candidates in a seven-member seat. So you would still split the columns, but what we are recommending is that the Electoral Act specifically provides how that would look, whereas at the moment it is vague.

THE CHAIR: I thought at one stage there was a discussion—take Ginninderra, for example—that if you ran six candidates there would be one column with five in it and the other column would have whatever was left—one, two or whatever. But that is not the case?

Mr Green: No. The act as currently phrased says you would split it into equal columns or as near equal as possible. So if there was an odd number you would have four and three, for example.

THE CHAIR: This would take away the disincentive for running over the number of candidates, but you are saying that you should take away that disincentive if the casual vacancy provisions do not get up?

Mr Green: Yes. Our thinking is that if the casual vacancy provisions do get up, there is no logical reason why a party would nominate more candidates than there are vacancies. I think that a factor to take into account when looking at that is the way that people tend to vote. Given the way our ballot paper instructions work, they are instructed to vote, in a five-member seat, by numbering at least 1 to 5 with your preferences, and then you may wish to number from 6 onwards. More than half of voters will follow that instruction to the minimum letter. So they will nominate 1 to 5.

What I have found, without systematically counting these things, is that if you have got a voter who is voting for a first preference for a party candidate, a second preference for a party candidate and a third preference for another candidate in another column, they will put the 3 over there and then they will come back to the party of first choice and go "4, 5" and then stop, and leave the last candidate in that column blank. A lot of voters look at the ballot paper instructions and say, "All I've got to do is 1 to 5." My concern is that if a party was to nominate six candidates in a five-member seat, a proportion of the voters for that party would go "1, 2, 3, 4, 5" and then stop, and leave one candidate blank.

THE CHAIR: So the people in the second column would be substantially disadvantaged because you would only rotate in those columns—

Mr Green: You would only rotate in each column, exactly.

THE CHAIR: So if you put up six candidates in Ginninderra, you would have two columns of three for the XYZ party and then they would only rotate in those columns—

Mr Green: That is right.

THE CHAIR: and not across the columns?

Mr Green: Yes. It concerns me that an unintentional effect of the current law is that it might disadvantage parties for a not very good reason.

THE CHAIR: Can you point to—or if you can't point to it now, take it on notice—the numbers of people who vote 1 to 5, the numbers of people who vote beyond 5, the numbers of people who do not vote up to 5?

Mr Green: I think that is in our report.

THE CHAIR: That is in there?

Mr Green: Table 59.

THE CHAIR: Okay, I will have a look at that. I thought it was there but I confess that I did not reread the report last night.

Mr Green: Recommendation 6 is part of the casual vacancy collection of amendments that we have already talked about. Recommendation 7 is really just a very technical thing at the moment. The words in the act require us to print it on declaration ballot papers, I think, above and in practice we are printing it below, simply because of the way the ballot papers are designed and the way the scanning system works. It is just providing a bit more flexibility there so we are not unintentionally breaking the act. The government has accepted that one.

Recommendation 8 is the one we have talked about—removing the requirement for a witness to sign a postal vote certificate, which is also in the bill. Recommendation 9 is

only contingent on whether recommendation 8 is not accepted. So the fact that the recommendation is accepted means that it is redundant. Recommendation 10 is the recommendation—

THE CHAIR: It is the declaration about not being able to vote on polling day.

Mr Green: Yes. If I might clarify the Attorney-General's remarks earlier: we have not recommended that all voters should be able to cast a pre-poll vote. We have recommended literally that the Assembly should consider whether it is a good idea or not. We are not actually positively pushing for it; we are just suggesting that it is an issue that the Assembly and this committee inquiry should consider.

Not only in the ACT but in every jurisdiction across Australia—and in federal elections—in election after election a higher proportion of people are voting early. It seems to be a combination of factors that are leading people to do that. There is the convenience factor, the fact that work patterns are not so much that people work Monday to Friday and do not work Saturdays. There are a whole range of reasons why people are voting early. The fact that large numbers of people are voting early, I think, suggests that the notion that most people should vote on a polling day because then they get the full benefit of the election campaign—we are already in a situation where a large number of voters, I think about 25 per cent, vote early now—

MS HUNTER: Maybe it is because many people do not want the full benefit of the election campaign.

THE CHAIR: This is just a thought that has come into my mind: how does it work in, say, the UK where they always vote on Fridays and the US where they vote on Tuesdays? Do they have pre-poll periods? I thought in the UK they did not; you vote on polling day.

Mr Green: I am not totally familiar with the situations in the UK and the US. They do have some early voting options, as I understand it, but I do not think they are anywhere near as generous as the Australian situation. We are much more generous with allowing people to vote early. One issue that they have in the United Kingdom, at least, is that they attempt to count every vote on election night and declare the poll on election. So they do not have that facility for postal votes, for example, to come back through the post the way that we allow it for a week after polling day.

THE CHAIR: But they do not have compulsory voting with a fine attached to it.

Mr Green: They do not have compulsory voting and their turnout is much less than our turnout.

THE CHAIR: That is interesting. Their polling stations remain open longer into the evening?

Mr Green: I think they do, yes.

THE CHAIR: That is certainly the case in the United States. I just look at that by way of comparison.

Mr Green: Just to sum up, we are not recommending that it should happen, but we think that because the way people are voting has changed quite dramatically over the last 10 to 15 years it is something that should actively be looked at. From our perspective in the Electoral Commission, we are providing our electronic voting facilities in our pre-poll voting centres. If we were allowing more voters to vote through those pre-poll voting centres during the lead-up to polling day we would capture a lot more electronic votes which leads to efficiencies, cost savings and also convenience for voters because it reduces the informal vote. It allows us to provide voting instructions in multiple languages. There are lots of good reasons why electronic voting is a better experience for voters. It would also enable us to extend that to more voters. It is not a crucial consideration, but it is something that would occur if we were able to get more people to vote early.

Recommendation 11 was the double-sided stickers issue. From my memory, there were only two brought to our attention—or four.

MS HUNTER: I think it was four complaints.

THE CHAIR: So complaints about four different pieces of—

Mr Green: I think there were only two stickers that were printed in the *Canberra Times* and I think they were both Australian Labor Party stickers.

THE CHAIR: So it was really about the stickers that were stuck to—

Mr Green: On the front page of the *Canberra Times*. To see the authorisation statement you had to actively peel them off and look on the other side. That is just an issue that we thought the committee might want to look at.

THE CHAIR: The other way of doing it would be, rather than saying it was authorised on both sides—I am not quite sure how you would word it—to say that for something which was being presented with a particular face, the facing page, it had to be authorised on the facing page.

Mr Green: That would solve the issue, yes.

THE CHAIR: Going back to pre-polling, we have now got three weeks of pre-polling. The commonwealth has three as well, or two?

Mr Green: The commonwealth has a variable election period, so it depends on the date specified in the writs.

Mr Moyes: The shortest period from writ to polling day is 33 days and I think it is 10 days from writ to close of nominations. There is another day after that for nominations to be declared. So what does that leave? I think it is about three weeks—22 days.

THE CHAIR: So once nominations are declared then they can commence pre-polling. Have we always, Mr Green, had three weeks in the ACT? I thought it was two at one stage.

Mr Green: No, we have always had three.

THE CHAIR: It has always been three?

Mr Green: Ever since 1995, since we have had our own electoral—

THE CHAIR: Yes.

Mr Green: An interesting development has been that extra public holiday being thrown into October. It looks like it might almost always fall on the first day of the pre-polling period, which means it would cut the pre-poll period shorter by a day and give us an extra day longer to print the ballot papers and get electronic voting ready. We are not that sorry about that happening. You might like to know that.

THE CHAIR: We did not think about that, did we? If you would like to continue with defamation?

Mr Green: The point that I would like to reinforce that we made in our submission about the defamation issue is that the defamation provision that we currently have was copied from the Commonwealth Electoral Act when we created our own Electoral Act in 1994. It was based, I think, pretty much word for word on the commonwealth provision. The commonwealth have now repealed that provision. It was done on the basis of a High Court decision that indicated that that provision was unenforceable. It seemed to me that if the commonwealth had repealed that provision for what seems to be a very good reason, it would be appropriate for the ACT to follow suit. It is really having on our statute books a provision that the High Court decision seems to have indicated was not workable and was a problem for us.

THE CHAIR: The case in the High Court was?

Mr Green: We did quote that in our report. It was Roberts v Bass. It is on page 50 of our report.

Recommendation 13 was dealing with disclosure issues. As the attorney mentioned, that is the subject of a separate inquiry. I would just mention, as an aside, that both New South Wales and Queensland have now introduced quite substantially different disclosure provisions and caps on expenditure and donations et cetera in their jurisdictions. So there are movements in other jurisdictions in that area.

MR HARGREAVES: Is it also not true, Mr Green, that both of those jurisdictions have a record of corruption at the political level far outreaching that of the ACT and a good reason therefore to introduce that legislation?

Mr Green: I am sure others can draw conclusions on that. I do not think it is my place to make comments like that.

The penalty notice recommendation is recommendation 14, which the government has not accepted. Our view on that—and we have put some numbers in our report—is that the number of people who are failing to vote in the ACT has increased in the last

election over the election before it. The number of people who paid the non-voter fine went up quite substantially.

MR HARGREAVES: Do you think $5 is going to make a lot of difference, quite frankly?

MS HUNTER: It went from 7.2 per cent to 9.6 per cent, I think.

MR HARGREAVES: You can't get a McDonald's breakfast for five bucks.

Mr Green: I will come to that question in a second. I will just find this number for you. In 2004, 1,953 people paid the $20 penalty. In 2008, 3,422 paid the penalty. So that is an increase of over 1,400 people choosing to pay the penalty. I am wondering if the reason for that is that $20 just is not a significant disincentive anymore. We suggested, say, $25 as a starting point, but if you look at what the other jurisdictions have done—and we have quoted this in the report—some of them have $50 or more and some of them have got a sliding penalty, so that if you pay on the first notice it might be $20 but if you ignore the first notice and get the second notice then the amount might have gone up to $50 or—

THE CHAIR: Or if you are a frequent flyer—

MR HARGREAVES: Or a deliberate flyer—

Mr Green: An option of a sliding penalty—on the first notice you pay $20, on the second notice you pay $50—might be a disincentive, but—

MS HUNTER: In Victoria it is $54. I think that is the highest.

Mr Green: Yes, I have not reminded myself of what the figures are.

MR HARGREAVES: I was just expecting to see a much more significant figure than 20, I have to say—something around the $50 to $100 mark, which is something to think about. It is not going to bankrupt anyone, but it will make them think about it.

MS HUNTER: That is what I was wondering. Where there is a higher penalty in Victoria—it is about $54—do you have any evidence to show that that has decreased the number of people who are not voting, or increased the number of people who are voting?

Mr Green: We have done an analysis of that. We are not sure that kind of information is available. We break our non-voter details down into quite detailed categories. I am not sure that the other electoral commissions do that.

MS HUNTER: The government has rejected the recommendation around increasing the penalty and I did ask the attorney before whether you have any alternative ideas about how to try and decrease—or increase—those who are not voting. Are there any other initiatives or ideas?

Mr Green: We certainly conduct an electoral education campaign before every

election and we also do community education and school group education between elections where we push the message that voting is compulsory. We will get a reasonable turnout in the ACT, but it is not as high as we get for commonwealth elections, for a range of reasons, one of which is the ACT elections just do not get the publicity that the commonwealth elections get. I think our turnout will always be lower than for commonwealth elections because people who are travelling do not know there is an ACT election happening.

The education campaign we are planning for the next election will continue to push the message that voting is compulsory. An aspect of enforcing compulsory enrolment is the fact that we actually take people to the Magistrates Court and fine them if they do not respond to the notices that we send them. Some other jurisdictions do not send voters to court if they do not reply. So in some places people are getting the message that if you just ignore the letters nothing will come of it. We do prosecute people. That is a message that we also will try and get out there.

MS HUNTER: Do you have the data on the demographics of the non-voters so you have some sense of how you might be able to target campaigns or information?

Mr Green: We did look at that. I cannot remember the details of it, but my memory of it was that it is fairly general across the age groups. I do not recall that there was an age group bias to that.

THE CHAIR: How many non-voters did we have last time? It was 3,000 people who paid the fine.

Mr Green: The total number of non-voters in 2008 was 23,452 compared with 16,349 in the election before. It is a reasonable increase.

Mr Moyes: That is those we sent a notice to. Some of those will have a valid reason for not voting.

THE CHAIR: That was the number of apparent non-voters. How many people did you take action against?

Mr Green: That was the number of apparent non-voters, which is simply calculated by the number of votes, subtracted from the enrolment figure. We sent non-voter notices to 16,673 people. We ended up getting 3,422 of those paying the $20 penalty. It was about 500 people that we ended up taking to court.

THE CHAIR: Out of the 16,000 people that you sent letters to, 3,000 stumped up the money straight away. You can take this on notice if you like: how many came back with a reasonable excuse?

Mr Green: These are set out on page 68 of the report. Most people provided a valid reason.

THE CHAIR: The next recommendation is the one about casual vacancies. What prompted the Electoral Commission to make this recommendation? We have been operating this for four or five elections.

Mr Green: It was prompted by the reports in the *Canberra Times* of parties considering nominating six candidates in five-member electorates. It was not clear in the article about the Liberal Party whether they were discussing preselection or whether they were discussing actually putting up six candidates for the election. The article was not clear about that. But the Labor Party, according to the *Canberra Times*, was considering putting up six candidates in a five-member seat. That got us thinking about why you would do that. And the only reason that you would do that, it seemed to us, was that it was insurance for the casual vacancy situation. If you had a series of casual vacancies and you ran out of available candidates who were unsuccessful, you would then not have a candidate able to fill the casual vacancy.

The thinking then went that if it was casual vacancy rules that are leading parties to want to put up more candidates than there are vacancies, that seemed to be a bit like the tail wagging the dog, to an extent, in that it was a casual vacancy mechanism that was impacting on the actual election, to the extent that it would make the ballot paper design somewhat problematic. It could be confusing for electors to have one party with two columns of candidates rather than one. The Robson rotation would only operate within the two columns rather than in the one column. There was the issue about voters exhausting their votes if they only go 1 to 5 when there are six candidates presented there. So the thinking was that the casual vacancy requirements were driving parties to put up more candidates than they needed to.

The scheme we have proposed is a way of getting around that without compromising the election process and unnecessarily complicating the election process but still providing a reasonable backup for what we would anticipate would be a fairly rare occurrence that has not occurred before and might not occur for some time. For example, the ACT Greens at the last election put up three candidates in Molonglo and two of them were elected. If both of those candidates died or resigned, one of those vacancies would be filled by the other Greens candidate, but the other one would be filled by someone from another party or by an independent. And that just seemed to not be consistent with the flavour of our electoral system, which is that party candidates are elected in the voters' minds to a large extent because they are candidates for a particular political party.

THE CHAIR: Can you refresh my memory, Mr Green, as to what the voting instructions are on the ballot paper? This is because we essentially have optional preferential voting but we do not make a thing about it.

Mr Green: Yes. Copies of our ballot papers are in our election statistics for 2008. For the electorate of Brindabella, a five-member seat, the instructions are: "Number five boxes from 1 to 5 in the order of your choice. You may then show as many further preferences as you wish by writing numbers from 6 onwards in other boxes. Remember, number at least 5 boxes from 1 to 5 in the order of your choice."

THE CHAIR: That is not strictly correct because I can still vote "1" and cast a valid vote. But you do not want too many votes to exhaust.

Mr Green: This has been a matter of some debate in previous Assemblies and it was particularly debated early in the life of the ACT's incarnation of Hare-Clark. The

formality rules require a valid vote to be simply a single first preference. Everything after that is optional when you come to counting it. But the way that the Electoral Act is constructed, it has a distinction between what is counted as a valid formal vote and what voters are instructed to mark on the ballot paper. So there is a deliberate intention expressed in the Electoral Act of the Assembly that voters are to be instructed to show preferences for at least as many candidates as there are vacancies. But when we come to count it, if voters have failed to follow those instructions and have simply gone "1" or "1, 2" or "1, 2, 3" we would still count it insofar as their preferences were valid.

THE CHAIR: Until they are exhausted, yes. It is an interesting philosophical question. Would you like to address your new recommendations?

Mr Green: Yes.

MR HARGREAVES: What about 16?

THE CHAIR: Yes, 16—the size of the Assembly.

Mr Green: If there was to be a change in the Assembly, we were recommending that the necessary legislative changes should be in place by October 2010 simply to give us time to do the redistribution. The redistribution is still underway.

MR HARGREAVES: Yes, but 2010 has passed.

Mr Green: 2010 has passed. If the Assembly was to decide, even at this stage, that it wanted to increase the size of the Assembly by 2012, it would be legislatively possible to change the Electoral Act to change the number of members, apart from going through all the negotiations with the commonwealth, and have another redistribution. There would still be time to do that, but it would be extremely tight to do that.

MR HARGREAVES: When is D Day, Mr Green?

Mr Green: It all has to be in place before the election starts in September next year.

MR HARGREAVES: So it has to be all done and dusted, wrapped up and tied in a bow by the end of August next year?

Mr Green: Yes.

THE CHAIR: But strictly speaking the Assembly cannot change the size of the Assembly at the moment.

Mr Green: Not without the cooperation of the commonwealth.

MR HARGREAVES: Of course. D Day is determined by what the commonwealth legislative process is going to be.

THE CHAIR: Your other recommendations?

Mr Green: Yes. In our new submission to this inquiry, we have brought you up to date on some developments that have occurred since we have done our review and expanded a little bit on some of the issues that we have put in our original report. The first recommendation is addressing the issue raised by the scrutiny of bills committee about the electoral matters bill.

We are suggesting that the bill could be amended to address the issue raised by the scrutiny of bills report. The way that nominations work is that the nomination period closes 24 hours before the hour of nomination, which is the point when we declare who the candidates are who have been elected. So there is a 24-hour period from when the close of nomination occurs and the actual declaration of the nomination happens. That is to allow us to sort out any difficulties with nominations, rather than what used to happen, which was that they would close at midday and then we would declare it at 1 o'clock. We would have an hour to sort out difficulties. This gives us 24 hours to sort out difficulties.

We are suggesting that if it is a concern the bill as it currently provides would require us to reject in total a nomination that had too many candidates in it. But we allow that 24-hour period during which the parties could correct that nomination by removing one or more candidates to bring them back within the required number. An alternative was suggested during the discussion with the Attorney-General so that, simply, if we got six nominations for a five-member seat, just dropping off the last one. I would not be comfortable with doing that because the one you choose might be the candidate who might end up wanting to be or who might be the existing Chief Minister or Leader of the Opposition, just because of the way they have put in the nomination. I just do not think that would be good.

THE CHAIR: And your decision might be challenged in court. I suppose I agree with the attorney that if a party official cannot count to five or seven, he is not doing his job properly.

MR HARGREAVES: Also, if a party official puts it in, a party official can take it out.

Mr Green: Yes. The way the nomination process works is that if we get a nomination that is defective, we will attempt to contact the person who has made the nomination and get them to correct the defect. But we are only able to do that until the close of nomination period. We have been known to get nominations at five minutes to midday on the last day. On at least one occasion we have had to reject a nomination because there was not the correct number of nominators on the form. So it does happen that people will give us the nomination form at the very last minute. So this recommendation will then give us that 24-hour breathing period to fix things in. That was the desire.

Recommendation 2 is really bringing explicitly to the attention of the committee and the Assembly the operation of the Hare-Clark proportional representation act and the Referendum (Machinery Provisions) Act, taken together. You have to read quite deeply into the legislation to actually work this out—

THE CHAIR: Which I confess, Mr Green, I have never done.

Mr Green: It is complicated. What the legislation effectively provides is that if a bill is passed in relation to a matter that is entrenched under the entrenchment act, and if it achieves a simple majority but not a two-thirds majority, the Referendum (Machinery Provisions) Act automatically requires that to be put to a referendum at the next general election. So we wanted to make the Assembly aware that that was the case, that if one of the parties in the Assembly does not support the casual vacancies bill and the other two do support it, the outcome of that would be to hold a referendum at the next election, which will obviously cost money.

MR HARGREAVES: Unless the two parties combined have more than two-thirds of the numbers.

Mr Green: That is right.

THE CHAIR: I think that is very helpful in clarifying the situation.

Mr Green: Recommendation 3 is on the same issue. Recommendation 4 is something we have discussed earlier. If the casual vacancies bill is not passed, we suggest that we go back to the existing situation of allowing more candidates to be nominated than vacancies and to provide for splitting columns, simply because the whole thing is a package. If part of the package drops out then the other part should be changed accordingly.

Several of our recommendations are simply suggesting that the committee might like to consider some of the matters that the government has not supported. So that includes pre-poll voting, the issue about allowing people to pre-poll vote, double-sided stickers, defamation—we have talked about those.

THE CHAIR: The thing about the double-sided stickers is that, as Mr Hargreaves suggested, you could say that on the double-sided stickers the facing page must have an authorisation on it.

Mr Green: That would be a solution to the problem. It does not currently explicitly provide that. Recommendation 8 talks about the penalty notice.

MS HUNTER: Do you have a view on that?

Mr Green: My view is that people should, on the face of an electoral advertisement, be able to determine who has authorised it. If you have to do something complicated to get to the authorisation statement then maybe that is not as obvious as it should be.

THE CHAIR: Do you think turning something over is too complicated?

Mr Green: Not necessarily but people did complain and assert that.

THE CHAIR: But removing a sticker—

MS HUNTER: Removing a sticker is not the same.

THE CHAIR: It is not the same as turning something over.

MS HUNTER: That is exactly right.

THE CHAIR: That seems to be the point that you are making.

Mr Green: Yes.

Mr Moyes: One of the complaints, because it was on the newspaper and a newspaper is a little flimsier than normal bond paper, is that in trying to remove it, they actually tore the newspaper and it did not all come off.

MS HUNTER: So you could not see the authorisation?

Mr Moyes: It took the newspaper with it so they could not see it.

Mr Green: Recommendations 9 and 10 deal with a new development that has occurred since we wrote the 2008 election report, which is the adoption, particularly by New South Wales and Victoria, of automatic enrolment, which is a new thing to electoral enrolment in Australia where trusted agencies are providing the electoral commission with data that indicates that people are both qualified to vote and are resident in a particular location in their state, and the state electoral commission is communicating with those electors through a variety of means—emails, SMSs and letters, in the main. They are saying to these electors: "We understand that you are qualified to vote and we understand you live at this address. We are going to automatically enrol you unless you tell us you've got a good reason why we can't automatically enrol you." So they are enrolling people who the commonwealth are not able to enrol because the commonwealth require a form to be filled in and signatures to be signed for a new enrolment and they require particular action on the part of electors to update their addresses on the electoral roll.

So what is happening now is that enrolment in New South Wales and Victoria is becoming quite dramatically out of step between the state roll and the commonwealth roll because the states are enrolling people according to advice they are receiving from places like the motor registry or the schools boards. There are some other agencies that they are using as trusted agencies. Everyone who is enrolled like that for the state is being written to and told: "You're now on the state electoral roll for your current address. You're not on the commonwealth roll at all" or "You're on the commonwealth roll for an old address. Here's a form to fill in. You need to fill this in to get your commonwealth enrolment up to date."

The bulk of people who are getting those letters are not filling in those commonwealth forms, so the commonwealth roll is getting more and more out of date with the state rolls. That impacts on our roll in the ACT, to the extent that if any of our electors move interstate, to Victoria or New South Wales, they might be getting placed on the Victorian and New South Wales roll but they are not getting placed on the commonwealth roll if they are not filling in the forms. This means they are staying on the ACT roll for an address in the ACT for commonwealth purposes, which means they are automatically on the roll for ACT purposes, and that means our roll has

people on it who have been enrolled in other states. So it is getting terribly complicated for people. We will be sending them non-voters notices to an address they do not live at, which adds to our expense. So it is a situation that is less than ideal because the ideal would be that we have one enormous spend for the whole country that is a good one; that we all have a common roll at all levels of government. That is not happening at the moment.

The commonwealth Joint Standing Committee on Electoral Matters has just presented its report in relation to the 2010 federal election where it has recommended that the commonwealth should adopt automatic enrolment. The commonwealth government has not had time to respond to that as yet. Of course, if it was to support it, it would have to get it through both houses of federal parliament. So there is a long way for the commonwealth to go before it decides what it does in relation to that. So we are suggesting that the committee might like to look at this as an issue for the ACT.

There are essentially two options for us. Either we go down the same road as New South Wales and Victoria and go it alone with our own automatic enrolment scheme and break the nexus that we have with the commonwealth to that extent or we keep in step with the commonwealth and wait for the commonwealth to do this, if indeed it does. The commission has traditionally recommended that we should remain in step with the commonwealth, simply because it is terribly confusing for voters to be on one roll at one level and a different roll at another level. The cost to the ACT of having our own separate enrolment criteria would be quite significant. We would have to put quite a bit of money into going out on our own to do that.

MS HUNTER: What would be the cost? Have you quantified that cost?

Mr Green: We have not put a dollar figure on it. It is costing New South Wales and Victoria a lot of money because they have got extensive computer systems. They have got a lot of people working on it. It is a very complicated process that they are going through. They are going through data from trusted agencies. They have got to filter the data to verify that people exist, that they are qualified because they are citizens. They have got to do quite a lot of data matching. It is a very complicated and expensive process.

THE CHAIR: If you are relying on motor vehicle registration or the board of senior studies the potential for non-citizens is quite high.

Mr Green: To get around that they do matching with births registries and with citizenship registry information. They actually verify that people are citizens before they will enrol them, which means that some people are not getting automatically enrolled who perhaps should be because they are not showing up as being citizens in these other data matches. It is not a perfect system by any means.

MS HUNTER: Obviously there must be some savings once you have got your system in place. Has that been quantified in the other jurisdictions where they have put this in place? There must have been some sort of cost-benefit done for them to move on this matter.

Mr Green: They have certainly costed and done business cases for the things that

they have implemented, but my impression is that it has cost them quite a lot more than they have saved. They are still paying the commonwealth a joint roll fee because they are still using the data from the commonwealth. They have totally separated themselves from the commonwealth.

THE CHAIR: Is this a move that came about because there was a tightening up of the process of witnessing and whatnot for the commonwealth role and there was some criticism that you were disenfranchising people from the commonwealth role? Is this a reaction to that?

Mr Green: I do not think it is a direct reaction to that specific issue. It is more a reaction to the fact that the commonwealth Electoral Commission has been saying for some years now that the number of people who are not on the roll who are qualified to be on the roll is at 1.4 million—

Mr Moyes: 1.4 million people at the last federal election—

Mr Green: And that is a number that is growing—

Mr Moyes: not on the roll.

Mr Green: So across Australia, over 1.4 million people who are qualified to be on the roll who are not on the roll anywhere. The impression that we electoral authorities are getting is that that is a mixture of people who do not want to enrol for a variety of personal reasons and also a reflection of the fact that people in our technological era do not fill in forms that require signatures anymore. They want to do things online. They want governments to do things for them automatically.

Young people these days do not think that they should go down and fill in a form. They think the government knows where they are and should enrol them. The Australian Electoral Commission is writing to people who they know from databases live at various addresses and saying: "We know you live here. We know you're qualified to vote. Fill in this form and we'll enrol you." I think people are saying: "You know who I am. You know where I live. Just enrol me without me doing anything."

There is a range of reasons why that number seems to be getting to be large and growing. The complication of the form I think was also a factor. The fact that there was a two or three full-page form that was full of writing and things just put people off. They have simplified the form recently. It is back down to a two-page form, I think.

Just to sum up, we do not have a clear way forward with this. If the commonwealth were to do automatic enrolment in a way that we thought was a good way then just piggybacking on their coat tails as we have done from now would be the best option for us and for the electors because there would be a one-stop shop rather than this process of having two different electoral rolls happening.

MS HUNTER: But it could take the commonwealth quite some time.

Mr Green: It could take the commonwealth quite some time, so the Assembly might want to think about whether we want to do anything earlier. But it would cost more money if we were to break that nexus with the commonwealth.

Recommendations 11, 12 and 13 are all to do with the provisions relating to the various officers on the redistribution committee. The fact that the Planning and Land Authority has been transferred from an independent statutory office-holder to being a position that is also tied to the chief executive of the relevant department introduces an element of that officer not necessarily being free of direction from the minister of the day. There is an explicit provision in the Electoral Act that refers to the surveyor-general not being subject to direction in relation to being on the redistribution committee. We thought it would be appropriate to extend that same provision to the Planning and Land Authority.

THE CHAIR: This is a direct outcome of the Hawke inquiry?

Mr Green: That is right. As to the last one, a thought of mine was that we have a history in the ACT of resolving thorny issues to do with our electoral system by putting the question to people at a referendum, which is how we ended up with the Hare-Clark system rather than a single-member electorate system.

THE CHAIR: Or d'Hondt. Anything but d'Hondt!

Mr Green: Yes, d'Hondt was not on the ballot paper at the time. We are just suggesting that if the Assembly and its various members are not able to decide on a particular model of what the Assembly should be increased to, another option might be to put that to people at a referendum, possibly at the next election, and say, "Would you like 21 members or 25 members or something else?"

THE CHAIR: Or none of the above.

Mr Green: Or none of the above. Whether that is a realistic suggestion is another question.

THE CHAIR: This has been a fairly discursive—rather than a hearing—conversation. Are there any other matters that have been put by the commissioner's submission that members would like to raise questions on?

MS HUNTER: Yes, just a couple. One of them is that the bill talks about 16-year-olds now being able to register so that they are ready to go at the age of 18. I know that in the past there has been an inquiry here in the Assembly about 16-year-olds and 17-year-olds voting and the commissioner has had a particular view. Do you still hold the view that 16 and 17-year-olds should not be able to vote?

Mr Green: That is not an issue that the current composition of the Electoral Commission has discussed since we made that inquiry some years ago. It is not something that the current members of the three-person commission have formed a view on. If I recall the arguments we put forward the last time this came up, it was very much concerned with the fact that 18 years is the voting age for the commonwealth elections and to introduce that for ACT elections would be to cause

considerable confusion. The commission really has not had a discussion on this.

MS HUNTER: I just note that there are more jurisdictions around the world that are moving in that direction, so it is quite an interesting one. The other one was around how-to-vote material. I noted that when you go to the complaints section, apart from the double-sided stickers, it talks about that old issue of being 100 metres from the polling booths, whether it be pre-polling or on election day. I am wondering if the commission has a view on one, I guess, solution that has been put forward which is around having the how-to-vote information in polling booths. You do not necessarily have the expense and waste of handing out pieces of paper and going back to the old system, but there is some guidance in polling booths. Does the commission have any view on that?

Mr Green: The full commission has not discussed this. Perhaps I can just reflect on the history of why we have a 100-metre ban in the first instance. As I understand the logic behind the policy intent of why we have the 100-metre ban, it is part of the package of Hare-Clark having Robson rotation that, firstly, with Robson rotation it is very difficult to come up with a how-to-vote card—that is, a straight copy of this list of numbers onto this column. Because candidates move around it is difficult to come up with a how-to-vote card that will make sense to voters and not cause confusion for them. But it is also reflecting the notion that the point of Robson rotation is that it is pushing voters gently towards choosing candidates of their own choice and numbering candidates according to their personal assessment of the merits of the various candidates rather than accepting what the party has recommended. So the ban on how-to-vote cards is really aimed at—

THE CHAIR: It would be inconsistent with what was said at the beginning when you say that, Mr Green. You were saying at the outset that we need to change the count-back because people tend to vote for parties and not individuals.

Mr Green: No, I did not say that. I said that people tend to vote for candidates in the knowledge of their party situation. I think that if you look at the behaviour of voters using the Robson rotation system, it is very clear that voters are using Robson rotation to reward good performers and to punish the bad performers, which is exactly what Robson rotation is meant to do.

Putting how-to-vote cards in polling places—either by getting rid of the 100-metre ban or putting how-to-vote cards in the polling places—is going away from that intent of Robson rotation, which is really leaving it up to voters to decide who they vote for rather than following a party recommendation.

THE CHAIR: As there is nothing further, thank you very much, Mr Green and Moyes, for your attendance here today. The transcript will become available. If members think that there are other questions, we can deal with them on notice, but I am mindful of the fact that we have to report on this by 22 September. Thank you.

The committee adjourned at 12.28 pm.