



Supplementary remarks—Senator Andrew Murray

1 Introduction

1.1 More is required

As always this Report is an important one, and the Chair and his Committee have done well in reviewing the conduct of the 2004 federal election so thoroughly.

These remarks of mine are deliberately characterised 'Supplementary Remarks', because although I oppose or qualify a few recommendations, (see Table 2 below), I support the Report as a whole.

I make no apology for repeating some observations made by me in previous Joint Standing Committee on Electoral Matters' (JSCEM) Reports. I do this because the issues I address remain problems, particularly in the areas of political governance and political donations and disclosure.

Despite successive references by the Senate to the Committee over several years for inquiries into political funding and disclosure, the Committee has failed to pursue these matters to their conclusion. This reflects a political cultural problem as much as anything, where inertia is encouraged by a fear that reform will hurt self-interest.

The institutional self-interest of political parties and their party organisations often acts against reforms to political governance and funding disclosure being adopted or advocated. Nevertheless there are parliamentarians from all parties that do support and advocate reform.

Getting such advocacy to be adopted by Governments is hard work. I stand to be corrected, but I cannot recall one single instance of improved accountability or transparency in political funding and disclosure initiated by the federal Coalition Government in its nearly ten years in office. The relatively minor changes that have occurred have been a result of Senate amendments.

Although there is self-evidently insufficient political support for major improvements the Democrats and others want in matters such as funding and disclosure or political governance, there does seem to be wide media and public support for significant improvements.

Coalition Government inertia in these matters is in complete contrast to major changes in this field in fellow democracies like Canada, the United Kingdom, and the United States, to take a few examples.

The JSCEM Report does tackle some significant reform topics, and the Chair and the JSCEM are to be congratulated in initiating real debate on fundamental issues. For instance, the detailed discussion in the Report on parliamentary terms, voluntary and compulsory voting, voting systems, modern campaigning and on public funding and funding disclosure is very welcome.

This is in addition to the normal fare of the Committee's reports into elections, which tend to focus more on statistical, technical, administrative and functional matters. Valuable insights and recommendations have been outlined.

The Australian Democrats have a long-standing commitment in seeking to improve the electoral process to ensure that the democratic rights of all Australians are protected and enhanced. In our view, there is no more appropriate place to address the spectrum of relevant electoral and political issues than in the JSCEM's triennial election review.

To this end, we have consistently sought to address several key issues in our Supplementary Remarks to previous JSCEM Reports. Consequently, the topics covered in these Supplementary Remarks are generally more controversial for political parties.

The issues that are arguably of greater public interest and notoriety covered in our Remarks are:

1. Political governance;
2. Constitutional reform;
3. Government advertising;
4. Funding and disclosure; and
5. Selected other matters.

In addition to our brief review of changes to electoral law since the 2001 Federal Election and the limited adoption of recommendations made by the JSCEM report into the 2001 Election, we concentrate on these five key issues.¹

In the Democrats' Minority Reports on the JSCEM's Reports into the 1996 and 1998 elections, we drew attention to voter dissatisfaction with politics, politicians, and parliaments expressed through polls and in the media. There still appears to be little improvement regarding voter and media perceptions, and no significant advance in parliamentary or political standards, or party political governance, with the notable exception of parliamentary entitlements reporting and administration.

Strong pressure by the Democrats and Labor over the last decade has resulted in the Coalition responding with radically improved reporting, accountability and administration of parliamentary entitlements. To their credit, the Coalition Government accepted the need for significant improvements in this area of federal administration.

An added hurdle to accountability and political standards that is more apparent following the 2001 election is the use and abuse of government advertising.

Given the federal resistance to better rules on funding disclosure, the eight Labor-controlled States and Territories could initiate reform and lead by example. Regrettably they have done no such thing.

Federal, State and Territory governments' resistance to significant reform may mean that aspirations to higher political standards can be characterised as idealistic and unlikely to be achieved, but in our view higher political standards remain worthy and necessary goals.

It is true that the Australian Democrats to date remain largely unsuccessful in our quest for significant improvements in party political governance, truth in political advertising, and the full disclosure of all types of political party income.

Nonetheless, our lack of success on improving these matters, in my view, does not absolve us of our obligation to continue to report on and address such important issues.

That is the purpose of these Supplementary Remarks.

1 Main sources of reference include previous JSCEM Reports on the 1996, 1998 and 2001 elections; the AEC's *Behind the Scenes* paper; transcripts from the JSCEM hearings and the 2004 election report; and submissions made to the current Senate Inquiry into Government Advertising and Accountability.

1.2 Summary of Australian Democrats position on electoral matters

The two tables within this section summarise the Democrats position on electoral matters and are included for reference purposes. The first table summarises the independent recommendations made by us to the JSCEM, whilst the second table summarises our dissenting or qualifying remarks on the recommendations of the Main Report. These recommendations are further expanded in the body of our supplementary remarks.

Table 1 Summary of Democrat Recommendations

1	Political governance
1.1	That political parties be brought under an accountability regime that includes a written publicly available constitution which must contain certain matters; protects the equal rights of members; and allows for regulatory oversight.
1.2	That the JSCEM inquire into branch stacking and pre-selection abuses in political parties.
1.3	That the <i>Commonwealth Electoral Act 1918</i> be amended to ensure that the principle of 'one vote one value' for internal party ballots be a prerequisite for the registration of political parties.
1.4	That the <i>Commonwealth Electoral Act 1918</i> and the <i>Workplace Relations Act</i> be amended as appropriate to ensure democratic control remains vested in the members of political parties.
2	Constitutional reform
2.1	That the dates of elections be fixed and preset by legislation; that if a four-year term for the House of Representatives is to be put to the people as a Referendum question that research be undertaken to determine support for fixed four-year terms; earlier closure of the Electoral Roll can only result following the implementation of fixed election terms.
2.2	That subsection 394(1) of the <i>Commonwealth Electoral Act 1918</i> be repealed.
2.3	That a referendum be held to alter the applicability of s44 of the Constitution.
2.4	That the Government review the potential for a Charter of Rights and Responsibilities to be introduced in Australia.
2.5	The <i>Commonwealth Electoral Act 1918</i> be amended to give all persons in detention, except those convicted of treason or who are of unsound mind, the right to vote.
3	Government advertising
3.1	The <i>Commonwealth Electoral Act</i> should be amended to prohibit inaccurate or misleading statements of fact in political advertising, which are likely to deceive or mislead.
3.2	That blackout provisions in the Caretaker period for all non-essential government advertising be extended to cover the time from the July 1 date preceding the earliest likely date for the House of Representatives and the half-Senate election.
3.3	That mandatory standards be adopted in relation to government advertising, policed by an appropriate oversight body.
4	Funding and disclosure
4.1	No media company or related entity or individual acting in the interests of a media company may donate in cash or kind to the electoral or campaign funding of a political party.
4.2	All electoral and campaign funding is subject to a financial cap, indexed to inflation and controlled by the Australian Electoral Commission. Section 294 of the <i>Commonwealth Electoral Act 1918</i> should be amended to this end
4.3	No entity or individual may donate more than \$100 000 per annum (in cash or kind) to political parties, independents or candidates, or to any person or entity on the understanding that it will be passed on to political parties, independents or candidates.
4.4	The donations loophole be closed that allows nine separate cheques to be written at a value just below the disclosure level, made out to the separate federal state and territory divisions of the same political party.

4.5	Additional disclosure requirements to apply to Political Parties, Independents and Candidates for fundraising and political donations.
4.6	Additional disclosure requirements to apply to political parties that receive donations from trusts or foundations. Should be obliged to return the money unless predetermined declarations of interest and/or relationship are made.
4.7	Political parties that receive donations from clubs (greater than those standard low amounts generally permitted as not needing disclosure) should be obliged to return these funds unless full disclosure of the true donor's identities are made.
4.8	Donations from overseas entities must be banned outright. Donations from Australian individuals living offshore should be permitted.
4.9	The <i>Commonwealth Electoral Act 1918</i> should specifically prohibit donations that have 'strings attached.'
4.10	The Corporations and Workplace laws be amended so that shareholders and members of registered organisations are required to periodically approve company or union political donations policies.
4.11	Where the Australian Electoral Commission conducts elections for registered and other organisations, the same provisions governing disclosure of donations for political organisations should apply.
5	Other matters
5.1	That the JCSEM initiate a cooperative inter-state consultation process to find ways to make how-to-vote laws and regulations as consistent as possible across all Australian parliamentary jurisdictions, and to take an early opportunity to trial, at a by-election, systems of displaying how-to-vote material inside polling booths.

Table 2 Dissenting or qualifying remarks on the findings of the Main Report

Chapter 2	Enrolment
Recommendation 3	This recommendation needs to be agreed with the States and Territories to ensure that the Joint Roll arrangements remain operative and integrated. If the States and territories oppose this recommendation, further consultation should occur before implementation.
Recommendation 4	The JCSEM has recommended an earlier closure of the Roll. The Democrats could support that if Federal Elections were based on fixed terms, since voters would know the election date in advance. In the absence of fixed terms we maintain that the rolls should remain open as at present, for seven days after the issue of the writs. Voters do not attach great importance to keeping their details up-to-date on the electoral roll outside of an election. It defies reality and human nature since hundreds of thousands of voters only update their details when an election looms. We fear that if implemented, the recommendation by the JCSEM for earlier closure of the rolls in the present system will result in voters being removed from the roll before they are able to amend their details. If this early closure arises from a concern that the AEC cannot check applications properly, that is only a danger for new enrolments. Persons already on the roll are validly on the roll, although their address details may need updating.
Chapter 4	Registration of political parties
Recommendation 18	This recommendation will almost certainly result in some presently-registered political parties losing party status. In some cases a name-change may be forced on them if they wish to retain registration. The recommendation arises from behaviour that is known in commercial law as 'passing off'. 'Passing off' has long been an issue in Australian political life, where one political party attempts to deceive voters that it is another party for which they might have voted. A number of political parties, including the Democrats, have been victims of such behaviour. The Democrats would have preferred the behaviour rather than the name of an existing political party to be the focus of law change.
Chapter 13	Funding and disclosure
Recommendation 49	The Democrats oppose this recommendation. We see no case for less disclosure.

Recommendation 50	The Democrats oppose this recommendation, unless it is to become a standard for all advocacy in civil society, properly constrained and defined. In my minority report, JSCEM, <i>The 1996 Federal Election</i> , June 1997, pp. 162–163, I said I would propose opposing the recommendation lifting the deductibility threshold unless such a provision was available to all relevant community organisations. I recommended that ‘tax deductibility for donations to Political Parties and Independents mirror those available to Community organisations as a whole’. I remain of that view. As a rule, tax concessions should operate to general principles, not for special interests.
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1.3 Legislation changes since the 2001 Federal Election

The JSCEM Report of the Inquiry into the Conduct of the 2001 Federal Election proposed no less than 34 recommendations to be adopted to enhance the functioning of future elections. Within these recommendations there were 13 proposed changes to electoral law, two of which were implemented. Five other amendments to the *Commonwealth Electoral Act 1918* (CEA) not covered within the scope of the 2001 JSCEM Report were also enacted. The legislative changes made during the 40th Parliament are summarised in Tables 3 and 4 below.

Table 3 2001 JSCEM Report Recommended Amendments

<ul style="list-style-type: none"> Increasing the penalty for multiple voting and making each additional occasion a separate offence, as well as increasing the penalty for false witnessing of enrolment forms (JSCEM Recommendation # 1);
<ul style="list-style-type: none"> Extending the time in which Australians overseas can either apply for eligible overseas elector status or enrol from outside Australia for eligible overseas elector status, from two to three years (JSCEM Recommendation # 5);
<ul style="list-style-type: none"> Allowing scrutineers to be present at pre-poll voting centres, and govern the behaviour of scrutineers at pre-poll voting centres (JSCEM Recommendation # 16); and
<ul style="list-style-type: none"> Removing the roll from sale in any format and extending the end-use restrictions for roll information to all forms of the roll to prevent the use of the roll for purposes other than those permitted by the <i>Commonwealth Electoral Act 1918</i>. (JSCEM Recommendations # 29 and # 31).

Table 4 Other amendments

<ul style="list-style-type: none"> Including the sex and date of birth of electors on the certified list as a check on fraudulent voting;
<ul style="list-style-type: none"> Amending the prohibition that prevents prisoners voting so that it affects prisoners serving a sentence of three years or more (instead of five years or more as previously);
<ul style="list-style-type: none"> Allowing registered political parties and independent members of parliament to be provided, on request, with certain information about where electors voted on election day; and
<ul style="list-style-type: none"> Allowing for the use of a measure of error in determining the ACT and NT’s entitlement to representation in the House of Representatives.

2 Political governance

Political governance includes how a political party operates, how it is managed, its corporate and other structures, the provisions of its constitution, how it resolves disputes and conflicts of interest, its ethical culture and its level of transparency and accountability. There is no doubt that improvements to the quality and acceptance of political governance should be focused on as a reform priority.

2.1 Regulation

The natural inclination of political parties is towards self-regulation. That natural inclination means that since political parties control the legislature, the regulation of political parties is relatively perfunctory, in marked contrast to the much stronger regulation for corporations or unions. True, the registration of political parties is well managed, as a necessary part of election mechanics, yet the conduct of political parties apart from election mechanics is often poor.

It is in the conduct of political parties that great public interest resides and where corrupted processes can result in real dangers. Corrupted processes are most evident in issues such as branch-stacking, pre-selection rorts, and abuses of party political power.

Political parties by their role, function, importance and access to public funding are not private bodies but are of great public concern. The courts are catching up to that understanding.² Nevertheless, the common law has been of little assistance in providing the necessary safeguards. To date the Courts have been largely reluctant to apply common law provisions (such as on membership or pre-selections) to political party constitutions, although they have determined that disputes within political parties are justiciable.

Political parties are fundamental to Australian society and its economy. They wield enormous influence over the lives of all Australians. Political parties need the very proper and necessary safeguards and regulations that are there for corporations or unions – for the same reason - it is in the public interest.

The integrity of an organisation rests on solid and honest constitutional foundations. Corporations and Workplace Relations Law provide a model for organisational regulation. The successful functioning of a company or a union is based on its constitution, which must conform to the legal code. Political parties do not operate on the same foundational constructs. What is surely indisputable is that the public interest has to be served. Political parties have to be more

2 *Baldwin v Everingham* (1993) 1 QLDR 10; *Thornley & Heffernan* CLS 1995 NSWSC EQ 150 and CLS 1995 NSWSC EQ 206; *Sullivan v Della Bosca* [1999] NSWSC 136; *Clarke v Australian Labor Party* (1999) 74 SASR 109 & *Clarke v Australian Labor Party (SA Branch), Hurley & Ors and Brown* [1999] SASC 365 and 415; *Tucker v Herron and others* (2001), Supreme Court QLD 6735 of 2001.

accountable because of the public funding and resources they enjoy, and because of their powerful public role.

The Democrats have argued for a set of reforms that would bring political parties under the type of regulatory regime that befits their role in our system of democracy and accountability. The present CEA does not address the internal rules and procedures of political parties.

The AEC dealt with a number of these issues in Recommendations 13-16 in the AEC Funding and Disclosure Report Election 98. Recommendation 16 asks that the CEA provide the AEC with the power to set standard, minimum rules which would apply to registered political parties where the parties own constitution is silent or unclear. This was a significant accountability recommendation.

The JSCEM's 1998 Report recommended (No.52) that political parties be required to lodge a constitution with the Australian Electoral Commission (AEC) that must contain certain minimal elements. This recommendation was a significant one, but we believed it did not go far enough.

In this Report, in Recommendation 19, to its credit the JSCEM has again recommended that political parties be required to lodge a constitution with the AEC that must contain certain minimal elements.

For many years the Democrats have campaigned for the following reforms as being necessary to make political parties open and accountable:

- The CEA should be amended to require standard items to be set out in a political party's constitution, in a similar manner to the Corporations Law requirements for the constitution of companies;
- Party constitutions should be required to specify:
 - ⇒ The conditions and rules of membership of the party;
 - ⇒ How office-bearers are preselected and elected;
 - ⇒ How preselection of political candidates is to be conducted;
 - ⇒ The processes that exist for resolution of disputes and conflicts of interest;
 - ⇒ The processes that exist for changing the constitution; and
 - ⇒ The processes for administration and management.

The Party would be free to determine the content under each heading, subject in some cases to certain minimum standards being met.

- Political parties' constitutions should provide for the rights of members in specified classes of membership
 - ⇒ To take part in the conduct of the Party's affairs either directly or through freely chosen representatives;
 - ⇒ To freely express choices about Party matters, including the choice of candidates for elections at genuine periodic secret ballots; and

- ⇒ To exercise a vote of equal value with the vote of any other member in the same class of membership as the member.
- Political parties exercise public power, and the terms on which they do so must be open to public scrutiny. Party constitutions should be publicly available documents updated at least once every electoral cycle. (The JSCEM were once told by the AEC that a particular party constitution had not been updated in their records for 16 years!) The fact that most party constitutions are secret prevents proper public scrutiny of political parties;
 - The AEC should be empowered to oversee all important ballots within political parties to ensure that proper electoral practices are adhered to. At the very least, the law should permit them to do so at the request of a registered political party. The law should be proactive and should also cater for the future possibility of an American Primary type system; and
 - The AEC should be empowered to investigate any allegations of a serious breach of a party constitution, and apply an administrative penalty.

Simply put, all political parties must be obliged to meet minimum standards of accountability and internal democracy. Given the public funding of the elections, the immense power of political parties (at least of some parties), and their vital role in our government and our democracy, it is proper to insist that such standards be met.

In Antony Green's 2004 election submission to the JSCEM, he stated that a critical deficiency in the CEA is the lack of rules governing political parties.³ Specifically, he points to the loose definition of political party membership with reference to the case of Pauline Hanson and David Ettridge of One Nation⁴ as an example of the impact of reduced governance standards.

The increased regulation of political parties is not inconsistent with protecting the essential freedom of expression and the essential freedom from unjustified state interference, influence or control. Greater regulation would offer political parties better protection from internal malpractice and corruption, and the public better protection from its consequences, and it would reduce the opportunity for public funds being used for improper purposes. It would also go some way towards addressing the public's often poor perception of politicians and politics.

I am delighted that the JSCEM has agreed with many of these points (see Chapter 4). Our own recommendations, which include some of the JSCEM's, are that:

3 Submission No 73, (Mr A Green), pp1-2; see also 4.10 in the Report.

4 Both Hanson and Ettridge were charged and sentenced for Electoral Fraud, which was later overturned. The key issue of debate in the case concerned the arbitrary definition of what it means to be a member of a political party.

Recommendation 2.1

That political parties be brought under the type of accountability regime that should go with their place in our system of government:

- a) **The *Commonwealth Electoral Act* be amended to require standard items to be set out in a political party's constitution, in a similar manner to the Corporations Law requirements for the constitutions of Companies;**
- b) **Party constitutions should be written and be publicly available by being published on the AEC website, and be updated to the AEC at least once every electoral cycle;**
- c) **The minimum requirements for the constitution of a registered political party are that they include:**
 - **The aims of the party, which must include contesting federal elections;**
 - **The structure of the party;**
 - **the conditions and rules of membership of a Party;**
 - **how office-bearers are preselected and elected;**
 - **how preselection of political candidates is to be conducted;**
 - **the processes that exist for the resolution of disputes and conflicts of interest;**
 - **the processes that exist for amending the constitution;**
 - **the processes for administration, management and financial management;**
 - **the procedures for winding up the party;**
- d) **Rights of members:**
 - **Political parties' constitutions should provide for the rights of members in specified classes of membership;**
 - **To take part in the conduct of the party's affairs either directly or through freely chosen representatives;**
 - **To freely express choices about party matters, including the choice of candidates for elections at genuine periodic secret ballots;**
 - **To exercise a vote of equal value with the vote of any other member in the same class of membership as the member.**
- e) **The relationship between the party machine and the party**

membership requires better and more standard regulatory, constitutional and selection systems and procedures, which would enhance the relationship between the party hierarchy, office-bearers, employees, political representatives and the members. Specific regulatory oversight should include:

- **Scrutiny of the procedures for the preselection and election of candidates for public office and party officials in the constitutions of parties, to ensure they are democratic;**
- **The AEC should be empowered to investigate any allegations of a serious breach of a party constitution, and apply an administrative penalty; and**
- **All important ballot procedures within political parties should be overseen by the AEC to ensure proper electoral practices are adhered to, if a registered political party so requests. The law should be proactive and should also cater for the future possibility of an American Primary type system.**

The above recommendation may well not go far enough in addressing the scourge of branch-stacking and pre-selection abuse that is widely reported to occur in many political parties, but it is a start. A Member or Senator who has won their seat through branch stacking or pre-selection abuse can be seen as morally corrupt. A Member or Senator that is pre-selected as a result of financial, union or any other patronage is beholden. That such parliamentarians can then rise to power in government or parliament is a concern.

Regrettably, no political party is safe from attempted branch stacking or pre-selection abuse. However, it is the energy and determination with which branch stacking is dealt with, that distinguishes the standards of the political parties concerned.

Recommendation 2.2

That the JSCEM inquire into branch stacking and pre-selection abuses in political parties.

2.2 One Vote One Value

‘One vote one value’ is a fundamental democratic principle recognised by Article 25 of the International Covenant on Civil and Political Rights. Since the 1960s the Labor Party has been particularly strong about the principle of ‘one vote one

value', first introducing legislation in the Federal Parliament in 1972/3. In recent years the ALP has taken the matter to the High Court with respect to the Western Australian electoral system. They should therefore be expected to support 'one vote one value' as a principle within political parties.

The democratic principle of 'one vote one value' is well established, and widely supported. As far back as February 1964 the US Supreme Court gave specific support to the principle.

During the 1970s, 1980s, and 1990s the principle of 'one vote one value', with a practical and limited permissible variation, was introduced to all federal, State and Territory electoral law in Australia, except Western Australia. That state finally ended the lower house gerrymander in 2005.

In my view it should be a precondition for the receipt of public funding that a registered political party comply with the 'one-vote one-value' principle in its internal rules.

At least one political party in Australia (the ALP) has internal voting systems that result in gerrymandered elections for conventions, preselections and various other ballots. This is largely as a result of the exaggerated factional voting and bloc power of union officials who are allowed to use the large numbers of union members, the great majority of whom are not party members, to achieve and exercise power within the political party.

If more powerful votes are also directly linked to consequent political donations and power over party policies, then the dangers of corrupting influences are obvious.

If 'one vote one value' were translated into political parties' rules, it would mean that no member's vote would count more than another's, which would seem one way of doing away with undemocratic and manipulated pre-selections, delegate selections, or balloted matters.

We made a similar recommendation in our Minority Report on the JSCEM's Inquiry into the 1998 election. The JSCEM subsequently took this up as Recommendation 18 in its *User friendly, not abuser friendly* report.

Recommendation 2.3

That the *Commonwealth Electoral Act 1918* be amended to ensure that the principle of 'one vote one value' for internal party ballots be a prerequisite for the registration of political parties.

I and other Democrats have made a number of speeches in the Senate and elsewhere over the years concerning the accountability and governance of political

parties. Democrat Issue Sheets have reflected these views, and Democrat traditions and perspectives support these views.

Among other things the proposition has been put that political parties, in addition to their overriding duty to the Australian public, must be responsible to their financial members and not to outside bodies (hence, 'one vote one value'). In Australia this is particularly relevant with respect to the ALP.

There are two legislative avenues that could be pursued in this regard - the CEA and the Workplace Relations Act (WRA). The JSCEM have taken the first step with its recommendation to introduce one vote one value in political parties in its report on the integrity of the roll. The WRA could be amended to insert provisions regulating the affiliation of registered employee and employer organisations to political parties.

These provisions would be contained in the chapter of the WRA which relates to the democratic control of organisations by their members. Such an approach might wish to:

- Prohibit the affiliation, or maintenance of affiliation, of a federally or state registered employee or employer organisation with a political party unless a secret ballot of members authorising the affiliation has been held in the previous three years; and/or
- Require a simple majority of members voting to approve affiliation to a political party, subject to a quorum requirement being met.

This proposition is popular with some ALP reformers who aim to make the process of trade union affiliation to political parties more transparent and democratic. By way of background, the ALP is the only registered political party that allow unions to affiliate to it and to exercise a right to vote in internal party ballots, such as in the pre-selection of ALP candidates.

Unions affiliate on the basis of how many of their union members (the great majority of whom are not party members), their committee of management chooses to affiliate for. The more members a union affiliates for, the greater the number of delegates that union is entitled to send to an ALP state conference. Individual members of that union have no say as to whether they wish to be included in their union's affiliation numbers or not. Affiliation fees paid to the ALP by the union is derived from the union's consolidated revenue.

Some proposed amendments that could deal with the inherently undemocratic nature of the present system might be as follows:

- (a) Any delegate sent to a governing body of a political party by an affiliated union has to be elected directly by those members of the union who have expressly requested their union to count them for the purpose of affiliation. As an added protection, the AEC could be asked to conduct such an election and the count would be by the proportional representation method;

- (b) Definitions would need to comprehensively cover any way a union may seek to affiliate to a political party e.g. by affiliating on the basis of the numbers of union members or how much money they may donate to a political party etc;
- (c) Any union delegates that attend any of the governing bodies of a political party that the union is affiliated to, must be elected in accordance with the CEA; and
- (d) Individual members of the union would need to give their permission in writing before the union can include them in their affiliation numbers to a political party. No person should be permitted to be both a voting party member in his or her own right, and also be part of the affiliation numbers of a union. Such people effectively exercise two votes, in contravention of the 'one vote one value' principle.

Recommendation 2.4

That the *Commonwealth Electoral Act 1918* and the *Workplace Relations Act* be amended as appropriate to ensure democratic control remains vested in the members of political parties. Specifically with respect to registered organisations to

- **Require them to have secret ballot provisions in their rules (developed by them)**
- **Prohibit the affiliation, or maintenance of affiliation, of a federally or State registered employee or employer organisation with a political party unless a secret ballot of union members authorising the affiliation has been held at least once in a federal electoral cycle; and**
- **Require a simple majority of union members voting to approve affiliation to a political party, subject to a quorum requirement being met.**

3 Constitutional reform

There is no Commonwealth body that is responsible for reviewing the Constitution, an eminently important task if Australia is to continue to evolve and grow as a nation. Even if such a body did exist, it is arguably the responsibility of the Parliament, hence the importance of the JSCEM from the Democrat's perspective.

By its nature and make-up, the JSCEM is suited for the task of Constitutional review and reviewing means of advancing our democracy. It has not ever taken up that full task, but it has attended to specific issues, such as four-year terms, fixed terms and Section 44 problems.⁵

3.1 A case for reform

There might well be agreement in the community that the Australian constitution needs modernising and reform, but there is always disagreement over the content and extent of any reform. This Report is the proper place for putting at least a summarised case for some constitutional change.

The provisions in the Constitution were drafted at the turn of the twentieth century and must be modernised in order to accurately reflect the evolution of our country's policies and practices. Although the Senate or the House of Representatives can in theory put matters before the people in their own right, in practice initiating change to the Constitution via referendum has been the sole prerogative of the Prime Minister. Section 128 of the Constitution provides that where a constitutional amendment is supported by only one House of Parliament, the Governor-General 'may' submit it to a referendum once the procedures set out in the section are satisfied. Of course, the Governor-General acts on the Government's advice in exercising this power, giving control of the process to the Prime Minister.

Even where there is Parliamentary unanimity on a case for reform over a long period (such as with section 44), for political, practical and financial reasons there is generally little enthusiasm for the referendum process. One answer to that barrier to action is to present a package of reforms in unison. Nevertheless, without political unanimity, precedent shows that it is just as hard to get a package of reforms approved at referendum, as it is to get a single issue approved.

The Australian Democrats have campaigned for constitutional reform over the last 29 years. They have been at the forefront of the public debate. That campaign remains as current now as then. Democrats' Senator Macklin proposed a raft of

5 Section 44 of the Constitution addresses the terms of disqualification of the right to stand for public office.

bills in 1987, which were effectively a package of legislative initiatives designed to remedy inadequacies in the Constitution:

- *The Constitution Alteration (Democratic Elections) Bill 1987 aimed to guarantee the right to vote and to guarantee that every citizen's vote will be treated equally ('one vote one value');*
- *The Constitution Alteration (Fixed Term Parliaments) Bill 1987 provided for the present three-year term for the House of Representatives to be increased to four years and for the new four-year electoral cycle to be fixed;*
- *The Constitution Alteration (Electors' Initiative) Bill 1987 sought to give citizens the right to initiate referenda upon gaining 5% in the electors petition;*
- *The Constitution Alteration (Parliament) Bill 1987 sought to prevent a Constitutional crisis created by a deadlock in the Senate by breaking the nexus created by section 24 of the Commonwealth Constitution; and*
- *The Constitution Alteration (Appropriations for the Ordinary Annual Services of Government) Bill 1987 sought to resolve the contentious issues of the Senate's power to block supply.*

Current on the Senate Notice Paper are later generations of those Bills and other new Bills.

Senator Murray has introduced the following Bills affecting the Constitution:

- *Constitutional Alteration (Electors' Initiative, Fixed Term Parliaments and Qualification of Members) 2000; and*
- *State Elections (One Vote One Value) Bill 2001.*

Senator Murray and Senator Stott Despoja have jointly introduced:

- *Constitutional Alteration (Appropriations for the Ordinary Annual Services of the Government) 2001*

And Senator Stott Despoja has introduced the

- *Republic (Consultation of the People) Bill 2002*

Despite its topicality and public interest, we do not intend to dwell here on the community desire for greater input into the appointment of Australia's Governor-General, or the bigger issue of the campaign for a Republic, except to say that the Parliament needs to keep the process alive.

3.2 Four year fixed election terms

It is pleasing to note that the Main Report is again focusing on the potential for implementing four year terms for the House of Representatives. As the Report notes (7.18), this has been a consistent and unanimous aspiration of the Committee.

It is a topic that the Democrats and I have addressed consistently in the past. I note that the recommendation by the Main Report for a referendum to be held to decide the legitimacy of changes to election terms has been a key recommendation by the Democrats in the past two JSCEM reports.

Snap and early elections are called for personal and party advantage, arbitrarily, sometimes capriciously, and always on a partisan basis. Elections held on a pre-determined date ensure stability and responsibility by both Government and Opposition. If introduced for the Federal parliament it would allow for sound party and independent preparation and for fairer political competition.

It would also effectively increase the average life of Australian governments. Federal Elections over the last century have been held on average about every 2 years 7 months. Australia should not have held more than 32 elections at the most last century. Instead they had 38, which represents a significant additional election cost of between \$800m and \$1 b in today's money.⁶ Fixed terms would therefore prevent the unnecessary waste of taxpayer's dollars from being spent on snap elections. These issues were also canvassed in the Democrats' 1996 and 1998 JSCEM Federal Election Minority Reports.

In the Democrats 2004 Election Issue Sheet entitled 'Four Year Fixed Terms' we stated that:

We believe that Parliamentary terms should be four years for the House of Representatives and eight years for the Senate. We also believe that it is even more important that terms be fixed. This would end the power of the Prime Minister to call elections according to the dictates of political expediency, and would increase stability and continuity in the electoral cycle.

Despite our support for longer terms, the Democrats recognise that the advantages of longer parliamentary terms seem to be almost entirely anecdotal. Has there been any research to discover whether these advantages have actually been realised in those Australian states and other countries which converted to longer terms? It would have been useful for the Report to have made some attempt to address this issue.

The Democrats had a lengthy and supportive section on longer terms in our Supplementary Remarks on the JSCEM Report into the 2001 election.

Chapter 7 rightly emphasises the importance of the Australian political tradition/norms – 7 of our 9 lower houses have 4-year terms. As Chapter 7 of the Main Report recognises, changing the House of Representatives term also entails making changes to the terms of the Senate. How the States have addressed this situation is relevant, and two states have 8-year terms for the upper house.

6 For further detail, refer Bennett S, "Four-Year Terms for the House of Representatives?", *Research Paper No. 2 2003-04*, Department of the Parliamentary Library, September 2003

The Democrats have consistently argued that fixed terms are more important than longer terms, but they have equally consistently supported four-year terms for the House of Representatives as well.⁷ Fixed terms could be set by legislation. Four-year terms will require constitutional change by referendum.

Both internationally and in Australia, longer terms are strongly supported because they ensure enough time for a Government to fully implement its policy agenda. As documented in the Main Report there is political unanimity on four-year terms and the Democrats support the findings of the Committee in seeking to advance this cause.

Looking at the terms of parliaments in the 30 OECD countries, and with reference to the Main Report, Australia is in the backward minority of four countries that have terms of less than three years for their lower houses.⁸ A majority have five-year terms, so giving their governments a reasonable period to implement their policy agenda, and for the people to judge their performance.

As the Report indicates (7.50), although the USA in theory stands out as the odd man out, (with Congress elected every two years), in practice the government (namely the President), accords with international norms, being elected on a four-year fixed term with a pre-set election date.

If a Referendum were to be held to determine whether the House of Representatives should move to four-year terms as recommended by the Democrats in previous years and by this Main Report, it would require a view to be taken on Senate terms. I agree that a feasible alternative would be to move from 3/6 to 4/8. There is some concern at Senators having an eight-year term, because of the need to confirm popular support at more regular intervals.

Eight-year terms will concern voters because being stuck with a dud for 8 years is worse than being stuck with a dud for 6 years. Our earlier recommendations on political governance might assist in this regard as they should have the effect of helping improve the potential standard of Senators.

Whilst it is refreshing to see serious consideration for longer and possibly fixed terms, the Main Report needs to deal more fully with the serious problem of unsuitable constitutional arrangements to manage simultaneous House of Representatives/Senate terms. This is a problem which is magnified when considering longer and/or fixed terms. Currently a general election comes about with a dissolution of the House of Representatives. A double dissolution under section 57 of the Constitution involves the dissolution of both Houses. The 'simultaneous House of Representatives/Senate terms' option would involve dissolving half of the Senate.

7 Senator Macklin introduced the *Constitution Alteration (Fixed Term Parliaments) Bill* in 1987, followed up later by Senator Murray who tabled the *Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualification of Members) Bill* 2000.

8 Refer Table 7.2 in the Main Report

At present the Senate continues in office. The proposal could mean that, for long periods, (or at least the length of an election), there would be no Parliament. If legislation were required to deal with some serious emergency, such as terrorist attacks or a disease pandemic, legislation could not be passed and governments would either have inadequate powers or would resort to arbitrary powers.

Is the caretaker convention adequate for this eventuality? Would it be jettisoned? Similarly, unlike at present when the Senate continues its Committee work (except by convention for the period of the election) during those periods there would be no Parliament to scrutinise and hold government accountable.

It would seem to me that if the Constitution is to be amended, it should be amended so that the terms of members of *both* Houses end on the day before the day on which the terms of their successors begin, as is currently the case with senators, including the territory senators who go out whenever the House of Representatives is dissolved.

This arrangement could apply regardless of whether the parliamentary term is fixed and regardless of the length of the term. At any time during an election the 'outgoing' Parliament could meet to deal with an emergency, and, provided that the handover date were suitably arranged, there would always be a Parliament to call upon.

Moreover, the Houses should meet when they decide to meet, and should not be able to be dismissed, either by prime ministerial decree through the Speaker, or by the power of prorogation. We need to consider in circumstances of constitutional change whether prorogation should be abolished.⁹

This option of 'simultaneous House of Representatives/Senate terms' is a proposal which has been put to referendum and rejected before. The lack of support for this option with the Australian public should be noted.

The main reason for opposing the simultaneous House of Representatives/Senate terms proposal was that it would increase prime ministerial power, and the scope for electoral manipulation, by allowing the Prime Minister to dissolve half of the Senate whenever he decided to dissolve the House of Representatives.

The same objection would likely arise even if the first three years of a four-year term is 'fixed': the Prime Minister would still be able to manipulate the Senate term by dissolving half of the Senate. The Senate would no longer be a fixed-term, continuing body.

If this option is put again the same objection will certainly be raised again. In my view any lengthening of the House of Representatives term will only be successful if this objection is dealt with, as the public have consistently fought measures which provide greater powers to the Prime Minister.

9 *Beware the monarchical gargoyle in our constitution* Harry Evans Canberra Times 25 February 2005

With reference to the Main Report, I am surprised a fixed four-year term is dismissed out of hand just because the current Prime Minister opposes it. Fixed terms are an accepted feature of a number of states and territories in Australia. Why wouldn't the people of Australia prefer it?

If the option for the major parties is the system to continue as it is, or the option is (for arguments sake) a four year fixed term – being perhaps the only change the Australian people might accept – would the majors still dismiss it out of hand? The answer appears to be that the Liberal Party would.

My view is that the Committee should encourage the Government to research such propositions that fall within broad principles we all accept – such as longer terms, stability, and continuity with Australian political norms.

I cannot really see why a fixed three-year period within an unfixed four year term should be an acceptable option but not the option of a fixed four-year term. By all means state the objections, although some stated objections to a full fixed term surely apply equally to a fixed three years within a four-year term.

Recommendation 3.1

- (a) That the dates of elections be fixed and preset by legislation;**
- (b) That if a four-year term for the House of Representatives is to be put to the people as a Referendum question, that further research be undertaken to determine support for fixed four year terms;**
- (c) That the closure of the Electoral Roll earlier than seven days after the issue of the writs only apply after the implementation of fixed election terms.**

3.3 Simultaneous Federal/State elections

The Democrats are of the opinion that simultaneous federal/state elections should not be banned outright – they should at least be at the discretion of the governments concerned. Why shouldn't a federal by-election be able to be held simultaneously - with state or local elections; or a state by-election during a federal election; or a federal referendum during local government or state elections - at the discretion of a government or as agreed between governments?

Australians are in frequent election mode, with nine governments holding Federal, State and Territory elections, and local government elections, as well as referenda and plebiscites at all three levels of government. The issue is simply one of cost and convenience. For instance, greater efficiency is achieved in the United

States of America where simultaneous elections are a long-standing, regular and unexceptional feature of their election system.

In 1922 the CEA was amended to prevent simultaneous Federal and State elections. The 1988 Constitutional commission recommended that this provision be repealed, and the Democrats urge Government to acknowledge this finding by amending the law.

If fixed dates for elections were to also become a reality, it would open up the possibility for simultaneous elections as well, although these could eventuate anyway, if they were not prohibited by the CEA. We recommended in our 1998 JSCEM Minority Report that subsection 394(1) of the CEA be repealed.

Recommendation 3.2

That subsection 394(1) of the *Commonwealth Electoral Act 1918* be repealed.

3.4 Section 44 problems

Subsection 44(i) of the Constitution has provoked litigation in the past, the leading case being *Sykes v Cleary* (No.2) of 1992. We dealt with the issue of section 44 in our 1996, 1998 and 2001 Minority Reports, as has the JSCEM itself (recommendation No.57 in its 1998 report). There is unanimous support for change.

Subsection 44(i) says 'that a person could not seek election to the parliament if that person was a citizen of another country or owed an allegiance of some kind to another nation'. We accept that this should be replaced with the simple requirement that all candidates for political office be Australian citizens.

This section was drawn up at a time when there was no concept of Australian citizenship, when Australian residents were either British subjects or aliens. It was designed to ensure the Parliament was free of aliens as so defined at that time. The Senate Standing Committee on Constitutional and Legal Affairs in its 1981 Report: *The Constitutional Qualifications of Members of Parliament*, recommended that Australian Citizenship be the constitutional qualification for parliamentary membership, with questions of the various grades of foreign allegiance being relegated to the legislative sphere.

The Constitutional Commission, in its Final Report of 1988, recommended that subsection 44(i) be deleted and that Australian citizenship instead be the requirement for candidacy, with the Parliament being empowered to make laws as to residency requirements.

The House of Representatives Standing Committee on Legal and Constitutional Affairs Report of July 1997 recommended that subsection 44(i) be replaced by a provision requiring that all candidates be Australian citizens, and it went further to suggest the new provision empower the Parliament to enact legislation determining the grounds for disqualification of members in relation to foreign allegiance. This Report also recommended that subsection 44(iv) be deleted and replaced by provisions preventing judicial officers from nominating without resigning their posts and other provisions empowering the parliament to specify other offices which would be declared vacant should the office holder be elected to parliament.

Whilst some offices, such as those of a judicial nature, must be resigned prior to candidacy, no provision is made for other offices to be declared vacant upon a candidate being successfully elected. It would be absurd, of course, if public servants could retain their positions after having been elected to parliament. It is essential that a mechanism be put in place declaring vacant certain specified offices upon their holders being elected.

Subsection 44(iv) has its origins in the Succession to the Crown Act 1707 (UK). Its purpose there was essentially to do with the separation of powers, the idea being to prevent undue control of the House of Commons by members being employed by the Crown. Obviously times have changed, even though the ancient struggle between executive and parliament continues to this day. Whilst this provision may have been appropriate centuries ago, the growth of the machinery of government has meant that its contemporary effect is to prevent many thousands of citizens employed in the public sector from standing for election without any real justification.

The Australian Democrats have a long history of trying to rectify this part of the Constitution. In February 1980 former Democrats Senator Colin Mason, moved a motion which resulted in the inquiry by the Standing Committee on Constitutional and Legal Affairs into the government's order that public servants resign before nomination for election. Again, this section featured in the *Sykes v. Cleary (No.2)* litigation.

The 2000 Bill below proposes to delete subsection 44(iv) and substitute a requirement that only judicial officers must resign their positions prior to election, as well as empowering the parliament to legislate for other specified offices to be vacated. We have sought to alter subsection 44(iv) four times through the:

- *The Constitution Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1985;*
- *The Constitution Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1989;*
- *The Constitution Alteration (Qualifications and Disqualifications of members of the Parliament) Bill 1992; and*

- *The Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualification of Members) 2000.*

The last paragraph of section 44 should also be deleted in its entirety. Indeed, the Standing Committee on Legal and Constitutional Affairs Report of July 1997 noted that if its recommendations concerning subsections 44(i) and 44(iv) were accepted, the last paragraph of subsection 44 should be deleted. We concur with that view.

Recommendation 3.3

That the following questions be put to the people as Referendum questions:

- (a) That subsection 44(i) of the Constitution be replaced by a requirement that all candidates be Australian citizens and meet any further requirements set by the Parliament.**
- (b) That subsection 44(iv) of the Constitution be replaced by provisions preventing judicial officers only from nominating without resigning their posts, and giving Parliament power to specify other offices to be declared vacant should an office-holder be elected.**
- (c) That the last paragraph of section 44 of the Constitution be deleted.**

3.5 Political Rights and Freedoms

Although there has been many a campaign for a Bill of Rights, there is stronger support for a legislated Charter of Political Rights and Freedoms. The Australian Capital Territory is the only Australian legislature to act on this front so far. It would be better if there were one Australian standard in this vital area. Unlike a number of other countries, Australians do not have their rights and responsibilities reflected in the Constitution, nor (mostly) in legislation, which is why we have seen indigenous, women and homosexual Australians compelled to seek international help in addressing unjust treatment and discrimination.

Anti-terrorism security concerns in the USA have resulted in the Patriot Act, which restricts a number of rights and liberties. However that legislation sits amongst US Constitutional guarantees of the Bill of Rights. These guarantees ensure that all citizens shall be secure in their persons and protects them against unreasonable search and seizure. The Constitution provides Americans with a right to due process and the right to a fair and speedy public trial among other things.

These Constitutional guarantees known as the US Bill of Rights provide the background against which legislation like the Patriot Act is interpreted.

Australia has no such entrenched constitutional guarantees yet the Government shows no compunction in 'borrowing' the Patriot Act ideas as a basis for its own security legislation.

Australia has also been borrowing its security legislative ideas from the United Kingdom, but in the United Kingdom the Human Rights Act 1998 acts as a control measure against which the Courts can interpret their anti-terrorism legislation. Again Australia has no Human Rights Act to provide a safeguard.

If Australia is going to enact legislation which impacts so stringently on its citizens' human rights, it is essential that it makes it either makes it constitutionally clear, or legislatively clear that it does respect those human rights.

The Democrats have attempted to establish a comprehensive human rights standard for Australia and introduced the Parliamentary Charter of Rights and Freedoms Bill 2001. The Democrats proposed Charter of Rights was an implementation of the International Covenant on Civil and Political Rights. It sets out certain fundamental rights and freedoms including the right to equal protection under the law, the right to a fair trial, freedom of expression and freedom of religion.

Recommendation 3.4

That the Government review the potential for a Charter of Rights and Responsibilities to be introduced in Australia.

We recommended in our 1998 Minority Report that the CEA be amended to give all persons in detention, except those convicted of treason or who are of unsound mind, the right to vote. It is important to understand that, although prisoners are deprived of their liberty whilst in detention, they are not deprived of their citizenry of this nation. As part of their citizenship, convicted persons in detention should be entitled to vote. To deny them this is to impose an additional penalty on top of that judged appropriate by the court. Nonetheless, following the 2001 Federal Election restrictions on the rights of prisoners were strengthened by increasing the disqualification criteria from individuals serving 5 years or more to individuals serving 3 years or more.

The Report urges the Government to disenfranchise any citizen serving a jail sentence. This is an extra-judicial penalty. If it is considered necessary to add the removal of citizenship rights to the deprivation of liberty, then that too should be a matter for judicial determination.

There is no logical connection between the commission of an offence and the right to vote. For example, why should a journalist, who is imprisoned for refusing on principle to provide a Court with the name of a source, be denied the vote?

To complicate this further, there is no uniformity amongst the states or between the states and the Commonwealth as to what constitutes an offence punishable by imprisonment. In WA, for example, there is a scheme whereby fine defaulters lose their license rather than go to prison, yet this has not been introduced uniformly in Australia. Why should an Australian citizen in Western Australia who defaults on a fine but is not jailed, retain the right to vote, whilst an Australian citizen in another jurisdiction who is jailed for the same offence lose the right to vote? This is inequitable and unacceptable.

Australia is a signatory to the International Covenant on Civil and Political Rights Article 25. Article 25, in combination with Article 2, provides that every citizen shall have the right to vote at elections under universal suffrage without a distinction of any kind on the basis of race, sex or other status. The existing law discriminates against convicted persons in detention on the basis of their legal status. This clearly runs contrary to the letter and spirit of the Covenant.

A society should tread very carefully when it deals with the fundamental rights of its citizenry. All citizens of Australia should be entitled to vote. It is a right that attaches to citizenship of this country, and should not be removed.

Recommendation 3.5

The Commonwealth Electoral Act be amended to give all persons in detention, except those convicted of treason or who are of unsound mind, the right to vote.

3.6 An insufficiently representative House of Representatives¹⁰

The Main Report has not addressed the issues of democratic representation at all, which is a great pity, because those issues go to the heart of democratic needs – the right to be represented. The 2004 Federal Election again demonstrated the weakness that democratically speaking, large numbers of voters who gave their primary vote to minor political parties are not directly represented in the House of Representatives.

In 2004, Australia's two major parties, the Liberal and Labor parties, secured 78.11% of the House of Representatives vote, up from 74.9% in 2001. The Labor Party secured a primary vote of 37.64%, and the Liberal party 40.47%. Of the minor parties, the National Party (12 members) and the (Northern Territory) Country Liberal Party (1 member), gained representation in the House of Representatives, with 5.89% and 0.34% of the national vote respectively. Three Independents were successful. Of the minor parties not represented in the House

¹⁰ For figures used in this section see the AEC 2004 Electoral Pocketbook.

of Representatives, the most notable were the Australian Greens (6.98%) and the Family First Party (2%). Overall, over 13% of voters, nearly one in six, were not represented in the House of Representatives at all.

Federal Election after Federal Election shows that approximately one quarter of all Australian voters are not major party voters. These voters largely remain unrepresented in the House of Representatives. This situation has led to campaigns to make the House of Representatives more representative, with suggested reforms ranging from full proportional representation, to a 'top-up' party list system to adjust unequal outcomes.

The Australian Democrats have previously proposed that the present system be adjusted for the House of Representatives with a form of 'mixed member proportional voting', which provides a compromise between the competing principles of local representation and fair representation. There have been moves towards proportional voting systems in recent years in unicameral parliaments such as New Zealand, and the new parliaments of Scotland and Wales.

Although seven political parties¹¹ are represented in the two Federal houses of Parliament, many commentators still focus on bipartisan not cross-party politics. Australia is still commonly described in two-party terms.

Australia is a multi party system, but its political discourse often exhibits a two-party mentality. Typical of multi party democracies, the Australian Federal Government is comprised of a coalition of three parties.¹² Like many democratic governments too, its power is disproportionate to its support since 59.5% of voters did not give their primary vote to the Government in the House of Representatives. Conversely and disproportionately however, it holds 58% of the House of Representatives seats.¹³

The nearly proportional representation nature of the Senate (within¹⁴ States and Territories) provides a useful and desirable democratic counter to the distorted nature of House of Representatives representation. This is reflected in the Government's share of votes and seats. In the Senate the Government had 45.09% of the national primary vote in 2004, up from 41.8% in 2001 (a 3.29% increase), yet it holds 51.3% of the seats, up from 46.0% in 2001 (a 5.3% increase).

The role of the Senate as a brake on the excesses of an unrepresentative House of Representatives (including Executive power) continues to be the subject of attack.

11 The Liberal Party of Australia and the Northern Territory Country Liberal Party; the Australian Labor Party; the National Party of Australia; the Australian Democrats; the Australian Greens; and the Family First Party.

12 The Liberal Party of Australia, the Northern Territory Country Liberal Party and the National Party of Australia.

13 As a coalition of The National Party, the Country Liberal Party and the Liberal Party.

14 As opposed to *between* States and Territories. The Federal Constitution allows for equal Senate representation of States, despite great disparities between State voting populations (a Tasmanian's Senate vote has 13x the value of a NSW Senate vote).

There are powerful organisations and individuals who still seek to make our parliamentary democracy less democratic, less accountable and less progressive, by making the Senate less proportionally representative and more subservient to the House of Representatives.

The Government's success in obtaining a majority in the Senate in the 2004 election and the consequential restrictions on democratic process witnessed in the Senate to date will please such forces.

After the 2004 election 91.6% of Australians were represented by their party of choice in the Senate, a significant reduction since 2001. Historically it has been the Senate, free of the dominance of the Executive, which preserves the essence of the separation of powers, not the House of Representatives. Historically it has been the Senate that protects the sovereignty of the people, not the House of Representatives, which is dominated by representatives of a minority of voters with a majority of seats.

The 2004 election result which provided the Government with an outright majority has reduced the capacity of the Senate to operate as an independent house of review. To all intents and purposes the Senate is now also beholden to the Executive.

4 Political and Government Advertising

4.1 Truth in Political Advertising

The Australian Democrats have actively campaigned to introduce 'truth in political advertising' legislation in Australia since the early 1980s. Our Minority Report on the 1996 election had an extensive section on this topic. I welcome the committee's attention to this important topic in Chapter 12 of the Main Report.

The Coalition parties, in their dissenting report to the JCSEM inquiry into the 1993 election supported the reinstatement of 'truth in political advertising'. In Government they have subsequently resiled from that view. Political advertising in Australia must be better controlled. Legislation should be enacted to impose penalties for failure to represent the truth in political advertisements. The enforcement of such legislation would advance political standards, promote fairness, improve accountability and restore trust in politicians and the political system.

The need for improved controls on political advertising in Australia is important because elections are one of the key accountability mechanisms in our system of government. Where 'facts' are used, advertisements disseminated during an election campaign must be legally required to represent the truth. Advertisements purporting to represent 'facts' must be legally required to do so accurately. In this way politicians can be held accountable for election promises designed to win over the electorate. A case in point is the tacit use of the Reserve Bank to bolster Government statements about interest rates in the 2004 election. This is a significant issue discussed in Labor's submission to this report that highlights the need for greater legal controls on accurate media representation.

In 1983 the Commonwealth Parliament introduced laws regulating political advertising in section 392(2) of the CEA, but these were repealed again prior to the 1984 election.

In 1985 the South Australian Parliament enacted the *Electoral Act 1985 (SA)*. Section 113 of the South Australian Act makes it an offence to authorise or publish an advertisement purporting to be a statement of fact, when the statement is inaccurate and misleading to a material extent. 'Electoral advertisement' is defined to mean an advertisement containing electoral matter. 'Electoral matters' are matters calculated to affect the result of an election.

The legislation has been tested in the Supreme Court of South Australia, where it was held to be constitutionally valid. Further, it did not infringe the implied guarantee of free political communication found by the High Court to exist in the Commonwealth Constitution.

The Commonwealth Parliament has examined proposed legislation similar to the South Australian Electoral Act concerning truth in political advertising. In 1995 it considered amendments to the CEA in this regard. Provision was to be made prohibiting persons, during an election, from printing, publishing, or distributing any electoral advertisement containing a statement that was untrue, or misleading or deceptive. However with the dissolution of the Commonwealth Parliament for the 1996 election, the amendments lapsed.

Experience teaches that when the competitive interests of political parties are at stake, only the force of law will ensure that reasonable standards on truthfulness are upheld. Following an Inquiry by the Senate Finance and Public Administration Committee into this matter, I revised and reintroduced my Electoral Amendment (Political Honesty) Bill 2003 that legislates for truth in political advertising. Whilst the Main Report addresses the scope of this Bill and the potential impact of misleading statements during the election period, the committee recommendation on this matter is limited to “addressing issues of misleading conduct on polling day”.

From the Democrats perspective, ignoring the period leading up to polling day does not go far enough. All inaccurate or misleading statements of fact in political advertising, regardless of its proximity to election day should be addressed. This recommendation is reinforced by the submission to the JSCEM by Dr Sally Young who asserts that the trend in electoral advertising is towards a “continuous campaign” that is carried out over the length of an election cycle, not just the period leading up to an election or, as the committee implies in their recommendation, merely the election day.¹⁵

Recommendation 4. 1

The *Commonwealth Electoral Act* should be amended to prohibit inaccurate or misleading statements of fact in political advertising, which are likely to deceive or mislead.

4.2 Extending the Caretaker Period convention for advertising

The concern about the propriety of government advertising practices leads to the need to extend the Caretaker Period convention.

Part of the limited accountability in government advertising arguably stems from the application of flexible election terms. With fixed election terms, formal blackout periods for electoral and campaign advertising with set dates can be implemented. Presently however, it is difficult if not impossible to ascertain with

15 Submission No 145, (Dr S Young)

confidence what is legitimate government advertising that happens to share proximity to an election and what is better described as party political advertising. A case in point is the government's use of advertising to promote measures announced in the budget which happened to coincide with the timing of the 2004 federal election. The obvious result of this coincidence is a favourable media outcome for the Government. According to Dr Young in her submission to the 2004 JCSEM, incumbent governments in Australia benefit heavily in election terms due to access to government advertising.¹⁶ This has two outcomes:

1. there is a trend towards permanent campaigning with the sophisticated use of government advertising to support party political goals; and
2. the cost of such an outcome is progressively borne by the public.

Achieving a solution in parity of access to resources is of paramount importance to an equitable political system. A logical approach would be to extend the caretaker period to the July 1 date preceding the earliest likely Federal Election date that can occur for both the House of Representatives and the half-Senate election. This way any government advertising during this period would receive greater scrutiny as per current Caretaker norms.

Recommendation 4.2

That blackout provisions in the Caretaker period for all non-essential government advertising be extended to cover the time from the July 1 date preceding the earliest likely Federal Election date that can occur for both the House of Representatives and the half-Senate election.

4.3 Improved guiding principles for government advertising

The Democrats believe that this whole area needs legislative correction or an appropriate restraining mechanism such as a Senate Order. Strong independent oversight is needed to oversee government publicity and advertising. Principles¹⁷ similar to the following should form the basis for determination of whether government publicity and advertising is genuine, or whether it has partisan and political content:

- Information campaigns should be directed at the provision of objective, factual and explanatory information. Information should be presented in an unbiased and equitable manner;

16 Submission No 145, (Dr S Young)

17 These principles are largely drawn from 'Taxation Reform Community Education and Information Programme' ANAO 1998

- Information should be based on accurate, verifiable facts, carefully and precisely expressed in conformity with those facts. No claim or statement should be made which cannot be substantiated;
- The recipient of the information should always be able to distinguish clearly and easily between the facts on the one hand, and comment, opinion and analysis on the other;
- When making a comparison, the material should not mislead the recipient about the situation with which the comparison is made and it should state explicitly the basis for the comparison;
- Information campaigns should not intentionally promote party-political interests, nor should they give rise to a reasonable perception that they promote any such interests. To this end:
 - ⇒ Material should be presented in unbiased and objective language, and in a manner free from partisan promotion of government policy and political argument;
 - ⇒ Material should not directly attack or scorn the views, policies or actions of others such as the policies and opinions of opposition parties or groups; and
 - ⇒ Material should avoid party-political slogans or images; and
- Campaigns should be supported by a statement of the campaign's objective. The oversight body or committee would be entitled to consider whether this objective is legitimate, and whether the campaign is adapted to achieving the stated objective. Campaigns, which have little chance of success, should not be pursued.

Any Committee would need to be empowered to order a public authority to do one or more of the following things:

- To immediately stop the dissemination of any government publicity that is for political purposes and that does not comply with the principles.
- To modify the content, style or method of dissemination of any such government publicity so that it will comply with the principles.
- To stop expenditure on any such government publicity or to limit expenditure so that the publicity will comply with the principles.

Recommendation 4.3

That mandatory standards be adopted in relation to government advertising, policed by an appropriate oversight body.

5 Funding and disclosure

The aims of a comprehensive disclosure regime should be to prevent, or at least discourage, corrupt illegal or improper conduct; to stop politicians being or being perceived to be beholden to wealthy and powerful organisations, interest groups or individuals; and, to protect politicians from pressure being brought to bear on them from 'secret' donors.

The Australian Democrats have a long history of activism for greater accountability, transparency and disclosure in political finances.¹⁸ We dealt with funding and disclosure issues at length in our Minority Reports on the JSCEM reports into the 1996, 1998 and 2001 elections. Progress in getting greater accountability in political funding and disclosure is slow, so we are obliged to repeat some of our previous themes.

These disclosure proposals can be seen from two perspectives – improving present principles, or establishing new principles. The first should in theory be easiest, but in practice it is not so. For instance it is a present principle that the source of a donation should be known, but there is great resistance to ensuring that is so with respect to clubs, trusts, foundations and foreign donations.

5.1 The role of the media

The value of funding disclosure rests on the premise of availability of and accessibility to documentation for public scrutiny. This is the role of the media as governmental scrutineer. Comprehensive public scrutiny can only be achieved if issues such as political donations are covered by the mass media.

This interrelationship between disclosure by the media to the public is potentially undermined according to a recent report by the Democratic Audit of Australia.¹⁹ The Democratic Audit report says that the symbiotic relationship that the media maintains with government may lead in some cases to a reluctance to fully cover political donations for fear of a backlash in government access. They say the result could be reduced public pressure on the government due to lack of scrutiny by the media regarding funding sources and consequentially, reduced transparency.

There have been suggestions by a member of the House of Representatives that members of the media should be required to declare all conflicts of interest that may reflect on their reporting of political matters.

18 A useful reference to our views is *the dangerous art of giving* Australian Quarterly June-July 2000 Senator Andrew Murray and Marilyn Rock.

19 Tennant-Wood, R. 2004, "The role of the Media in the public disclosure of electoral funding." Democratic Audit of Australia – December 2004

Important points have been raised, that will need even more attention if media concentration continues. It is vital that any potential perception of political influence over the media, or vice versa, is avoided.

The following is recommended:

Recommendation 5.1

No media company or related entity or individual acting in the interests of a media company may donate in cash or kind to the electoral or campaign funding of a political party.

5.2 Uncontrolled campaign funding

We believe that democracy is best served by keeping the cost of political party management and campaigns at reasonable and affordable levels. Although in any democracy some political parties and candidates will always have more money than others, money and the exercise of influence should not be inevitably connected. One step forward in setting a limit on expenditure is to set a limit on donations – to apply a cap, or ceiling.

With reference to the Main Report, such limitations do apply in other democratic systems around the world. The cost of campaigning in Australia is growing exponentially and constitutes a barrier to entry. Other governments have recognised the importance of placing restraints on campaign expenditure.

Several submissions to the JSCEM following the 2004 elections called for the imposition of restraints which the Main Report duly noted. Indeed, with reference to Chapter 12 of the Main Report, there appears to be significant cross-party support for such reform with commentators including the Liberal Members Mr Malcolm Turnbull MP²⁰ and Mr Christopher Pyne MP,²¹ the Greens Bob Brown MP²² and academics Mr Tham Dr Young and Professor Orr.²³ The ALP's supplementary report has also alluded to concerns about the level and control of campaign funding.²⁴

In their submission to the JSCEM, Tham and Orr stressed the importance of combining improved disclosure laws with donation caps and expenditure limits, since “disclosure on its own is a weak regulatory mechanism, and probably

20 Submission No 196, (Mr M Turnbull)

21 Submission No 195, (Mr C Pyne)

22 Submission No 39, (Senator B Brown)

23 Submission No 160, (Mr J Tham and Dr G Orr); Submission No 199, (Mr J Tham and Dr G Orr - supplementary)

24 Submission No 201, (Australian Labor Party - supplementary)

merely 'normalises' corporate donations".²⁵ Tham and Orr suggest improving disclosure laws to include:

- expanding the definition of 'associated entity' in the CEA to more accurately capture the financial relationships that exist within political parties;
- payments from fundraisers, party conferences and similar events are classified as gifts and that all parties be required to submit gift reports which include the status of all donors; and
- removing delays in the timing of disclosure, by potentially requiring quarterly disclosure statements and even weekly statements during an election period.

For these improvements to be effective donation caps that limit actual or perceived undue influence by individuals or corporations would also need to be implemented.

Limiting the level of funding for election campaigns is also an issue raised by Professor Williams and Mr Mercurio in their submission to the 2004 JSCEM, to the extent that increased costs of campaigning heavily favours major parties.²⁶ As Williams and Mercurio state, unrestricted campaign expenditure which is heavily concentrated on advertising has the effect of crowding out minor party voices and is further evidence of a lack of equity in the current system.

In their 'Political Donations' Issue sheet for the 2004 federal election, the Democrats recommended that a cap or ceiling of \$100 000 be imposed on any donation made to political parties, independents or candidates. While this is higher than the caps recommended by others, the Democrats took the view that the new principle of a cap, to even be considered, would need to be at a high level.

Despite this support for placing limitations on funding from both international models and from domestic commentary outlined in the Main Report, there is no recommendation forthcoming from the JSCEM to this end. In contrast, the Democrats do propose a legislated amendment that places an indexed cap on electoral and campaign funding, with the amount to be set and controlled by the AEC:

25 Submission No 160, (Mr J Tham and Dr G Orr); Submission No 199, (Mr J Tham and Dr G Orr - supplementary)

26 Submission No 48, (Professor G Williams & Mr B Mercurio)

Recommendation 5.2

All electoral and campaign funding is subject to a financial cap, indexed to inflation and controlled by the AEC. Section 294 of the *Commonwealth Electoral Act 1918* should be amended to this end.

Recommendation 5.3

No entity or individual may donate more than \$100 000 per annum (in cash or kind) to political parties, independents or candidates, or to any person or entity on the understanding that it will be passed on to political parties, independents or candidates.

Ultimately, minimising or limiting the public perception of corruptibility associated with political donations requires a good donations policy that should forbid a political party from receiving inordinately large donations. Of concern is the Liberal Party's advocacy for increased threshold values before disclosure requirements apply. In their submission to this report, the Liberals argue for increasing the threshold from \$1,500 to \$10,000.²⁷ The current threshold for disclosure of donations is a generous individual sum.

A major problem is that at present it is alleged (see evidence to the Committee) that it is possible that significant sums have and can be made without disclosure. For instance, nine separate cheques for \$1,499 can be made to the separate federal, state and territory divisions of the same political party, totalling \$13,491.

The same principle could be used to write nine separate cheques for \$9,999 for the separate federal, state and territory divisions of the same political party, totalling \$89,991.

The Democrats oppose raising the disclosure level from \$1,500 to \$10,000.

Recommendation 5.4

The donations loophole be closed, that allows nine separate cheques to be written at a value just below the disclosure level, made out to the separate federal, state and territory divisions of the same political party .

27 Submission No 95, (Liberal Party of Australia - Federal Secretariat)

5.3 Hidden funds

It is essential that Australia has a comprehensive regulatory system that legally requires the publication of explicit details of the true sources of donations to political parties, and the destinations of their expenditure. The objectives of such a regime are to prevent, or at least discourage, corrupt, illegal or improper conduct in electing representatives, in the formulation or execution of public policy, and helping protect politicians from the undue influence of donors.

Some political parties, in seeking to preserve the secrecy surrounding some of their funding, claim that confidentiality is essential for donors who do not wish to be publicly identified with a particular party. But the privacy considerations for donors, although in some cases perhaps understandable, must be made subordinate to the wider public interest of an open and accountable system of government. Further, if donors have no intention of influencing policy directions of political parties, they would not be dissuaded by such a transparent scheme. As Tham and Orr state, “transparency is viewed as a method of deterring corruption and undue influence directly, or, indirectly, by discouraging large amounts of private funding”.²⁸

Recommendation 5.5

Additional disclosure requirements to apply to Political Parties, Independents and Candidates:

- a) any donation of over \$10 000 to a political party should be disclosed within a short period (at least quarterly) to the Electoral Commission who should publish it on their website so that it can be made public straight away, rather than leaving it until an annual return;**
- b) professional fundraising must be subject to the same disclosure rules that apply in the *Commonwealth Electoral Act 1918* to donations.**

One of the key screening devices for hiding the true source of donations is the use of Trusts. As a consequence, the Democrats continue to recommend strong disclosure provisions for trusts that provide electoral donations. The AEC has dealt with some of these matters in Recommendations 6-8 of its 1998 Funding and Disclosure report concerning associated entities. The Labor Party²⁹ has given in-principle support to some of the AEC’s recommendations, which the Democrats welcome. More recently, the Labor Party has also suggested increasing powers to

28 Submission No 160, (Mr J Tham and Dr G Orr); Submission No 199, (Mr J Tham and Dr G Orr - supplementary)

29 Media Release 2 June 2000

audit disclosure returns of political parties. This is a sensible and practical solution to a troubling problem and has the support of the Democrats.

Recommendation 5.6

Additional disclosure requirements to apply to political parties that receive donations from trusts or foundations. They should be obliged to return the money unless the following is fully disclosed:

- a declaration of beneficial interests in and ultimate control of the trust estate or foundation, including the trustees;
- a declaration of the identities of the beneficiaries of the trust estate or foundation, including in the case of individuals, their countries of residence and, in the case of beneficiaries who are not individuals, their countries of incorporation or registration, as the case may be;
- details of any relationships with other entities;
- the percentage distribution of income within the trust or foundation; and
- any changes during the donations year in relation to the information provided above.

Another key screening device for hiding the true source of donations are certain ‘clubs’. Such clubs are simply devices for aggregating large donations, so that the true identity of big donors is not disclosed to the public.

Recommendation 5.7

Political parties that receive donations from clubs (greater than those standard low amounts generally permitted as not needing disclosure) should be obliged to return these funds unless full disclosure of the true donor’s identities are made.

5.4 Overseas donations

A number of countries ban foreign donations to domestic political parties, including Canada, New Zealand and the United Kingdom.

The Main Report does attend to the contentious issue regarding the question of political parties receiving large amounts of money from foreign sources – both

entities and individuals. It is neither necessary nor desirable to prevent individual Australians living overseas from donating to Australian political parties or candidates. There is no case, and it is fraught with danger, for offshore based foundations, trusts or clubs to be able to donate funds, because those who are behind those entities are hidden and beyond the reach of Australian law. Although foreign entities with shareholders or members are more transparent, none of these entities are capable of being audited by the AEC. By banning donations from overseas entities and closing the loophole, this problem is significantly mitigated.

Recommendation 5.8

Donations from overseas entities must be banned outright. Donations from Australian individuals living offshore should be permitted.

5.5 Conflicts of Interest

In most cases, donors appear to make donations to political parties for broadly altruistic purposes, in that the donor supports the party and its policies, and is willing to donate to ensure the party's candidates and policies are represented in parliament. Nevertheless, there is a perception (and probably a reality), that some donors specifically tie large donations to the pursuit of specific policies they want achieved in their self-interest. This is corruption.

Recommendation 5.9

The *Commonwealth Electoral Act 1918* should specifically prohibit donations that have 'strings attached.'

The practice of companies making political donations without shareholder approval and without disclosing donations in annual reports must end. So must the practice of unions making political donations without member approval. It is neither democratic nor is it ethical. Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) should be given the right either to approve a political donations policy, to be carried out by the board or management body, or the right to approve political donations proposals at the annual general meeting. This will require amendments to the relevant acts rather than to the CEA.

Recommendation 5.10

The Corporations and Workplace laws be amended so that either:

- a) Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) must approve a political donations policy at least once every three years; or in the alternative
- b) Shareholders of companies and members of registered organisations (or any other organisational body such as mutuals) must approve political donations proposals at the annual general meeting.

Under the Registered Organisations schedule of the WRA, elections are conducted under the auspices of the AEC. It would seem self evident, in the public interest and for the same reasons - that the same provisions governing disclosure of donations for political organisations should apply to industrial or other organisations for whom the AEC conducts elections.

Controversy sometimes attends union elections. Trade unions are an important institution in Australian society and union elections have become far more expensive to campaign in today than ever before. Many people and organisations contribute to union election campaigns. As for political elections the public and members of those unions in particular should have the right to know the source of any campaign donations above a minimal amount.

Recommendation 5.11

Where the AEC conducts elections for registered and other organisations, the same provisions governing disclosure of donations for political organisations should apply.

6 Selected other matters

6.1 How-to-Vote provisions

How-to-vote provisions vary widely in the various electoral acts governing the elections for our nine parliaments. Political parties contesting elections at all levels of government would benefit significantly from consistent and common practices across the nine jurisdictions. There is certainly enough experience to form a final view in each political party who contest elections across Australia, which should provide a basis for negotiation for State, Territory and federal practices to be made as consistent as possible.

How-to-vote card regulation is an area badly in need of harmonisation and common practice. In our Minority Report on the 1996 election we urged the JCSEM and the Parliament to address the need for better regulation. In the 1998 Report we urged the committee to initiate a cooperative inter-state parliamentary committee to find ways to make how-to-vote laws and regulations as consistent as possible across all Australian parliamentary jurisdictions. This approach is picked up in the Report (5.71).

We remain of the view that how-to-vote cards should be displayed in polling booths rather than handed out. We recognise that there is doubt as to the practical effects of such a system. The best way to find out is to trial the proposal. The advantages of the proposal are self evident, against the costs, aggravation and harassment of the present system. The greatest loss from changing current practices would probably be the motivational effect and camaraderie associated with turning out for your candidate and promoting his or her how-to-vote.

Recommendation 6.1

That the JCSEM initiate a cooperative inter-state consultation process to find ways to make how-to-vote laws and regulations as consistent as possible across all Australian parliamentary jurisdictions.

That the AEC take an early opportunity to trial, at a by-election, systems of displaying how-to-vote material inside polling booths.