Report of the Inquiry into the conduct of the 2001 Federal Election and matters related thereto

Supplementary Remarks—Senator Andrew Bartlett and Senator Andrew Murray

1 Prologue

These 'Supplementary Remarks' of ours are so titled because this is not a dissenting report. There is little we would disagree with in the Main Report. We consider it an important Report, whose recommendations if accepted would advance electoral law and the functioning of our Federal democracy.

Nevertheless, without diminishing its importance, the Main Report is a Report that focuses more on analytical technical administrative and functional matters, and eschews some of the more controversial topics on which Committee unanimity is less likely.

One highly controversial issue the Committee did take up productively and resolve unanimously in the Main Report is the voter identification issue.

By the nature of the Committee's processes and remit, the Joint Standing Committee on Electoral Matters (JSCEM) reform agenda tends to be

incremental, and the Committee is careful of change that may affect the integrity of our system.

The topics covered in these Supplementary Remarks are coincidentally those of the greatest public interest and notoriety. Although the Report does include a section on funding and disclosure, it is not an issue considered in any real depth.

Prior to the 2001 election the JSCEM had been given a reference to examine political donations and disclosure and received many submissions. Hearings were held. After the 2001 election the Inquiry was not resurrected (against our wishes), and the topic has received low coverage in the Report.

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. Our Supplementary Remarks therefore intend to pick up on three contentious and topical areas neglected in the Main Report: Political Governance; Political Donations; and Constitutional Reform.

We make no apology for repeating some observations made by us in the JSCEM Reports on the 1996 and 1998 elections. However, space does not allow us to develop arguments as fully as we would like.

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.

While there appears to be little improvement regarding voter perceptions since then, with no significant advance in parliamentary or political standards, or party political governance, there have been considerable gains in accountability and reporting, particularly in the area of parliamentary entitlements.

Aspirations to higher standards may be idealistic but in our view higher political standards remain worthy and necessary goals.

The Australian Democrats remain largely unsuccessful in our quest for significant improvements in party political governance, a more representative political system, truth in political advertising, and full disclosure of all types of political party income.

2 An insufficiently representative HoR[1]

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 2001 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 (HoR).

In 2001 Australia's only two major parties, the Liberal and Labor parties, secured 74.9% of the HoR vote, up from 74.5% in 1998. The Labor Party secured a primary vote of 37.8%, and the Liberal party 37.1%.

Of the minor parties, the National Party (13 members) and the (Northern Territory) Country Liberal Party (1 member), gained representation in the HoR, with 5.6% and 0.3% of the national vote respectively. Three Independents were successful.

Of the minor parties not represented in the HoR, the most notable were the Australian Democrats 5.4% and One Nation 4.3%.

Overall, over 18% of voters, nearly one in five, were not represented in the HoR at all, having given their primary votes to political parties and independents other than the Liberals, Labor or the Nationals.

Federal election after federal election shows that one quarter of all Australian voters are not major party voters. These voters largely remain unrepresented in the HoR.

This situation has led to campaigns to make the HoR 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 HoR 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.

1 For figures used in this section see the AEC 2001 Electoral Pocketbook.

Although nine[2] political parties 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 parties.[3] Like many democratic governments too, its power is disproportionate to its support.

57% of voters do not give their primary vote to the Government in the HoR. Conversely and disproportionately however, it holds 54.7% of the HoR seats.

The nearly proportional representation nature of the Senate (within[4] States and Territories) provides a useful and desirable democratic counter to the distorted nature of HoR representation.

This is reflected in the Government's share of votes and seats. In the Senate the Government had 41.8% of the national primary vote in 2001, and held 46.0% of the seats.

The role of the Senate as a brake on the excesses of an unrepresentative HoR continues to be the subject of attack. 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 HoR.

It is the Senate, free of the dominance of the Executive, which preserves the essence of the separation of powers, not the HoR. It is the Senate that protects the sovereignty of the people, not the HoR, which is dominated by representatives of a minority of voters with a majority of seats.

After the 2001 election 95% of Australians were represented by their party of choice in the Senate. In contrast, over 18% of the HoR were not.

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2 The Liberal Party of Australia and the Northern Territory Country Liberal Party; the Australian Labor Party and the Country Labor Party; the National Party of Australia; the Australian Democrats; the Australian Greens; the Australian Progressive Alliance; and Pauline Hanson's One Nation Party.

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

4 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 13 x the value of a NSW Senate vote).

3 Political governance

Political governance needs to be focussed on as a reform priority.

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 how transparent and accountable it is.

The natural inclination of political parties is towards self-regulation. Since political parties control the legislature, the consequence is that 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.

The conduct of political parties apart from election mechanics is often poor. Yet 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 like 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.[5] Nevertheless, the common law has been of little assistance in providing the necessary safeguards.

To date the Courts have been reluctant to imply common law provisions (such as on membership or pre-selections) into political party constitutions, although they have determined that disputes within political parties are justiciable.

Political parties are fundamental to the Australian society and economy. They wield enormous influence over the life of every Australian. Political parties need the very proper and necessary safeguards and regulation 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

5 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.

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 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 *Commonwealth Electoral Act 1918* does not address the internal rules and procedures of political parties. The JSCEM's 1998 Report recommended (No.52) that political parties be required to lodge a constitution with the AEC that must contain certain minimal elements. Whilst we believe this recommendation is a significant one, we believe it does not go far enough.

The AEC deals with a number of these issues in Recommendations 13-16 in the AEC Funding and Disclosure Report Election 98. Recommendation 16 asks that the Act 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 too is a significant recommendation, which should be given consideration.

We believe that the following reforms are necessary to make political parties open and accountable:

- The Commonwealth Electoral act 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
  - ⇒ 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 exercise public power, and the terms on which they do so must be open too public scrutiny. Party constitutions should be publicly available documents updated at least once every electoral cycle. (The JSCEM was 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;
- 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, 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.

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.

Recommendation 3.1

The following initiatives would bring political parties 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 publicly available documents updated at least once every electoral cycle;

c) The key constitutional principles of political parties should at least include:

- **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 changing the constitution;**
- **the processes for administration, management and financial management.**

d) 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;**
- **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 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 3.2

That the JSCEM and the AEC give closer scrutiny to branch stacking and pre-selection abuses in political parties.

'One vote one value' is a fundamental democratic principle recognised by Article 25 of the International Covenant on Civil and Political Rights.

Since the 60's 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 West 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. During the 70's, 80's, and 90's 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's. As far back as February 1964 the US Supreme Court gave specific support to the principle.

It should also be a precondition for the receipt of public funding that the 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 give some members greater voting power than other members, resulting in gerrymandered elections for conventions and various other ballots.

This power is reinforced by the exaggerated factional voting and bloc power of union officials. 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 would, 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 3.3

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.

Senator Murray 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 Electoral and Workplace Relations (WRA) Acts. 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 Chapter 7 of the Registration and Accountability of Organisations Schedule of the WRA (Schedule 1B), 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;
- 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 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 unions 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 Australian Electoral Commission could 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 Act.

(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 3.4

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;**

- **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 at least once in a federal electoral cycle;**
- **Require a simple majority of members voting to approve affiliation to a political party, subject to a quorum requirement being met.**

4 Funding and disclosure

The Australian Democrats have a long history of activism for greater accountability, transparency and disclosure in political finances.[6]

We also 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.

Ultimately, to minimise or limit the public perception of corruptibility associated with political donations, a good donations policy should forbid a political party from receiving inordinately large donations.

We dealt with funding and disclosure issues at length in our Minority Reports on the JSCEM reports into the 1996 and 1998 elections. Progress in getting greater accountability in political funding and disclosure is slow, so we are obliged to repeat some of our previous themes.

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.

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

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.

Recommendation 4.1

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.

Recommendation 4.2

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 Act to donations.

One of the key screening devices for hiding the true source of donations is the use of Trusts. The AEC[7] has dealt with some of these matters in Recommendations 6-8 concerning associated entities. The Labor Party[8] has given in-principle support to some of the AEC's recommendations, which the Democrats welcome.

The Democrats continue to recommend strong disclosure provisions for trusts.

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Recommendation 4.3

Additional disclosure requirements to apply to Donors: Political parties that receive donations from Trusts or Foundations 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;**
- **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 4.4

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.

The Main Report does attend to the contentious issue regarding the question of political parties receiving large amounts of money from foreign sources – 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. Bodies with shareholders or members are more transparent.

However, none of these entities are capable of being audited by the AEC.

Recommendation 4.5

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

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 4.6

The Act 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 right.

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 Electoral Act.

Recommendation 4.7

The Corporations, Workplace and other 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 *Workplace Relations Act* 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 organizations 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 4.8

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

5 Constitutional and franchise matters

There is not much disagreement in the community that the Australian constitution needs modernising and reform. The disagreement comes with the content and extent of any reform.

There is no Commonwealth body that is responsible for review of the Constitution. Even if there was, it is properly the responsibility of the Parliament.

By its nature and make-up, the JSCEM is suited for the task of Constitutional review and reviewing means of progressing 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.

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 century and must be modernised in order to accurately reflect the evolution of our country's policies and practices.

Although the Senate or the HoR can in theory put matters before the people of 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 s44), 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 one hit. 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 26 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 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*
- *State Elections (One Vote One Value) Bill 2001*; and

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 and moving forward through its Committee processes.

Fixed and four year terms do however need a fuller discussion. Australian and some international practice is listed below. (These tables are additional to those helpful tables in the Main Report.)

Australia has nine legislatures and fifteen houses of parliament in its federal system.

Of the nine lower houses three (including the Commonwealth) have three-year terms and six have four-year terms. Four have fixed terms with pre-set election dates, and five do not have fixed terms with pre-set election dates.

Of the six upper houses, two have four-year terms, two (including the Commonwealth) have six-year terms, and two have eight-year terms. All have fixed terms but only four have pre-set election dates.

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

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.

We have not been able to get details in time for this Report on the question of fixed terms with pre-set election dates in international practice. One guide is provided in a (perhaps outdated) entry in the *Blackwell Encyclopaedia of Political Science* (1992) David Butler states:

> In the majority of democracies there are no fixed dates for elections though parliaments often last for their full three-, four or five-year term. [Apart from the USA] …Norway [September] and Switzerland [November] are the only democracies in Europe to have fixed-term parliaments with no provision for early dissolution; but several other states such as Portugal and Sweden have very limited facility for early dissolution.

Table 1 Australian Commonwealth and State Terms of Parliament

Legislature	Date
Commonwealth (Bicameral)	An election for the House of Representatives must be held on or before **16 April 2005.** The Commonwealth is a mixed system. The HoR does not have fixed terms and has three-year terms (in practice an election must be held within three years three months of the first day of sitting). The Senate has fixed six-year terms, and half the Senate is elected every three years (generally simultaneously with the HoR, but constitutionally there could be two separate elections), unless there is a double dissolution, when all the Senate is elected at the same time as the HoR members.
New South Wales (Bicameral)	Next election **24 March 2007.** NSW is a mixed system. The NSW Legislative Assembly has a fixed four-year term, and the NSW Legislative Council has a fixed eight-year term, with half the members being elected at every general election. Elections are held on the fourth Saturday in March every four years.
Queensland (Unicameral)	The next election must be held on or before **15 May 2004.** The Queensland Parliament has a three-year term, and the election date is not fixed.
Victoria (Bicameral)	The next election must be held on **25 November 2006.** Victoria

	enacted major electoral reform in March 2003. The Legislative Assembly and Council now both have fixed four-year terms. Elections are to be held on the last Saturday in November every four years, commencing in 2006.
South Australia (Bicameral)	The next election must be held by **18 March 2006.** The South Australian House of Assembly now has a fixed four-year term and the Legislative Council has a fixed eight-year term, with half of its members being elected at each general election. Elections are to be held on the third Saturday in March every four years, commencing in 2006.
Western Australia (Bicameral)	The next election must be held before mid **February 2005.** The Western Australian Legislative Assembly has a four-year term, while the Legislative Council has a fixed term of four years from the time members take their seats on the 22 May following the date of their election. The election date is not fixed.
Tasmania (Bicameral)	An election for the House of Assembly must be held on or before **23 September 2006** The Tasmanian House of Assembly has a four-year term. The election date is not fixed. Legislative Council members have fixed six-year terms with an election for two or three of the 15 being held on the first Saturday every May, on a six-year periodic cycle.
Australian Capital Territory (Unicameral)	An election must be held on **16 October 2004** The ACT Legislative Assembly has a fixed three-year term. Elections are held on the third Saturday in October every three years.
Northern Territory (Unicameral)	An election must be held on or before **15 October 2005.** The Northern Territory has a four-year term. The election date is not fixed.

Table 2 Terms of Parliaments in 30 OECD Countries

Term *(number of countries)*	**Countries**
Five years *(7)*	Canada, France, Ireland, Italy, Luxembourg, Turkey, United Kingdom
Four years *(19)*	Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Iceland, Japan, Republic of Korea, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland
Three years *(3)*	Australia, Mexico, New Zealand
Two years *(1)*	United States of America

The Democrats have consistently argued that fixed terms are more important than longer terms, but they have equally consistently supported four-year terms as well.[9]

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.

There is political unanimity on four-year terms. If four-year terms were to become a reality, the HoR would join every state government in Australia bar Queensland, which also has a three year term.

The JSCEM has previously unanimously recommended four-year terms for the House of Representatives.

If a Referendum were to be held to determine whether the HoR should move to four-year terms, it would require a view to be taken on Senate Terms. (Presently the relationship is 3 years HoR/6 years Senate.)

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. There are those who believe the relationship should be 4/4 or even 5/5.

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 5 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.

Fixed terms prevent the unnecessary waste of taxpayer's dollars from being spent on snap elections.

9 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.*

These issues were also canvassed in the Democrats' 1996 and 1998 JSCEM Federal election Minority Reports.

Recommendation 5.1

(a) That the dates of elections be fixed and preset by legislation;

(b) That four-year terms for the House of Representatives be put to the people as a Referendum question at the next federal election.

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 Act.

We recommended in our 1998 JSCEM Minority Report that subsection 394(1) of the Act be repealed.

The Democrats are of the opinion that simultaneous elections should not be banned outright – they should at least be at the discretion of the governments concerned. For instance why shouldn't a Federal by-election be able to be held simultaneously with State or local elections, at the discretion of a Government, or a State by-election during a Federal election?

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

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

In 1922 the *Commonwealth Electoral Act 1918* was amended to prevent simultaneous Federal and State elections. The 1988 Constitutional commission recommended that this provision be repealed.

Recommendation 5.2

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

Section 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 and 1998 Minority Reports, as has the JSCEM itself (recommendation No.57.) There is unanimous support for change.

Section 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', be deleted.

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 s44(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 s44(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.

S44(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 the 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 s44 (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 s44 should be deleted in its entirety. Indeed, the Standing Committee on Legal and Constitutional Affairs Report of July 1997 noted that if its recommendations concerning ss44(i) & (iv) were accepted, the last paragraph of s44 should be deleted. We concur with that view.

Recommendation 5.3

That the following questions be put to the people as Referendum questions at the next federal election:

(a) That s44(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 s44(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 s44 of the Constitution be deleted.

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 ACT 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 people, women and homosexual citizens compelled to seek international help in addressing unjust treatment and discrimination.

The Democrats saw this as an opportunity to establish a comprehensive human rights standard for Australia and introduced the *Parliamentary Charter of Rights and Freedoms Bill 2001*.

The Charter of Rights is 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 of the law, the right to a fair trial, freedom of expression and freedom of religion.

Recommendation 5.4

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 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.

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.

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 5.5

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.

6 Other matters

The concern about breaches of the caretaker conventions dealing with government advertising during election periods have escalated since into a general debate about the propriety of government advertising practices.

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.

Principles[10] similar to these 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.
- 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.
  - ⇒ Material should avoid party-political slogans or images.
- 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.

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

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 6.1

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

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.

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 6.2

(a) 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.

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

The Australian Democrats have actively campaigned to introduce 'truth in political advertising' legislation in Australia since the early 1980's. Our Minority Report on the 1996 election had an extensive section on this topic.

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 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. 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.

In 1983 the Commonwealth Parliament introduced laws regulating political advertising (s392(2) of the Act), 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 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 Act concerning truth in political advertising. In 1995 it considered amendments to the *Commonwealth Electoral Act 1918.*

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 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, Senator Murray revised and reintroduced his *Electoral Amendment (Political Honesty) Bill 2003,* that legislates for truth in political advertising.

Recommendation 6. 3

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.

Senator Andrew Bartlett **Senator Andrew Murray**