

ELECTORAL REGULATION RESEARCH NETWORK

**DEVELOPING A LEGISLATIVE FRAMEWORK FOR A
COMPLEX AND DYNAMIC ELECTORAL ENVIRONMENT**

DISCUSSION PAPER

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Part 1 - Introduction

1.1 Elections in a representative democracy are a structured method by which the people of a nation, state or territory make collective decisions, and at a most basic level are a substitute for the exercise of power by the strongest. They are a societal undertaking, the success of which depends on the support, active or passive, of a wide range of actors. The notion of contestation is inherent in them, and the legislature and/or executive which flows from an election is expected to have legitimacy, in the sense that the result of the election is generally accepted as conferring the right to make laws and/or to govern. In order for such societal acceptance to arise, however, a basic requirement is a prior consensus regarding the way in which the electoral process will unfold. It is in the regulatory framework for an election (though not exclusively there) that such a consensus is primarily expressed.²

1.2 In many countries, the election management body is seen as having a purely operational role, involving the implementation of laws determined solely in the political, and occasionally judicial, sphere. In Australia, however, independent electoral commissions, federal, state and territory, are now typically expected (and mandated) not just to be implementers, but to contribute actively to the improvement and modernisation of the way in which elections are conducted. This reflects a recognition at both the political and mass level that participants in elections - parties, candidates and elected representatives - are in a position of unavoidable conflict of interest when issues of electoral policy are to be considered. Independent, neutral and professional commissions have increasingly come to be seen as best placed to transcend such conflicts, and to devise processes which are well attuned to the objective of making optimal provision for free and fair elections.

1.3 This more active engagement with policy development appears sometimes to have led commentators to assume that Australian electoral commissions are able to make policy directly, or to exercise more administrative discretion than is

¹ The discussion which follows draws extensively on a report prepared by Professor Graeme Orr for the NSW Electoral Commission in 2011 entitled *Modernising the Electoral Act: Legislative Form and Judicial Role*.

² We refer here to the “regulatory framework” for, rather than the “laws governing”, elections so as not to pre-judge the key question of what matters need to be prescribed in law, and what can be left to administrative discretion or determination which lacks legal status.

actually the case.³ In fact, their high level of prescriptiveness was for a long time one of the most striking features of the laws governing elections in Australia, and that remains the case in some jurisdictions, including at the federal level. This is understandable for purely historical reasons: in the early days of Australia's democracy, governmental resources were much more limited than they are today, and electoral field staff and polling staff, rather than receiving the sort of structured and comprehensive training that is now taken for granted, were often given little more to guide them than a copy of the laws and regulations.

1.4 Put another way, electoral commissions in Australia have historically been positioned as administrators overseeing (and sometimes advising law-makers on) the detail of election law. Their organisational - and resourcing - focus has been as *administrators* delivering smooth electoral events. This contrasts with *regulatory* agencies like ASIC (the corporate regulator) and, more pertinently, Integrity Commissioners (who have been empowered to set standards for parliamentarians, ministers and lobbyists and advise on their practical implementation). But history is not destiny, and the position of electoral commissions is evolving. Most obviously, the emergence of increasingly complex political funding and disclosure, and party registration, regimes is changing our understanding of commissions' role. In New South Wales, for instance, the power to level administrative penalties to mulct parties for failures to comply with political finance law puts the commission in a quasi-judicial role. In one sense such a power is not new: commissions have, for a close to a century, ruled on whether individual electors had a valid excuse for not turning out to vote and backed those decisions with penalty notices. But the funding and disclosure role is not tied to a particular election and assumes a higher-profile and year-round role.

1.5 Detailed and prescriptive laws, however, can constrain the ability of modern electoral commissions to make improvements to processes on an ongoing basis. This point, juxtaposed with arguments in favour of prescriptive laws, was highlighted in the then federal government's September 2009 *Electoral Reform Green Paper*:

“3.23 It might be argued that the highly prescriptive nature of the current federal electoral laws makes them susceptible to becoming quickly outdated, and requires

³ Mr Gerard Henderson's recent contention that “The Australian Electoral Commission made a bad decision in allowing [Mr Clive] Palmer to establish his own UAP [United Australia Party]” - his concern being that the name is the same as that of a party which governed at the federal level in the 1930s and 1940s - is a good example of this. In fact, section 129 of the *Commonwealth Electoral Act 1918* makes it clear that a decision to reject the party's name on the grounds suggested by Mr Henderson would have been inconsistent with the law, such that it would inevitably have been appealed and overturned. See Gerard Henderson, “Palmer unlikely to upend our stable two-party tradition”, *The Australian*, 23 February 2019, at <https://thesydneyinstitute.com.au/blog/palmer-unlikely-to-upend-our-stable-two-party-tradition/>, viewed 1 April 2019.

regular amendments to be made to update particular provisions from time to time. Less prescriptive laws could ensure greater flexibility for processes to be updated to reflect a changing electoral environment, without the need for Parliament to consider amendments to legislation. It could be contended that primary legislation should be prescriptive enough to ensure that electoral administrators uphold the key principles of the Australian electoral system, while more detailed administrative arrangements could be contained in subordinate legislation that would be easier to amend if change becomes necessary.

3.24 On the other hand, it could be argued that one advantage of highly prescriptive electoral laws is that they encourage political consensus by requiring the Parliament to agree to more of the details of electoral processes. They may also leave fewer matters open to the interpretation of the courts. In addition, highly prescriptive laws may heighten public trust in the electoral system, and may also serve as a mechanism for deflecting criticism from the electoral administration, which can point to a legislative basis for particular decisions or processes.”⁴

1.6 If parliaments were typically in a position to translate widely accepted policy proposals into law promptly, the concerns about prescriptive laws expressed in the *Green Paper* might not have much force. In fact, however, parliaments are typically resource constrained: as the main representative and legislative bodies in their respective jurisdictions, they have a great deal of work to do - as also do their individual members - and that puts at front and centre of debate about policy-making processes the concept of adopting an approach which enables them to focus on the most important issues, while leaving less important “administrative” matters to be dealt with by others. The various parliamentary counsel tasked with drafting bills to be put to their parliaments are also often resource-constrained, and are required to give priority in their work to those matters deemed by the government to be of most significance.

1.7 The question of how to get the balance right between prescriptiveness and flexibility is now one of the key ones with which Australian electoral administrators and reformers are having to engage. To support detailed consideration of the issue, the Electoral Regulation Research Network has agreed to host a workshop on the topic in July 2019. This paper has been prepared in advance of that workshop to stimulate discussion on the following three fundamental questions relating to the development or reform of regulatory frameworks for Australian elections.

- What principles should underpin Australian electoral legislation?

⁴ Australian Government, *Electoral Reform Green Paper: Strengthening Australia's Democracy*, September 2009, at https://web.archive.org/web/20091024131827/http://www.pmc.gov.au/consultation/elect_reform/strengthening_democracy/docs/strengthening_australias_democracy.pdf, viewed 1 April 2019.

- What subject matter should such legislation deal with?
- What detail should be specified through:
 - Statutory provisions;
 - Regulations; and/or
 - Determinations of electoral commissions?

From a practical point of view, the last of these questions is the one which has most occupied the minds of electoral administrators in Australia, and is our primary focus.

1.8 The balance of this paper is structured as follows.

- **Part 2 - Principles, standard and rules.** As a basis for our analysis, we elaborate the distinction between principles, standards and rules, and list and discuss the various laws or documents in which they can be found.
- **Part 3 - Distinctive features of a delegated rule-making regulatory framework.** We here describe the delegated rule-making approach in further detail, with examples.
- **Part 4 - Implementing delegated rule-making.** We here discuss matters which an electoral commission may need to take into account when considering whether, and if so how, to pursue with other stakeholders the establishment of a delegated rule-making regulatory framework.

Part 2 - Principles, standards and rules

2.1 All regulatory frameworks for elections embody, to a greater or lesser extent, principles, standards and rules; categories which we now define.

- **Rules** are typically narrow, specific and relatively mechanical. That said, rules often contain some ambiguity in their language, purpose or application in some circumstances.
- **Standards** supply a set of criteria to delimit a decision-maker's discretion, and tend not to be mechanically applicable.

- **Principles** are norms expressed at a high level of generality. Principles most obviously express values and goals.

2.2 Rules tend to have an all-or-nothing quality: rules can clash, but when they do, we expect methods of statutory interpretation to tell us which rule gives way to the other. For instance, one rule in the *Australian Constitution* says the Senate is to consist of equal numbers of senators from the states. Another rule empowers the federal parliament to allow territory representation as it sees fit. The rules clash if we assume a deep purpose that the Senate is to be a state's house. The High Court resolved the clash by holding that the more particular and direct provision about territory representation permitted territory senators.

2.3 Standards lie intermediately between rules and principles. A standard is a binding guideline to action or further decision. Standards are expressed with less specificity than rules, whilst being less abstract than principles.

2.4 Principles, like religious precepts, exist to point the way. As with rules, they can overlap and contradict. When they do, one principle has to be assigned greater weight than another. A classic example involves someone guilty of involuntary manslaughter of a relative, standing to inherit from the estate. Is the higher principle “no one is to profit from their wrongs” or “clear intentions in a will are sacred”?

2.5 We can illustrate the rule/standard/principle classification with a familiar example from electoral law: the redistribution process.

- The key principle is that redistributions are to achieve one-vote, one-value.
- A standard is that the redistribution commission is to take account of certain factors in drawing electorate boundaries: community of interest, geographical features, existing boundaries, communication and transportation, etc.. That standard gives binding guidance to the discretion of the body undertaking the redistribution.
- One rule exists in the formula that electoral enrolments must fall within a 10% tolerance of the average enrolment. (Note how that rule gives flesh to the one-vote, one-value principle.) Another rule is that redistributions must occur every 5 years, or earlier if triggered by some formula. (Note how that rule triggers the re-implementation of the standards-driven process of drawing boundaries.)

The outcome of applying these principles, standards and rules is a particular set of electoral boundaries.

2.6 The distinction between principles and standards is not always clear cut. An example of a case which falls into something of a grey area is the requirement which was set out in section 109 of the *Aboriginal and Torres Strait Islander Commission [ATSIC] Act 1989* that “Voting at Regional Council elections shall be by secret ballot”. While at one level a requirement for a secret ballot could be seen as one of the loftiest of all electoral principles, enshrined in both the 1948 *Universal Declaration of Human Rights* and the 1966 *International Covenant on Civil and Political Rights*, in the ATSIC case it also served as a standard by which the validity of the *ATSIC Regional Council Election Rules* was to be assessed, and formed the basis of a ruling by the Federal Court of Australia that the balloting process prescribed in those Rules did not satisfy the secrecy requirement, as the ballot was required to be returned in an envelope bearing the voter’s particulars.⁵

2.7 Finally, it is worth noting that a reconstruction of electoral laws to make them more principles-focused can easily be confused with the aim of drafting laws in “plain English”; not least because the end product of both processes can be a law which seems, on the face of it, simpler. The two exercises are, however, different ones: a law may be in plain English but not embody delegated rule-making, or may provide for delegated rule-making but not necessarily follow guidelines for plain English drafting. **Annex 1** contains a very brief discussion of plain English drafting.

Constitutions, laws, regulations, determinations etc.

2.8 A second way of classifying the elements of a regulatory framework for elections is according to the documents in which they are found.⁶ In most jurisdictions, because of the sheer complexity of an electoral operation, election law is primarily statutory, though supplemented by common law (i.e. judicial decisions clarifying interpretation of, or filling gaps in, statute law). A range of different statutes and instruments, varying in extent of application and generality, can serve to regulate the conduct of an election. A hierarchy of statutes and instruments typically exists.

⁵ *Re William Joseph Yarran v Michael Blurton and others* [1992] FCA 199, at <http://classic.austlii.edu.au/au/cases/cth/FCA/1992/199.html>, viewed 1 April 2019.

⁶ The following discussion draws directly, and largely verbatim, from Michael Maley, “Transplanting Election Regulation”, *Election Law Journal*, vol. 2, no.4, 2003, pp. 479-497.

Constitutions

2.9 The first document to be considered is the constitution of the nation, state or territory.⁷ The extent of detail contained in a written constitution regarding the conduct of elections varies considerably: some constitutions, such as that of New South Wales, contain significant provisions explicitly relating to elections, while others, such as the *Australian Constitution*, are rather more sparse. In a federal system, separate federal and state constitutions may each contain provisions that relate to elections, and these may or may not have to be read together. While in some countries, such as the United States, a bill of rights may be embedded in the constitution, in other jurisdictions there may be a separate statute of that type, which nevertheless may have something to say about the legitimate content of other statutes. Some jurisdictions also have as part of their law a generalised statute governing statutory interpretation, which may influence the judicial construction of election legislation.

2.10 Sometimes a constitution will be able to be amended from time to time by a simple act of parliament; but it is not unusual for additional requirements to be imposed governing the “manner and form” in which some such amendments may be made: there may for example be a requirement for a “super majority” (e.g. two-thirds) supportive vote in the parliament, or a referendum. Such requirements are known as entrenchment; in Australia, the whole of the *Australian Constitution* is entrenched by the referendum requirement of section 128, while at the state and territory level there are several examples of provisions specifically relating to elections which are entrenched.

Electoral Acts

2.11 At the next level of the hierarchy, one finds the main statutes governing elections. These supplement such constitutional provisions as exist by making more detailed provision for the conduct of election processes. Again, it is possible in a federal system for both federal and state statutes to be relevant to the conduct of elections.⁸ Even in unitary systems, the relevant law may be spread over several statutes: electoral offences, for example, may be defined both in the electoral law and in the criminal law. The content of statute law governing elections is typically constrained by a need to maintain consistency with any relevant constitutional requirements, though this is less significant when a

⁷ For Australia’s self-governing territories, the primary role of a constitution is played by the relevant self-government act passed by the federal parliament.

⁸ For example, section 9 of the *Australian Constitution* empowers the states “to make laws for determining the times and places of elections of senators for the State”. Another example can be found in the way federal law relating to broadcasting imposes a ban on broadcast election advertising for the several days preceding polling days for federal, state and territory elections.

constitution can be amended by ordinary legislation. As mentioned, the tradition in Australia has been for electoral legislation to be very detailed, to the point that courts of disputed returns tend to talk of them as exhaustive “codes”.

Subordinate legislation

2.12 Provision often also exists for the enactment of subordinate legislation: “regulations” or “rules” made by the holder of an office, rather than by the legislature, pursuant to a power delegated by the legislature. The person to whom regulation-making power is delegated will vary from place to place; very often, it is formally the vice-regal representative, though in practice the relevant minister. Regulations are usually subject to disallowance by the parliament (or by either house thereof in a bicameral legislature), and constrained to be consistent with the provisions of the main statute under which they are made. The capacity to make regulations enables prescriptions to be enacted, with the full force of law, without there being a need to take a proposed law through the legislature, and provides a feasible mechanism either for dealing with points of fine detail or for responding promptly to unforeseen circumstances. Given the tendency to prescriptive acts, electoral and referendum regulations in Australia are often relatively thin. For instance, the federal regulations are barely one-fortieth the size of their parent legislation. Their content is also rather random. For example, they set the form of the Senate ballot, but not the House ballot which is still set in the Act. But the value of regulatory flexibility is evident in one aspect of the regulations, namely their dynamic list of “prescribed” bodies with privileged access to roll information.

Orders, instruments, determinations and notices

2.13 The next level of regulation is provided by orders, instruments, and determinations made, and notices given, pursuant to a law or regulation, which are not regarded as laws in themselves, but which may nevertheless structure and influence the conduct of elections. One such mechanism is profound: the determination of the boundaries of electoral divisions is final and deliberately puts in the hands of independent electoral authorities a power once seen as a fundamental legislative privilege. Others relate to administrative particularities, e.g. to specify the design of an election form, to declare that a particular political party has been registered, to specify the locations of polling stations, or to declare the final election results. In exceptional circumstances, such orders may have the effect of overriding provisions of the law, if the law explicitly makes this possible.⁹

⁹ For example, subsection 17(1) of the *Canada Elections Act* states that:

2.14 Regulatory rules of this type can take a number of different forms.

- At the federal level in Australia, those defined as “legislative instruments” within the meaning of the *Legislative Instruments Act 2003* are subject to specific requirements, including for their registration, and are generally susceptible to disallowance by either house of the federal parliament, though there are exceptions. For example, the Australian Electoral Commission (AEC) is empowered under subsection 126(2AB) of the *Commonwealth Electoral Act 1918* to set technical requirements for party logos by legislative instrument, and under section 321D to set the finer detailed requirements for authorisation of electoral material. (It is to be noted that the requirements in question may have significant, because criminal, consequences.)
- At various points in the *Commonwealth Electoral Act 1918*, the AEC is empowered to “approve” certain forms, processes, systems etc. by notice published in the *Gazette*, or to determine particular matters. Some of the documents setting out these approvals or determinations are specifically stated in the Act not to be legislative instruments. The matters covered by such approvals can be of major significance: for example, section 111 of the Act empowers the AEC to approve the computer system on which the electoral roll is managed.

Procedures

2.15 Finally, most electoral commissions will promulgate procedures - which are in fact instructions to their own staff - expanding upon matters prescribed in the law, filling gaps that may exist, and defining in a transparent manner, for the benefit of all participants in the election process, how an election will be conducted.¹⁰

“During an election period or within 30 days after it, if an emergency, an unusual or unforeseen circumstance or an error makes it necessary, the Chief Electoral Officer may, for the sole purpose of enabling electors to exercise their right to vote or enabling the counting of votes, adapt any provision of this Act and, in particular, may extend the time for doing any act, subject to subsection (2), or may increase the number of election officers or polling stations.

See <https://laws-lois.justice.gc.ca/eng/acts/e-2.01/page-3.html#docCont>, viewed 1 April 2019.

¹⁰ The extent of this transparency can vary. Some guidelines will be withheld from publication for sound reasons: the publication of a list of “valid and sufficient reasons” for failure to vote, for example, would clearly undermine the entire system for enforcement of compulsory voting. Transparency will be maximised if procedures are published on a commission’s website; less so if they can only be obtained through a freedom of information application.

Conventions and codes

2.16 Another important source of regulatory content is constitutional convention. In a number of countries, especially those with legal systems derived from that of the United Kingdom, unenforceable but well-understood conventions structure important aspects of constitutional practice, and these can be significant for the conduct of elections. A good example of the relevance of such conventions is the way in which governments in some countries go into “caretaker” mode once an election has been called.

2.17 A final source of the content of regulation is voluntary codes to which non-state stakeholders in the election process may subscribe. Particular value has been seen in a number of countries in encouraging political parties and candidates to adhere to codes governing their conduct during the campaign, not least because it is possible to include in such codes voluntary limitations, for example, on certain forms of expression, which, if included in the election law, could be inconsistent with international human rights instruments guaranteeing freedom of expression.¹¹

Some general observations on this hierarchy

2.18 It is important to note that the categories of documents discussed above are broad ones, and their detailed structures can vary considerably from place to place. Terminology also varies: main statutes, for example, are called “Acts” in some countries, “Laws” or “Organic Laws” in others, “Regulations” in others; and so on.¹²

2.19 Apart from the written sources discussed above, an important source of the content of election regulation is legal precedent to which effect is given under the common law doctrine of *stare decisis*. Of particular significance, given the preponderance of statute law in election regulation, are those precedents that relate to the interpretation and application of statutes in general, and those that relate specifically to electoral statutes. Such precedents may cover such critical points as the interpretation of provisions in the light of other provisions of the same statute, or of provisions of other statutes; the consistency of the provisions with provisions of a constitution or bill of rights; whether the provisions are applicable in particular cases; and even whether the provisions have been validly

¹¹ For example, the Legislative Assembly of Queensland’s *Code of Ethical Standards* (June 2018) includes a “Code of Conduct for Election Candidates” at its Appendix 4. See www.parliament.qld.gov.au/documents/assembly/procedures/CodeOfEthicalStandards.pdf, viewed 3 April 2019.

¹² For example, prior to the enactment of Victoria’s *Electoral Act 2002*, the principal law governing elections in the state was not an earlier “Electoral” Act, but rather the *Constitution Act Amendment Act 1958*.

enacted. It is a commonplace that, in a legal system based on precedent, the way in which a statute operates in practice cannot be properly understood without an understanding of the case law that has developed around it.

2.20 A consistent feature of the sources of regulation in established democracies is their comprehensiveness. Government based on rule of law and bureaucracy tends to rely on regulation and precedent to guide administrative behaviour, and where there is a long history of elections, it is likely that most contentious issues will have arisen before, in response to which a rule or instruction for dealing with them will exist somewhere (even if the divining of the relevant rule sometimes calls for a degree of judicial creativity). It needs to be emphasised, however, that there is considerable variation across countries regarding which issues are dealt with at which points within the hierarchy of sources. At one end of the scale, in countries with code-based legal systems, one might hope to find answers to all relevant questions in a single document. But it is also striking that points which in some countries are spelled out in the constitution are, in other countries, left to administrative determination.¹³

2.21 In general, forms of regulation that stand relatively high in the hierarchy are more reflective of a political consensus than lower forms of regulation, but are also more difficult to amend. If particular points are prescribed in the constitution, a bill of rights, or a main election statute - for example, the use of a paper ballot - the hands of the electoral commission may be tied if it wishes to introduce innovations to the election process, for example computerised voting.

Part 3 - Distinctive features of a delegated rule-making regulatory framework

3.1 In public and administrative law, “principles-based” law-making aims to draft legislation in clear but general terms and, where possible, to leave fine detail to be filled by other agencies. It encompasses both principles and standards in the sense described above. What it seeks to avoid is an excessive attempt by parliaments (or appeal courts) to craft the law as a dense maze of rules that can supposedly be mechanically applied and which somehow foresees all eventualities.

3.2 In the common law of negligence, for example, the higher courts do not attempt to lay down strict rules of behaviour. Rather, they set principles (“act reasonably to avoid foreseeable harm to your neighbour”) and standards (“what is

¹³ A good example is the apportionment of legislative seats among the political units from which a country is constituted. In the United States and Australia, strict numerical formulae are specified in the relevant constitutions. In the United Kingdom, Boundaries Commissions long had the discretion to vary (within certain defined limits) the number of seats in England, Scotland and Wales.

reasonable depends on the level of foreseeability, the likely harm and the cost of precautions”). These principles and standards are then elaborated on the ground, in documents such as health and safety codes and in decisions by people in charge of physical activities; decisions that are reviewed by lower courts.

3.3 Principles-based law-making is usually attributed to the continental European tradition. A 1975 United Kingdom report on *The Preparation of Legislation* called for principles-based drafting “wherever possible”:

“the traditional approach in Europe has been to express the law in general principles, relying upon the courts ... to fill in the details necessary for the application of the statutory propositions to particular cases ... This approach appears to result in simpler and clearer primary legislation ... but equally it lacks the greater certainty which a detailed legislative application of the principles would promote.”¹⁴

Whilst not new, principles-based drafting has had limited use in Australia.

3.4 A classic example of principles-based electoral drafting opens the French *Code Électoral*:

“Le suffrage est direct et universel.” (“Voting is by direct and universal suffrage.”)

This introduces the first chapter of the French Code, titled “Conditions requises pour être électeur” (“Qualifications of Electors”). Of course, defining the franchise requires more than six words; but in just two further sentences, the chapter sets both positive qualifications (French nationals who reach 18 years) and disqualifications (legal incapacity, including judicial discretion to disenfranchise during guardianship or for offences penalisable by a loss of civil rights).¹⁵ Similarly, the first operative provision of the *Canada Elections Act* provides that “Every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector”.¹⁶ It is followed by a series of relatively short sections defining the entitlement to vote and enrol, including succinct definitions of residence for electoral purposes.

3.5 A typical example of detailed, rules-based Australian electoral drafting is the law providing for voting in Antarctica at federal elections. The *Commonwealth*

¹⁴ The Renton Committee (London, 1975, Command Paper 6053) at paras 6.5 and 9.14.

¹⁵ *Code Électoral*, chapter 1, at https://www.legifrance.gouv.fr/affichCode.do?sessionId=AEE0E8271056B0963F94125DB18CF562.tp_lgfr26s_3?idSectionTA=LEGISCTA000006148454&cidTexte=LEGITEXT000006070239&dateTexte=20190401, viewed 1 April 2019.

¹⁶ *Canada Elections Act*, section 3, at <https://laws-lois.justice.gc.ca/eng/acts/e-2.01/page-2.html#h-3>, viewed 1 April 2019.

Electoral Act 1918 devotes a whole Part XVII, of 17 sections, to the topic. One provision, section 251, does no more than require ballot papers to be initialled, a step the importance of which is by no means clear in the Antarctic voting context. Under the most concise principles-based approach, Part XVII could conceivably be condensed to a single section, along the following lines:

“The Electoral Commission must establish procedures to enable Antarctic electors to vote, and have their votes counted, in as secret and timely a manner as is reasonably possible. It is an offence punishable by 0.5 penalty units to breach any such ballot secrecy procedures.”

3.6 As noted above, the advantage of such an approach is that it enables improved service mechanisms to be provided as they become available, without the need to wait for the Parliament to amend the law to permit them to be used. In this respect, the case of Antarctic voting is especially instructive. In 1983, when Part XVII was originally enacted, facilities for telecommunication between Australian Antarctic bases and mainland Australia were far more limited than they are now, with radio-telephone and telex messaging (both explicitly mentioned in section 246 of the Act) then being the mainstay. The rules-based approach of Part XVII still requires the individual registration of Antarctic electors, the appointment of Antarctic Returning Officers, voting in Antarctica using a paper ballot, transmission to Australian Electoral Officers of details of ballots, and the transcription of those details onto postal ballot papers. Had Antarctic voting instead been authorised using the sort of principles-based provision flagged in the preceding paragraph, a number of other options would have been open to the AEC. Most notably, telephone voting of the type now made available to blind or low-vision voters could easily have been extended to Antarctica.¹⁷

3.7 Another widely-cited example of overly detailed drafting is the requirement in section 206 of the *Commonwealth Electoral Act 1918* that “every voting compartment shall be furnished with a pencil for the use of voters”. That provision, as it happens, dates back to 1902, when ball-point pens were not generally available and the alternative to the pencil was the fountain pen, which was comparatively expensive, required regular refilling, and had a tendency to leak. From a modern perspective, the optimal choice of writing implement to be supplied ought to be a technical choice best left to administrators, rather than parliaments. Such legal requirements also risk leaving the electoral authorities in technical breach of the law if, say, sharpeners are lost and pens are substituted.

¹⁷ Part XVb of the *Commonwealth Electoral Act 1918* (“Electronically assisted voting for sight-impaired people”), in striking contrast to the older Part XVII, adopts a principles-based rather than rules-based approach. It consists of only six sections, and leaves the nature of “electronic assistance” open-ended and to be specified by regulation.

3.8 Delegated rule-making can lead to an economy of detail in a main electoral law which many Australian electoral administrators would find startling. An example of this can be found in the UN regulation under which a Constituent Assembly election was conducted in East Timor in 2001.¹⁸ In a mere 18 pages containing 38 sections and one schedule, the regulation determined the structure and mandate of the Constituent Assembly; established an independent electoral commission and stated the main rules governing its operation; provided for the registration of political parties; stated eligibility criteria for voters and candidates; and specified the mixed-member majoritarian electoral system which was to be used.

3.9 In a field like electoral law, delegated rule-making in its most fully-developed form involves:

- the legislature laying down **principles and standards**;
- in **suitable** areas;
- where the detailed implementation is **to be filled in by the electoral commission**, as an independent and expert agency.

A somewhat less expansive model would enable the details of implementation to be specified either in regulations, or commission determinations, or both.¹⁹

Arguments in favour of delegated rule-making

3.10 The upsides of such delegation are numerous.

- The electoral act is cleaner and simpler to understand, by politicians, interested citizens and activists, students and lawyers alike. This is not merely a matter of style: it focuses parliamentary minds on matters of principles (“what are our aims; what outcomes are desired?”).
- Under the most expansive model, fine detail, typically of a machinery kind, is left to non-partisan experts. Australia’s electoral commissions have in

¹⁸ United Nations Transitional Administration in East Timor (UNTAET), *Regulation No. 2001/2 On the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor*, 16 March 2001, at <http://mj.gov.tl/jornal/lawsTL/UNTAET-Law/Regulations%20English/Reg2001-02.pdf>, viewed 1 April 2019.

¹⁹ Prior to 1984, many of the details now spelt out in the *Commonwealth Electoral Act 1918* were contained in the *Electoral and Referendum Regulations*. In particular, most of the forms used for enrolment and voting were set out therein and could only be amended with difficulty. Under the 1984 amendments, the great majority those forms were changed to ones which could be “approved” by the AEC by notice published in the *Gazette*.

general been seen as respected, independent, “integrity” agencies. Where detailed rules are made by experts, there is less risk of a commission having to work with inappropriate rules imposed by the legislative branch or ministry.

- Parliamentary time is not wasted on relative minutiae.
- Electoral regulation can change more speedily and flexibly when needed, especially to take advantage of new technology or administrative methods.

Arguments against delegated electoral rule-making

3.11 There are four main concerns with delegated rule-making under principles-based legislation. Each stems from a belief that principles are inherently vague: that whilst a principles-based act may appear to be able to be read more cleanly and simply, that perception can be somewhat deceptive. Though these downsides are real, they can largely be avoided through judicious drafting and delegation.

3.12 First, it is sometimes argued that if the parliament legislates principles, but an agency like the electoral commission fills in the detail, the process is less “democratic”, as a commission is not “responsible” in the way that cabinet is responsible via the parliament, and parliamentarians via elections.²⁰

3.13 This argument is more theoretical than practical: parliament retains overriding control of the law, and can always revoke the commission's rules or discretions if the rule-making power is abused. In addition, bills and regulations are invariably framed by the government, and the governing ministry is a political body. Leaving some of the detail of electoral law to the electoral commissions can potentially make the process less partisan. Further, in practice, electoral commissions, even those that are formally independent, are still required in a general sense to be accountable for their actions, sometimes to the parliament through a minister, sometimes through interactions with a parliamentary electoral matters committee, and almost invariably, through such mechanisms or otherwise, to the broader community.

3.14 Second, concern is sometimes expressed that being drawn into the rule-making process can compromise an electoral commission's actual or perceived neutrality, if the rules or determinations it makes may have partisan

²⁰ This idea is encapsulated in some jurisdictions as a fundamental principle of legislation. For example, the *Legislative Standards Act 1992* (Qld) includes it under the rubric of “regard for the institution of parliament”:

https://www.parliament.qld.gov.au/documents/explore/education/factsheets/Factsheet_3.23_FundamentalLegislativePrinciples.pdf viewed 1 April 2019.

consequences. This fear may explain why Australian electoral authorities have sometimes been more comfortable to be seen as administrators of detailed laws, rather than as regulators. Constraining discretion to a relatively mechanistic following of “higher orders” will, it is argued, protect the commission from accusations of bias.

3.15 This concern is a legitimate one, but the risks which drive it can be mitigated in several ways. Of primary importance is to have a balanced approach: (i) delegate only in areas of limited contention, where the commission’s technical expertise is predominant; and (ii) frame the commission’s discretion with sufficiently clear principles and standards. Almost as important is to work to ensure that delegated power is exercised transparently and responsibly, so as to build an environment of trust. Just as a minister exercising delegated rule-making power is expected to consult stakeholders, even more so would that be part of the process followed by any responsible electoral commission.

3.16 Third, some see a danger that excessive use of delegated rule-making risks fragmenting the law. Underpinning this argument is the notion that the electoral legislation should form a code - a “one-stop shop” for all elements of electoral regulation.

3.17 This concern is true of any legislation that employs a hierarchy of act + delegated rule-making. It is particularly true of public administration. There is always some discretion reposed in an administering agency to settle policy and process on the ground, and to understand public law in action always involves some understanding of that agency, its procedures and manuals. It needs to be said, also, that the attraction of having all relevant electoral law in a single code - which, it needs to be emphasised, has never truly been the case in Australia - seemed an attractive one in the days when laws, regulations, determinations etc. had to be obtained in hardcopy, often from diverse sources, but is far less relevant in the modern era, when it is trivially simple for an electoral commission to provide links to all such relevant sources through a single page on its website.

3.18 Fourth, it is sometimes argued that notwithstanding any shift to a delegated rule-making approach, the regulatory framework will still be complex, but the complexity will be manifested in rules promulgated by the electoral commission, which will still have to cover all the matters currently covered. This proposition is correct, but is somewhat tangential to the main purpose of delegation, which is to enable legislators to focus on the main game while leaving purely technical details to expert agencies. Those details in turn should be drafted as lucidly as possible by the commission, using plain drafting methods. It needs to be noted, however, that for this to happen, commissions themselves will have to ensure that they have

access to appropriate skilled drafting resources, either maintained in-house or obtained externally.

Suitable subjects for delegated electoral rule-making

3.19 The International Institute for Democracy and Electoral Assistance (International IDEA), in its *Guidelines for reviewing the legal framework of elections*, while recognising the appropriateness of delegating some of the “finer details, such as voting procedures” to electoral authorities, nevertheless counsels that certain fundamental issues including the following must still be clearly addressed by the legislature.

- Qualification to register as a voter, together with any restrictions.
- Qualification for and restrictions on candidacy.
- Rules governing seat allocation.
- Limits on terms of office.
- Methods of filling casual vacancies.
- Removal of mandates (i.e. any recall).
- The secrecy of the vote.
- Election management (i.e. authority).

3.20 More generally, it can be said that any issues of principle, or which are subject to significant partisan contention, or where there is a real potential for a conflict of interest involving or within the electoral commission, should not be left primarily to delegated discretion. Examples which can be added to International IDEA’s list include the following.

- Matters relating to the rights of parties, candidates and their representatives, voters and other stakeholders.
- Matters relating to duties to be performed by or on behalf of parties, candidates, voters and other stakeholders, including such key things as the place, mode and deadlines for nominations, and for applications for party registration and the like.

- All powers to be exercised by the election administration or its employees.
- The basic rules for party registration and candidate nomination.
- The most important elements of voting operations. This would not necessarily require them to be spelt out in detail, but would rather focus on those characteristics of operations which bear fundamentally on their legitimacy, deviation from which could have significant consequences.
- Any criminal offences and penalties relating to the election process.
- Campaigning and broadcasting rules.
- Accountability mechanisms, including those for the resolution of disputes (e.g. disputed returns and judicial review).
- Provisions intended to have a retrospective effect (especially if their aim is to validate some action taken by the electoral commission which failed to comply with regulatory requirements).

Conversely, issues that are essentially technical or routine, and where there is little concern with partisanship, are ideally delegated to a body such as the commission.

Form and ordering of electoral acts

3.21 As noted earlier, the French *Code Électoral* begins with something of a flourish: its first articles define the franchise. In comparison, the typical Australian electoral act begins bureaucratically. The *Commonwealth Electoral Act 1918* commences with a preliminary Part I, followed by a lengthy Part II which establishes and defines the functions and power of the AEC.

3.22 The contrast between the Australian and French approaches is significant. The French law begins with a grand principle - universal and direct suffrage - as a reminder that democratic power flows from the people. The Australian approach is more pragmatic: free and fair elections depend, in practice, on professional and independent electoral administration. While the contrast is more symbolic than practical, the French approach is elegant and intuitively appealing. Electoral legislation should, ideally, begin with a focus on right to vote (qualifications and enrolment), then move sequentially through the processes of: party registration; initiating an election including writs and nominations; campaigning; polling and the scrutiny; general offences; and dispute resolution. Redistributions, followed by

the detailed provisions relating to the commission, can then form the tail of the legislation. Following modern drafting practice, a “dictionary” of definitions can be a schedule to the Act, rather than clogging the first pages.

3.23 It needs to be noted, however, that electoral laws comprise but a minute fraction of the total corpus of statute law in Australia, and the form, as distinct from content, of laws is a matter very much influenced by the various offices of parliamentary counsel, which have their own drafting practices and guidelines. The extent of the opportunity which commissions may have to advocate for different drafting structures and styles may therefore vary across jurisdictions.

Objects of electoral legislation

3.24 One typical element of modern drafting practice is the commencement of an act with a general objects provision. The purpose of such a provision is to set the scene, upfront, for the reader. It forces parliament to focus on and declare its broad intents or purposes in enacting the law. An example of such a provision is section 3 of the *Electoral Act 2017* (NSW):

“Objects of Act

The objects of this Act are as follows:

- (a) to constitute an independent Electoral Commission for New South Wales and to provide for the appointment of an independent Electoral Commissioner for New South Wales,
- (b) to promote and maintain an electoral system characterised by accessibility, integrity and fairness that provides for the election of members of Parliament of New South Wales in accordance with the *Constitution Act 1902*,
- (c) to provide for a fair and transparent process for the distribution of New South Wales into electoral districts for elections for the Legislative Assembly,
- (d) to facilitate and protect the integrity of representative government in New South Wales,
- (e) to enable the citizens of New South Wales to participate freely in fair and transparent electoral processes,
- (f) to facilitate the fair and transparent conduct of elections in New South Wales,

- (g) to provide guidance to members of Parliament, parties, groups and candidates in relation to their rights, responsibilities and obligations in relation to the conduct of elections under this Act.”.

3.25 The objection sometimes raised to the inclusion of such a provision is that it might be employed in unpredictable ways in judicial interpretation, given the broad and abstracted rather than concrete language of “purposes”. This risk, however, can be mitigated in various ways, including by careful drafting, or by explicitly “fencing off” the objects clause from judicial use. Some, however, might regard it as unseemly or paradoxical for a parliament to begin an electoral act with a statement of high and broad principle, and in the same breath declare those principles to be merely symbolic.

3.26 On balance, general objects clauses can do little harm. In their absence, any judge interpreting an ambiguous electoral provision may put on the blinkers of a narrowly literal approach to interpretation, or invoke some purposes drawn from his or her own conception of electoral democracy. Indeed common law judges have done this for centuries, divining presumptions that parliament does not intend to interfere with liberties of speech, private property or mobility without clear words. The problem with this “common law bill of rights” is that these values are liberal individualist, to the exclusion of other social values such as substantive equality, or the needs of good governance. A well-drafted objects clause may be more balanced, and certainly more explicit and hence procedurally democratic, than common law intuition.

Clarity of principles

3.27 When constructing a principles-based regulatory framework, it is particularly important to ensure that expressed principles have a well understood meaning rather than being ambiguous, or highly susceptible to subjective interpretation. This is a problem in the electoral field, as many terms in wide use can prove on closer analysis and inspection to be problematical. We here give three examples.

3.28 Australia’s electoral commissions are frequently described as **independent**. In the case of New South Wales this is stated explicitly in the provision quoted in paragraph 3.24 above. In relation to the AEC, however, while it was made clear in the second reading speech for the bill which led to its creation that it was expected to be an independent body, that concept is not defined (in relation to the commission) in the *Commonwealth Electoral Act 1918*. A binding statement in a law that functions of an electoral commission are to be carried out in an

“independent” manner could give rise to many conundrums, such as, for example, whether “independence” permits a commission to consult informally with political parties and players, or requires it to keep them at arm’s length and deal with them in a strictly structured way (in the manner of a judge presiding over litigation).

3.29 As noted in paragraph 2.6 above, the concept of a **secret ballot** proved, in the context of the first ATASIC elections, so unclear that rules enacted in the belief that they complied with the requirement of secrecy were struck down for failing to do so. That case, moreover, merely scratched the surface of the uncertainty surrounding the concept. A classic definition of a secret ballot is that put forward by the Norwegian political scientist Stein Rokkan in 1961:

“... there are two distinct elements in the secrecy provisions: the first is to make it possible for the voter to keep his decision private and avoid sanctions from those he does not want to know; the second is to make it impossible for the voter to prove how he voted to those he does want to know.”²¹

If a requirement for a “secret ballot” were stated as a principle constraining delegated rule-making, and if a court were persuaded to adopt and apply Rokkan’s definition, that could exclude the possibility of any remote unsupervised voting - such as postal voting or remote internet voting - in the course of which the voter could reveal his or her vote to someone else. Even the first leg of Rokkan’s definition - which is probably more widely understood than the second - could cast doubt on whether, for example, the ballot of a blind, physically handicapped or non-literate voter could be marked by someone else on his or her behalf.

3.30 The concept of **proportional representation** is similarly unclear and contested. In 1988, the proposed law for the alteration of the *Australian Constitution* entitled *Constitution Alteration (Fair Elections) 1988*, which was ultimately voted down in a referendum held that year, envisaged the insertion of provisions requiring “one-vote, one-value” elections to state and territory legislatures, with a requirement for the use of “a system of proportional representation” in the event that the one-vote one-value benchmark was not properly met. That wording was intended to provide a degree of flexibility in the fall-back systems which states and territories might be forced to use. One can, however, reasonably speculate whether the High Court might have chosen instead to take a narrow view of a proportionality requirement. It had already taken a somewhat similar stance in *McKellar’s Case*, striking down provisions of the *Representation Act 1964* which had led the allocation of seats in the House of Representatives between the various states to be less strictly proportional than

²¹ Stein Rokkan, “Mass Suffrage, Secret Voting and Political Participation”, *European Journal of Sociology*, vol. II, 1961, pp. 132-152 at p. 142.

was mathematically feasible.²² The possibility that the court could take a similar strict approach to the construction of the term “proportional representation” could well lead to uncertainty as to which of the large number of competing proportional representation formulae would be deemed compliant with any transcendent requirement.

A clear hierarchy of provisions

3.31 A key point on which there is a need for clarity is the effect of enacted principles, and objects clauses: are they to be taken as simply aspirational/inspirational, or are they quasi-constitutional, in the sense that they may constrain more detailed rules, or influence their interpretation?

3.32 In general, an act of parliament is presumed to be constitutionally valid until held otherwise, and will be construed as a whole by the courts, being presumed not to contain inconsistencies. Typically, therefore, a general principle stated in an act will be read down if necessary so as to give effect to more specific provisions in that act which appear to relate to the same issue.

3.33 Where possibly inconsistent provisions are found in different source documents, however, the approach to be taken may not be so obvious. This highlights the need to ensure when constructing a regulatory framework that it is clear which provision is to be taken to be paramount. Sometimes this is reasonably well defined.

- The powers of the parliaments are constrained by the *Australian Constitution*, and the parliament cannot validly enact laws which contradict a constitutional requirement. A similar constraint applies to territory legislatures, whose powers are derived from the relevant self-government acts.
- A state parliament cannot enact laws which contradict an entrenched provision of that state’s constitution, but can, however, enact laws which contradict unentrenched provisions, under the *McCawley* principle (which holds that a sovereign parliament when enacting such a law is impliedly repealing the relevant constitutional provision).²³

²² *Attorney-General (NSW); Ex Rel McKellar v Commonwealth* [1977] HCA 1, at <http://classic.austlii.edu.au/au/cases/cth/HCA/1977/1.html>, viewed 1 April 2019.

²³ *McCawley v The King* [1920] AC 691, at <http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/UKPCHCA/1920/1.html>, viewed 1 April 2019.

- Regulations made under an act are typically constrained to be “not inconsistent” with the Act.

3.34 There is a particular need to draw a clear demarcation line between matters which may be the subject of regulations made by ministerial power, and determinations made by an electoral commission, especially if the powers to make such regulations and determinations are each expressed in general terms. To take the *Commonwealth Electoral Act 1918* as an example, it is, as noted above, replete with provisions which empower the AEC to “approve” forms to be used at elections. This would appear to constrain the power of the relevant minister acting in the name of the Governor-General to make regulations specifying such forms, since they would on the face of it be inconsistent with the intention of the Act that such forms were to be determined solely by the AEC.

Part 4 - Implementing delegated rule-making

4.1 For electoral commissions, the greatest challenge to be faced when advocating for the adoption of delegated rule-making flows from the fact that it involves persuading legislators to give up a power which they currently have; and, importantly, to keep it in that delegated state.²⁴ Certain factors may make this easier, or more difficult. Such a change will tend to be easier if at least the following conditions apply.

- There is broader momentum at the political level in support of electoral reform.
- The electoral commission enjoys a high degree of trust - in both its competence and neutrality - among political actors, and in the broader community.
- Such trust is well institutionalised, such that it is unlikely to be compromised by, for example, a change in the leadership or personnel of the commission.
- The electoral commission has a record of having previously exercised delegated powers responsibly, neutrally and transparently.

²⁴ To give but one recent example of how challenging that may be, an attempt by the federal government to enact (via the *Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018*) an amendment to section 206 of the *Commonwealth Electoral Act 1918* to remove the requirement that every voting compartment be equipped with a pencil (see paragraph 3.7 above) was abandoned in early 2019 after meeting resistance in the parliament, with consideration of the issue being deferred until after the 2019 election.

- There is a clear and widely accepted demarcation in the minds of politicians between matters of principle, or of partisan dispute, and purely or predominantly administrative matters.
- Reform is being pursued at the optimal point in the electoral cycle (which will normally be shortly after an election, to provide the maximum time for all necessary delegated rules to be drafted and put in place, and for all stakeholders to adapt to the new regulatory framework).
- The prospect of significant legislation is not constrained by a lack of availability of resources to the relevant parliamentary counsel, or by an already overcrowded legislative program.

Conversely, if any or all of these factors are absent, a commission will face a more difficult task in advocating for a shift to a delegated rule-making framework.

4.2 The amount of trust or “political capital” more broadly which an electoral commission will have at its disposal can vary considerably across jurisdictions, and over time. All commissions tend to go through good periods and not so good ones, and if, for example, there has been a serious problem in the administration of an election, or a breakdown of some sort in relations between the commission and a minister, political party or influential parliamentarian, the time might not then be right to request additional authority and responsibilities.

4.3 More generally, the respect and trust which a commission enjoys represents a relationship not just with the political classes, but with the broader community. Electoral commissions are not themselves democratically chosen and representative bodies; and while some issues of policy may have an almost purely technical dimension, others may go to the heart of the way in which a society would wish to see its electoral processes. In many cases, policy issues will have elements of both of these dimensions.²⁵ For this reason, all stakeholders in the electoral process have, to a greater or lesser extent, the right and expectation to have their perspectives taken into account when consideration is being given to how the regulatory framework for elections can best be structured. In the following table we list the main categories of people and organisations with an interest in the regulatory framework for elections, and highlight the general nature of those interests.

²⁵ An example of this can be found in the decision the AEC faced some years ago on whether or not to continue to provide a National Tally Room at federal elections. It had become clear over a decade ago that there was no longer an operational need for such a Tally Room, since the media had acquired the capacity to obtain through an electronic feed from the AEC all the data they needed to report election results to the wider community. The AEC nevertheless appreciated that the institution of the Tally Room had a symbolic and ritualistic as well as operational significance, and therefore was not prepared to abandon the establishment of a Tally Room until it was clear that such a move would be acceptable to all significant stakeholders.

Stakeholders	Interests
Electors and potential electors	<p>The great bulk of electors engage directly with the electoral process only through the acts of enrolling and voting. They are therefore directly affected by comparatively few of the provisions of a typical regulatory framework. Moreover, only a tiny fraction of them would ever need to consult the constitution, acts, regulations etc. to ascertain their rights and obligations, as these are now well-publicised by electoral commissions through publications and websites, supplemented by public information campaigns at election time. For this reason, they will usually be oblivious of and indifferent to whether provisions are contained in laws, regulations or administrative determinations.</p> <p>Some of them may, of course, be affected by more than these most basic provisions if, for example, they have a particular interest in where an electoral boundary might be placed, or in whether a party which they support will be registered.</p> <p>They will also be subject to laws creating electoral offences, but the typical voter acting in accordance with general norms of behaviour will tend not to be affected by such offence provisions. Such a voter also runs very little risk of being caught up in electoral litigation.</p>
Candidates	<p>Candidates' engagement with the regulatory framework will be more intricate than that of the basic voter. They are subject to specific nomination requirements, and to a range of obligations, including in relation to funding and disclosure, some of which are relatively complex. In Australia, electoral commissions have made significant efforts over the years to provide clear and consolidated advice to candidates through websites, and through dedicated Candidate Handbooks. While reference to these will often obviate the need for candidates to consult specific text of laws, regulations etc., there are still likely to be some candidates who will have to refer directly to the constitution or the law, especially if there are questions concerning their constitutional qualifications to nominate (this being a matter on which commissions have</p>

	<p>historically been reluctant to provide advice).</p> <p>Candidates have a particular need to be well aware of electoral offences, and may have to go beyond the information provided by commissions in handbooks to understand their obligations, and the legal risks they may face, in full detail. They thus have an interest in the relevant regulatory provisions being as accessible as possible.</p> <p>Candidates, especially those from the major parties contesting marginal seats, also tend to face a significant risk of being caught up in electoral litigation.</p>
Political parties	<p>In Australia, parties can range from large, well-established and resourced mass organisations, to boutique operations with little more behind them than is needed to meet the minimal requirements for registration. Of all the direct participants in an Australian electoral process, it is the parties which typically find themselves most enmeshed with the regulatory framework. They have obligations as organisations in relation to their own registration, and disclosure of their finances; they are typically heavily involved in the nomination process; and they will usually be the first point of contact for their own candidates when any regulatory issues arise. If they are planning to deploy scrutineers or booth workers, it can be expected that they will need to train them to make them aware of their rights and obligations. Ideally, well-established and professionalised parties can help to promulgate electoral law, having both the knowledge and reputational incentive to do so. Other, less consolidated, actors may lack the requisite knowledge or incentives to so assist. Of course, parties can also in the worst cases breed cultures that undermine the law; but on the whole, given their interest in their ongoing reputation, they can act as a buffer to the more pressing self-interest of individual political actors.</p> <p>In general, the role of parties in elections tends to be too intensive to make it feasible for commissions to produce a single handbook which can summarise all the relevant regulatory provisions. Parties therefore will have a</p>

	<p>specific interest in the accessibility of those provisions.</p> <p>Parties represented in the Parliament also have an interest in making use of the opportunity that gives them to influence the structure and content of the regulatory framework for elections.</p>
Political donors	<p>Individuals and organisations which fall into this category will frequently have disclosure requirements, sometimes arising from both federal and state laws. In straightforward cases they will normally be guided by detailed information provided by the electoral commissions; but if they are minded to “sail close to the wind” in relation to their obligations, disclosing as little as possible, they may well see a need to consult the fine detail of the law, and indeed to seek their own legal advice as to what their options may be.</p>
The media	<p>Media organisations tend to encounter the regulatory framework in two distinct ways. First, there are certain specific requirements which apply directly to the media, such as the blackout applicable to broadcast election advertising, and authorisation requirements for printed material. For small players such as regional newspapers, that is likely to be their most significant form of encounter. Larger media organisations providing national or state-wide coverage will also, however, need their working journalists to have a sufficient understanding of the regulatory framework to be able to report on how that may be influencing the behaviour of other participants in the election process.</p>
Third party campaigners	<p>Third party campaigners vary from individuals or small groups pursuing purely local issues to major players operating at a national level, such as lobby groups, trade unions or bodies such as GetUp! Their activities can cover the full gamut of campaigning, ranging from distributing leaflets and how-to-vote cards or placing small advertisements, right up to the conduct of extensive national campaigns involving broadcast advertising, and organised direct contact with voters. Major players tend to attract close attention from political parties whose interests they may be seen to be opposing, and they will</p>

	<p>need to have a very sound understanding of their precise rights and obligations. In some cases, the question of whether they are in fact “associated entities” of political parties may arise.</p>
Electoral commissions	<p>Commissions tend to live and breathe the regulatory framework for elections to a greater extent than almost any other stakeholders in the process. For this reason, convenience of accessibility is of secondary importance to them; they will typically have in-house legal specialists who will know exactly where all relevant prescriptions are to be found. Commissions tend to place the highest priority on achieving a regulatory framework that is clear in what it obliges them to do or prevents them from doing, and what obligations and restrictions it places on all other electoral stakeholders: genuinely obscure or unclear provisions relating to important issues are a curse. A commission which is mandated or motivated to pursue modernisation, continuous improvement or other reform also has an interest in ensuring that necessary changes to the regulatory framework can be made easily and expeditiously.</p>
Legislators	<p>Legislators, having acquired their positions through an electoral process, tend to see themselves as experts on the subject; and some of them are. While much of the legislation with which they deal will not affect their personal interests directly, that is not true of electoral legislation. Proposed changes may significantly impact on them, giving rise to a tendency for proposed reforms to be viewed with at least initial scepticism. It is probably fair to say that in general politicians are disinclined to change the system which they may see as having contributed to their coming to power. Of all the different stakeholders in an electoral process, it is the legislators who are most likely to be resistant to the notion of taking from them responsibility for designing every significant aspect of the process, and giving that responsibility to some other body.</p>
Legal practitioners	<p>In general, legal practitioners will be equipped and prepared to deal with the regulatory framework in whatever form it takes. They will be used to dealing with requirements spread across a number of relevant source</p>

	documents, and provided the requirements are clear and well drafted, they should be able to provide appropriate legal advice as necessary, and to manage litigation that happens to arise.
Advocates of electoral reform	In Australia a wide range of people and organisations take an interest in the structure of the electoral system, and in some cases are advocates for electoral reform, major or minor. This can be seen in the diversity of submissions which are typically lodged with electoral matters committees of parliaments during post-election reviews. At one level it could be anticipated that such advocates would be supportive of the situation in which certain reforms could be fast-tracked by electoral commissions rather than requiring enactment by Parliament. It is important to note, however, that different electoral reform advocates can disagree strongly about the directions which reform should take. For example, arguments in Australia about requirements for voters to produce identity documents at the polling place largely mirror a much more bitter dispute on the same topic which is pursued eternally in the USA. Advocates seeking very specific outcomes may well judge the desirability of leaving certain issues to commissions largely on the basis of whether they believe that in the short term that will increase the likelihood that they will get their way.

4.4 An analogy can be drawn here with United Nations peacekeeping, which depends for its success on the ongoing consent of all relevant parties to a peace settlement. A shift to delegated rule-making for elections needs to be seen not just as a one-off set of amendments, but as a fundamental change in the environment within which stakeholders and an electoral commission relate to each other. And in such a relationship, the stakeholders ultimately hold the trump cards, since a power which is given to a commission can be taken away again if the way in which it is exercised becomes controversial, leading to a revocation of consent.²⁶

²⁶ An example of this can be found in the provision of the *Commonwealth Electoral Act 1918* relating to the location of AEC divisional offices. From 1983 to 2006, the AEC had the power to authorise such an office to be located outside the boundaries of the electoral division to which it related, but when this power was used to support a significant programme of consolidation of offices into larger co-located ones, the parliament amended the Act so as to take the authorisation power back from the AEC and give it to the minister responsible for electoral matters.

Possible mechanisms for building and sustaining consent

4.5 There is no single model for advocacy of a shift to delegated rule-making which electoral commissions can take “off the hook”. They rather need to assess realistically the extent of the challenges they will face in their own jurisdictions, and craft their strategies accordingly. In the best case, consent of stakeholders will be readily given, resources will not be constrained, and the process will run smoothly. This, however, would seem likely to be the exception rather than the rule.

Large scale or incremental change?

4.6 A regulatory framework that has evolved over a long period is unlikely to be either purely rules-based or purely principles-based; it will more probably contain provisions drafted at different times in different styles, giving rise to something of a hybrid. This therefore raises the question for commissions of whether the better approach would be to advocate for a one-off rewrite of an entire electoral law to make it principles-based, or whether, alternatively, delegated rule-making should be introduced when enacting new provisions or significantly amending older ones, without necessarily putting the issue of a full rewrite on the agenda.²⁷ There is no right or wrong answer to this question: the optimal choice of approach will depend on the totality of the circumstances. An advantage of incremental change is that it may serve to lessen the scepticism of stakeholders who might otherwise be disinclined to support a large one-off shift of responsibility to the electoral commission. If powers are delegated incrementally, commissions have the opportunity to demonstrate by their actions their capacity to use those powers in a way that satisfies stakeholders.

Mechanisms for involving stakeholders

4.7 The discussion above has been largely silent on the process by which commissions would arrive at a particular set of rules to be promulgated. While it would be possible for this to be done entirely behind closed doors, the ultimate need to sustain the trust and consent of stakeholders might make it desirable to adopt more elaborate consultative mechanisms, which in some respects would be analogous to the multi-layered, deliberative processes used for federal redistributions, which are widely recognised world-wide as representing a gold standard. Some examples follow.

²⁷ The legislative scheme underpinning the use of the iVote system at NSW state elections is an example of this approach.

- There could be a requirement for the promulgation of consultation drafts of rules. Specified stakeholders entitled to be so consulted could include parliamentary electoral matters committees; registered political parties; or the general public, via a requirement that drafts be published on the commission's website.
- Structured rights to make comments on such drafts within a specified timeframe could also be written into the legislation.
- Commissions could be required to issue statements of reasons setting out why particular objections to draft rules were not taken up.
- Rules could be required to be in the form of disallowable legislative instruments.
- The timeframe within which rules could be made could be constrained so as to prevent last-minute changes before an election which would compromise the ability of stakeholders to take account of them. For example, at the federal level such rule-making might be restricted in the six months prior to the expiration of senators' terms, and/or in the six months preceding the expiration of the House of Representatives by effluxion of time. (Such a restriction would not necessarily prevent last-minute changes in cases of emergency; it would rather require them to be made by law or regulation, as is currently the case.)

4.8 A relatively well-elaborated scheme for this type of stakeholder engagement in relation to the exercise of delegated powers is set out at sections 16.1 to 16.4 of the *Canada Elections Act*, which are reproduced at **Annex 2**.

Additional skill requirements within electoral commissions

4.9 Finally, it must again be strongly emphasised that a shift of responsibility for rule-making to electoral commissions is likely to require them to enhance or enlarge their access to legal or quasi-legal drafting skills, possibly in-house; to ensure they have the required policy-development skills; and to make major changes to the way in which they operate on a day-to-day basis. This may well have significant resource implications, and it is imperative that commissions can be sure that the resources available to them will suffice for the tasks.

Annex 1 - Plain English drafting

A1.1 The nature of plain English drafting can best be captured with an example. At Senate elections, if a ballot paper has been marked by the voter both “above the line” and “below the line”, in each case in a way which would have been formal by itself, it is the “below the line” vote which counts. This is expressed in subsection 269(2) of the *Commonwealth Electoral Act 1918*, as follows:

“Votes that are formal both above and below the line

- (2) If a ballot paper in a Senate election:
 - (a) has squares marked above the line in accordance with subsection 239(2) or paragraph (1)(b) of this section; and
 - (b) has squares marked below the line in accordance with subsection 239(1) or section 268A;

then, for the purposes of sections 272 and 273, the only squares that are taken to have been marked on the ballot paper are the squares that are marked below the line.”

Prior to 2016, however, section 269(2) of the Act used the following words to express exactly the same idea:

- “(2) If a ballot paper in a Senate election:
 - (a) has been marked in accordance with subsection 239(2); and
 - (b) has been marked in accordance with paragraph 239(1)(a) so that, if it were not marked in accordance with subsection 239(2), it would not be informal by virtue of paragraph 268(1)(b);

the ballot paper shall, for the purposes of sections 272 and 273, be deemed not to have been marked in accordance with subsection 239(2).”

That provision was essentially comprehensible only to people who already knew what it was trying to say. The aim of plain English drafting is to prevent such a situation from arising whenever possible, through the use of simpler, clearer and more direct statutory expression and layout.

A1.2 It should be noted that neither the old nor the newer version of subsection 269(2) exemplifies principles-based legislation. In each case, a rule is being

stated, but the newer version does that much more clearly, through the use of a sub-heading which makes it obvious what the provision is seeking to do, and the direct use of the well-understood terms “above the line” and “below the line”.

A1.3 While the decision to adopt delegated rule-making will be one for governments and parliaments, influenced by the views of electoral commissions, the use of particular linguistic styles in legislation is more a matter for parliamentary counsel, and will normally be applied (or not) across the statute books. For that reason, a detailed discussion of plain English drafting is beyond the scope of this paper. At the federal level, the Office of Parliamentary Counsel has a *Plain English Manual* (running to 41 pages), dating back to 1993 and since updated, which spells out its approach to plain English drafting in considerable detail.²⁸

²⁸ Office of Parliamentary Counsel, *Plain English Manual*, 1 August 2016, at <https://www.opc.gov.au/publications/plain-english-manual>, viewed 1 April 2019.

Annex 2 - Canada Elections Act, sections 16.1 to 16.4²⁹

“Guidelines and interpretation notes

16.1 (1) The Chief Electoral Officer shall, in accordance with this section, issue guidelines and interpretation notes on the application of this Act – other than Division 1.1 of Part 16.1 – to registered parties, registered associations, nomination contestants, candidates and leadership contestants.

Application

(2) The Chief Electoral Officer shall, in accordance with this section, on application by the chief agent of a registered party, issue a guideline or interpretation note on the application of a provision of this Act – other than a provision of Division 1.1 of Part 16.1 – to registered parties, registered associations, nomination contestants, candidates and leadership contestants.

Consultations

(3) Before issuing a guideline or interpretation note, the Chief Electoral Officer shall provide a copy of the proposed guideline or interpretation note to the Commissioner and to the members of the Advisory Committee of Political Parties established by subsection 21.1(1). The Commissioner and those members may provide their written comments to the Chief Electoral Officer within 45 days after the day on which the copy is sent.

Comments

(4) The Chief Electoral Officer shall, in preparing the guideline or interpretation note, take into consideration any comments received under subsection (3).

(5) and (6) [Repealed, 2018, c. 31, s. 9]

Issuance

(7) The Chief Electoral Officer shall issue the guideline or interpretation note by registering it in the registry referred to in section 16.4 as soon as possible after preparing it.

²⁹ At <https://laws-lois.justice.gc.ca/eng/acts/e-2.01/page-3.html#docCont>, viewed 1 April 2019

Nature of guidelines and interpretation notes

(8) The guidelines and interpretation notes are issued for information purposes only. They are not binding on registered parties, registered associations, nomination contestants, candidates or leadership contestants.

Application for written opinion

16.2 (1) The Chief Electoral Officer shall, in accordance with this section, on application by the chief agent of a registered party, issue a written opinion on the application of any provision of this Act – other than a provision of Division 1.1 of Part 16.1 – to an activity or practice that the registered party or a registered association, nomination contestant, candidate or leadership contestant of the registered party proposes to engage in.

Consultations

(2) Before issuing an opinion, the Chief Electoral Officer shall provide a copy of the proposed opinion to the Commissioner and to the members of the Advisory Committee of Political Parties established by subsection 21.1(1). The Commissioner and those members may provide their written comments to the Chief Electoral Officer within 30 days after the day on which the copy is sent.

Comments

(3) The Chief Electoral Officer shall, in preparing the opinion, take into consideration any comments received under subsection (2).

Pre-publication

(4) Within 90 days after the day on which the application is made, the Chief Electoral Officer shall publish on his or her Internet site for a period of 30 days the opinion as well as a notice stating that the opinion will be issued at the expiry of that period. However, if the 90-day period coincides or overlaps with the election period of a general election, the opinion and the notice shall be published no later than 90 days after polling day for that election.

Issuance

(5) On the expiry of the 30-day period referred to in subsection (4), the Chief Electoral Officer shall issue the opinion by registering it in the registry referred to in section 16.4.

Opinion binding

(6) If all the material facts have been submitted by an applicant for an opinion and they are accurate, the opinion issued by the Chief Electoral Officer under this section is binding on the Chief Electoral Officer and the Commissioner with respect to the activity or practice of the registered party, registered association, nomination contestant, candidate or leadership contestant in question. It remains binding for as long as the material facts on which it was based remain substantially unchanged and the activity or practice is carried out substantially as proposed.

Precedential value

(7) An opinion issued by the Chief Electoral Officer under this section has precedential value for the Chief Electoral Officer and the Commissioner.

Contrary interpretation

(8) The opinion remains binding in accordance with subsection (6), and has the precedential value referred to in subsection (7), for as long as a contrary interpretation has not been subsequently issued by means of a guideline or interpretation note issued under section 16.1 or an opinion issued under this section.

New interpretation

16.3 If an opinion that is published under subsection 16.2(4) interprets a provision of the Act in a way that contradicts an interpretation of that provision provided in a previously issued opinion, the new interpretation does not replace the former interpretation until the date that the new opinion is issued under section 16.2.

Registry

16.4 The Chief Electoral Officer shall establish and maintain a registry on his or her Internet site that contains every guideline and interpretation note that is issued under section 16.1, every opinion that is issued under section 16.2 and all comments of the Commissioner that are provided under subsection 16.1(3) or 16.2(2).”