# ACT Electoral Commission submission to the ACT Legislative Assembly Standing Committee on Administration and Procedure in relation to its inquiry into the review of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth)


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**in relation to the inquiry into the review of the**
***Australian Capital Territory (Self-Government) Act 1988* (Cwlth)**

## Introduction

The ACT Electoral Commission (the Commission) provides this submission in response to an invitation issued on 20 December 2011 by the Speaker of the ACT Legislative Assembly, as Chair of the Standing Committee on Administration and Procedure.

The **Terms of Reference** for the review are:

> The Standing Committee on Administration and Procedure resolved on 6 December 2011 to conduct an inquiry to review the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) and any associated regulations, and make recommendations as to whether the Act should be modified since it was enacted by the Commonwealth Parliament on 6 December 1988.

This submission is made pursuant to section 7(1)(d) of the *Electoral Act 1992* (the Electoral Act) which empowers the Commission to provide information and advice to the Legislative Assembly in relation to elections.

This submission will address those aspects of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) (the Self-Government Act) that relate to electoral matters, including:

- The power to alter the number of Members of the Assembly;
- Elections of Members to the Assembly;
- Redistributions of electorate boundaries; and
- Entrenching legislation by referendum.

This submission also places this discussion in context by providing a brief history of elections and referendums for the Assembly.

The Commission will be happy to provide further information to the Committee if requested, and the Electoral Commissioner will be available to appear before the Committee, should this be required.

## List of recommendations

The Commission makes the following recommendations to the Committee:

1. The Commission **recommends** that section 26 of the Self-Government Act be amended to define the term "a majority of the electors" to mean a majority of electors casting formal votes in a referendum.

2. The Commission **recommends** that it would be appropriate to amend section 8 of the Self-Government Act to give the Assembly the power to set its own number of Members, to bring the ACT Legislative Assembly into line with the Northern Territory Legislative Assembly.

3. The Commission **recommends** that the existing requirement for compulsory enrolment for all persons eligible to vote, as set out in section 67B(c) of the Self-Government Act, should remain unchanged.

4. The Commission **recommends** that section 67B(d) of the Self-Government Act be amended to provide that a redistribution of the Territory into electorates is to commence not later than 8 years after the previous redistribution.

5. The Commission **recommends** that section 67C of the Self-Government Act be amended to provide that the qualifications of a person to be enrolled as an elector and to vote at an election shall be as provided by enactment.

6. The Commission **recommends** that legal advice be sought on the inclusion in the Self-Government Act of a requirement that the Assembly is to be directly chosen by the people, and that each elector may only vote once in an election.

## Provisions of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) related to electoral matters

The *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) (the Self-Government Act) includes provisions that establish ground rules for the conduct of elections of Members of the ACT Legislative Assembly. Some of these provisions give the Assembly the ability, with respect to election related matters, to legislate as it sees fit, while other provisions either enable the Assembly to legislate within parameters or provide no discretion to legislate. These are discussed in detail under the relevant sections below.

The Self-Government Act serves an important purpose by providing the minimum standards under which elections of Members to the ACT Legislative Assembly are to be conducted. In this sense, the Self-Government Act can be likened to the Commonwealth Constitution, which also lays down minimum standards for elections of Members and Senators to the federal parliament.

The minimum standards for elections that the Self-Government Act provides for include:

- That the Assembly must pass an electoral enactment providing for fundamental aspects of its electoral system, including the times of general elections, qualifications for enrolment, and qualifications for candidates and for Members of the Assembly;
- That the Assembly will consist of 17 Members unless and until a different number is set by regulations;
- That electoral boundaries for the Assembly are to be drawn so that electorate enrolments must be within +/- 10% of the quota;
- That electoral boundaries must be redistributed at least every 6 years;
- That there must be a roll of electors for the ACT; and
- That electoral enrolment is compulsory for all eligible ACT residents.

The Self-Government Act also provides for a mechanism for entrenchment of special laws prescribing restrictions on the manner and form of making particular enactments, known as entrenching laws. An entrenching law must be submitted to a referendum of the electors of the ACT before it can take effect. Only one such referendum has been held in the life of the Assembly; in 1995 a referendum was passed entrenching key principles of the ACT's Hare-Clark electoral system.

The relevant sections of the Self-Government Act are listed below.

*Number of Members of the Assembly*

The number of Members of the Legislative Assembly is currently specified in section 8 of the Self-Government Act, which states:

> **8 Legislative Assembly**
>
> (1) There shall be a Legislative Assembly for the Australian Capital Territory.
>
> (2) Subject to subsection (3), the Assembly shall consist of 17 Members.
>
> (3) The regulations may fix a different number of Members for the purpose of subsection (2), but regulations shall not be made for that purpose except in accordance with a resolution passed by the Assembly.

No such regulations have ever been made; as a result the Assembly has consisted of 17 Members since its inception.

*Elections of Members of the Legislative Assembly*

Matters relating to the qualification of candidates for election as Members of the Legislative Assembly, qualification of electors, timing of elections, the electoral roll for elections, and Territory electorates and redistributions are specified in Part VIII (Elections to Assembly) of the Self-Government Act, which states:

> **PART VIII—ELECTIONS TO ASSEMBLY**
>
> **66 Interpretation**
>
> In this Part:
>
> **"electoral enactment"** means an enactment described in subsection 67A(1).
>
> **66A Part to bind Crown**
>
> This Part binds the Crown in right of the Territory, but nothing in this Act renders the Crown liable to be prosecuted for an offence.
>
> **66B Election of Members**
>
> The Members are to be elected in accordance with this Part.
>
> **67 Qualifications of candidates**
>
> (1) The qualifications of a person to be elected and take a seat as a Member shall be as provided by enactment.

**67A General elections**

(1) The Members to be elected at a general election are to be elected as provided by sections 67, 67C and 67D and by an enactment that:

(a) provides for general elections; and

(b) complies with section 67B; and

(c) was made after polling day for the second general election.

**67B Electoral enactment**

An electoral enactment is to provide, among other things:

(a) for the times of general elections; and

(b) for a Roll of the electors of the Territory for the purposes of general elections; and

(c) that every person who is entitled to be enrolled on that Roll and who is resident in the Territory is required to claim enrolment; and

(d) if the electoral enactment provides for the distribution of the Territory into electorates—that a redistribution of the Territory into electorates is to commence not later than 6 years after the previous distribution or redistribution.

**67C Qualifications of electors**

(1) At a general election held on a particular day, a person is entitled to vote if:

(a) on that day, the person's name is on the Roll of the electors of the Territory for the purposes of general elections; and

(b) the person would be entitled to vote at an election held on that day to choose a Member of the House of Representatives for the Territory.

(2) A person's name is not to be taken to be on the Roll for the purposes of paragraph (1)(a) if an electoral enactment so provides.

(3) This section does not prevent an electoral enactment from providing that other persons, in addition to persons entitled under subsection (1), be entitled to vote at a general election.

**67D Territory electorates**

(1) In this section:

**"quota"**, in relation to an electorate for the Territory, means the number calculated in accordance with the formula:

$$\frac{\text{Number of Territory electors} \times \text{Number of electorate Members}}{\text{Number of Territory Members}}$$

where:

**"Number of Territory electors"** means the number of electors of the Territory;

**"Number of electorate Members"** means the number of Members to be elected by the electorate;

**"Number of Territory Members"** means the number of Members of the Assembly.

(2) A distribution or redistribution of the Territory into electorates is not to result in any electorate having, immediately after the distribution or redistribution:

(a) a number of electors of the Territory greater than 110% of its quota; or

(b) a number of electors of the Territory less than 90% of its quota.

*Entrenching laws by referendum*

Section 26 of the Self-Government Act allows the Assembly to pass an entrenching law, prescribing restrictions on the manner and form of making particular enactments. Such restrictions can include requiring a special majority to be achieved in order for an enactment to be made or subsequently amended. Under section 26(2), an entrenching law must be submitted to a referendum of the electors of the ACT.

Only one entrenching referendum has been held in the life of the Assembly. A referendum was held concurrently with the 1995 election asking electors whether they wished to entrench key principles of the Hare-Clark electoral system.

Section 26 of the Self-Government Act states:

**26 Special procedures for making certain enactments**

(1) The Assembly may pass a law (in this section called the ***entrenching law***) prescribing restrictions on the manner and form of making particular enactments (which may include enactments amending or repealing the entrenching law).

(2) The entrenching law shall be submitted to a referendum of the electors of the Territory as provided by enactment.

(3) If a majority of the electors approve the entrenching law, it takes effect as provided by section 25.

(4) While the entrenching law is in force, an enactment to which it applies has no effect unless made in accordance with the entrenching law.

(5) If an entrenching law includes the requirement (however expressed) that an enactment or enactments be passed by a specified majority of the Members (in this subsection called a ***special majority***), the same requirement shall be taken to apply to the entrenching law, so that it must be passed by:

(a) that special majority; or

(b) if it specifies different special majorities for different enactments—the highest of those special majorities.

(6) If an entrenching law passed by the Assembly:

(a) includes the requirement (however expressed) that an enactment or enactments be submitted to a referendum of the electors of the Territory; and

(b) includes provision (however expressed) that, to have effect, the referendum is to be passed by a specified majority of the electors (in this subsection called a ***special majority***);

the same requirement shall be taken to apply to the entrenching law, so that the reference in subsection (3) to a majority of the electors shall be taken to be a reference to:

(c) that special majority; or

(d) if the entrenching law specifies different special majorities for different enactments—the highest of those special majorities.

## A brief history of elections for the ACT Legislative Assembly

The ACT Legislative Assembly was established following the passage of the Self-Government Act and the *Australian Capital Territory Electoral Act 1988* (Cwlth) in 1988. The first election for the Assembly was conducted on 4 March 1989.

The 1989 and 1992 ACT Legislative Assembly elections were conducted by the Australian Electoral Commission under the *Australian Capital Territory Electoral Act 1988* (Cwlth). At these elections, the ACT Legislative Assembly was elected under one 17 Member electorate, using the modified d'Hondt electoral system. A referendum was held concurrently with the 1992 election, giving the people of the ACT the opportunity to choose their own electoral system to replace the unpopular modified d'Hondt system . Around 65% of voters chose the Hare-Clark system over the single Member electorate system.

Following the 1992 election, the Self-Government Act was amended by the federal Parliament to give the ACT Assembly the power to enact its own electoral legislation and to establish its own electoral authority. As a result, the ACT's *Electoral Act 1992* was passed by the Assembly in 1992, establishing the ACT Electoral Commission and enacting procedures for dividing the ACT into 3 electorates for the purposes of elections for the Assembly. The first redistribution of the ACT into electorates for the Assembly was completed in 1993, resulting in the creation of the 5 Member electorates of Brindabella and Ginninderra and the 7 Member electorate of Molonglo.

In 1994, further comprehensive amendments to the Electoral Act were passed by the Assembly, providing for detailed arrangements for conducting elections in the ACT using the Hare-Clark system. The Electoral Act has continued to be amended by the Assembly to keep pace with developments in electoral law and procedures.

The *Referendum (Machinery Provisions) Act 1994* was enacted by the Legislative Assembly in 1994. This Act provides for the conduct of referendums should the Assembly pass legalisation requiring a referendum to be held. Only one referendum has been conducted under this Act; the 1995 referendum that resulted in the passage of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994.*

The Hare-Clark system has now been used for elections of the Legislative Assembly in 1995, 1998, 2001, 2004 and 2008. These elections have been conducted by the ACT Electoral Commission. The next election is due to be held in October 2012.

## Entrenchment of key principles of the Hare-Clark electoral system

As discussed above, section 26 of the Self-Government Act allows the Assembly to pass an entrenching law, prescribing restrictions on the manner and form of making particular enactments. Such restrictions can include requiring a special majority to be achieved in order for an enactment to be made or subsequently amended. An entrenching law must be submitted to a referendum of the electors of the ACT.

Only one entrenching referendum has been held in the life of the Assembly. A referendum was held concurrently with the 1995 election asking electors whether they wished to entrench key principles of the Hare-Clark electoral system. Around 65% of voters supported the entrenching proposal (constituting 56.7% of all the electors entitled to vote at the referendum), resulting in the enactment of the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (the Entrenchment Act).

The Entrenchment Act entrenches various principles of the ACT's electoral system as set out in the Electoral Act. Principles that are entrenched can only be amended or repealed either by at least a 2/3 majority of the Members of the Legislative Assembly, or by passage by a majority of Members of the Legislative Assembly and passage of a referendum by a majority of electors.

Section 4(1) of the Entrenchment Act entrenches a range of principles related to the ACT's electoral system. Section 4(2) of the Entrenchment Act also entrenches the power to make laws with respect to the number of Members of the Assembly, should the Assembly be given that power by the Commonwealth. Section 4 of the Entrenchment Act provides:

> **4 Entrenchment of electoral system**
>
> (1) This Act applies to any law that is inconsistent with any of the following principles of the proportional representation (Hare-Clark) electoral system:
>
> (a) at a general election, an odd number of Members of the Legislative Assembly shall be elected from each electorate;
>
> (b) at a general election, at least 5 Members of the Legislative Assembly shall be elected from each electorate;
>
> (c) voting in an election shall be compulsory;
>
> (d) each voter has the right to a fully preferential vote;
>
> (e) squares for the indication of preferences on each ballot paper shall appear only alongside the names of individual candidates;
>
> (f) a voter shall not be taken to have marked any preferences beyond the numbers, starting with '1' for the candidate with the first preference, marked by the voter in the squares alongside the names of individual candidates;

(g) ballot papers shall be—

(i) prepared and collated in accordance with the method known as the Robson Rotation; and

(ii) distributed and issued;

as set out in schedule 2 of the Electoral Act 1992, being that schedule as in force on 1 December 1994;

(h) a candidate whose total votes equal or exceed a relevant quota as defined in schedule 4 of the Electoral Act 1992, being that schedule as in force on 1 December 1994, shall be declared elected;

(j) unless the number of successful candidates is equal to the number of vacancies, any surplus votes for a successful candidate shall be transferred to continuing candidates in accordance with the next available preferences indicated on ballot papers that were counted for the successful candidate;

(k) if there are no surpluses to be distributed, the candidate with the least total votes shall be excluded and the ballot papers counted for the excluded candidate shall be transferred to continuing candidates in accordance with the next available preferences (if any) indicated on each ballot paper;

(l) where there are 2 or more eligible candidates in relation to a casual vacancy, the vacancy shall be filled by a recount of the ballot papers counted for the person who, at the last election before the vacancy occurred, was elected to the seat in which the vacancy has occurred.

(2) This Act applies to any law made pursuant to a power at any time vested in the Legislative Assembly to make a law with respect to the number of Members of the Legislative Assembly.

**The operation of section 26 of the Self-Government Act: Special procedures for making certain enactments**

As discussed above, section 26 of the Self-Government Act allows the Assembly to pass an entrenching law, prescribing restrictions on the manner and form of making particular enactments. An entrenching law must be submitted to a referendum of the electors of the ACT.

Subsection 26(2) of the Self-Government Act provides that "The entrenching law shall be submitted to a referendum of the electors of the Territory as provided by enactment.". Subsection 26(3) provides that "If a majority of the electors approve the entrenching law, it takes effect as provided by section 25." The meaning of the term "a majority of the electors" in this clause is arguably ambiguous. It could be taken to mean:

- half plus one of the total number of electors on the electoral roll; or
- half plus one of the total number of electors who voted at the referendum; or
- half plus one of the total number of electors who cast a formal vote at the referendum.

At the 1995 entrenching referendum, each of these majorities was met. Around 56.7% of all the electors entitled to vote at the referendum voted in favour of the proposal; around 62% of electors who voted at the referendum supported the entrenching proposal; and around 65% of voters who cast formal votes supported the entrenching proposal.

However, it would be conceivable for more than half of electors who cast a formal vote to support a future entrenching proposal, but for that number of voters to constitute less than half of all the electors on the electoral roll. In this case, the meaning of "a majority of the electors" would be crucial.

While the meaning of "a majority of the electors" has not been tested in the courts, it would be prudent to assume that a court would define "a majority of the electors" to mean half plus one of the number of electors on the electoral roll, as this is the closest to the plain meaning of this expression, and the definition that would be beyond argument, as it is the hardest hurdle to reach.

However, using this meaning raises a number of issues. It could give rise to the situation described above where a majority of people actually casting a formal vote on the referendum would fail to see their choice adopted, if that number of voters does not constitute half plus one of the total number of enrolled electors. It could be argued that this would be an unfair outcome, as the number of electors who did not vote at the election and the number of electors who voted informally at the election would in effect be allocated as "no" voters in a referendum.

Using the number of enrolled electors as the decisive factor in determining the referendum result could be problematic, as the number of enrolled electors can be also be defined differently. This number could be determined as the absolute

number of names listed on the electoral rolls at the time of the close of rolls. However, under the Electoral Act it is possible for electors who are not listed on the electoral rolls to have their votes admitted to the count if it can be determined that their names were removed from the rolls in error. In this case, it would be appropriate to increase the number of electors on the roll for the election to account for the admission of votes from unenrolled electors. The number of electors listed as at the close of rolls for an election will also include electors who were deceased or who no longer lived in the ACT. It would arguably be unreasonable to include these electors effectively as "no" voters in a referendum.

Given that the number of enrolled electors is not explicitly defined in law, it could be problematic to decide a referendum using this number in a case where the outcome was very close to 50% of the apparent number of enrolled electors.

The number of electors enrolled on the roll also varies according to a range of other factors, particularly the timing of "objections" made to the roll by the Australian Electoral Commission, where electors who appear to be no longer eligible to be enrolled in the ACT are removed from the roll. Objection action involves an extended period where electors are sent letters advising them of the possibility of their names being removed from the roll, followed by further letters finalising their removal from the roll if no replies are received to the earlier letters. The number of electors listed on the rolls for an election can vary significantly depending on whether such objection action is taken before or after the rolls close for the election. Again, it is arguably unreasonable for the fate of a referendum to turn on factors such as these.

In order to remove the uncertainties and arguable unfairness discussed above, it may be appropriate to amend section 26 of the Self-Government Act to define the term "a majority of the electors" to mean a majority of electors casting formal votes in a referendum. This is an absolute number that is straightforward to determine.

It is also noteworthy that the *Proportional Representation (Hare-Clark) Entrenchment Act 1994* also uses the test of "a majority of electors at a referendum" in section 5, which deals with amendment or repeal of that Act or the principles entrenched under that Act. Similar considerations regarding the meaning of this expression also arise. However, given that this Act can only be changed by a 2/3 majority of the Members of the Assembly and by a majority of electors at a referendum, it would be problematic to address the meaning of this expression by an amendment to that Act.

Accordingly, the Commission **recommends** that section 26 of the Self-Government Act be amended to define the term "a majority of the electors" to mean a majority of electors casting formal votes in a referendum.

## Number of Members of the ACT Legislative Assembly

Section 8 of the Self-Government Act states that the Legislative Assembly is to consist initially of 17 Members. It provides that a change to the number of Members can be made by regulations by the relevant Commonwealth Minister; however, such regulations cannot be made for that purpose except in accordance with a resolution passed by the Assembly.

As regulations have not been made under section 8(3) of the Self-Government Act, the number of Members of the Legislative Assembly has remained at 17 since the Assembly was established in 1989.

There have been reports from five previous inquiries relevant to the number of Members of the ACT Legislative Assembly. These reports, starting from the most recently released are:

- The 2002 report of the Assembly Standing Committee on Legal Affairs;
- The 1999 report of the Assembly Select Committee on the 1998 report *Review of the Governance of the ACT* (The Pettit Report);
- The 1998 review of the Governance of the ACT (The Pettit Report);
- The 1990 report of the Select Committee on Self-Government; and
- The 1985 House of Assembly report of the Standing Committee on the Transition to Territorial Government.

A copy of the 2002 report, which includes a summary of the findings of earlier reviews and reports, can be found at:

www.parliament.act.gov.au/downloads/reports/la04sizeoflegass.pdf

Recommendations 1-3 of the 2002 report stated:

1. The committee commends the action of the Assembly in requesting the Chief Minister undertake discussions with the Commonwealth government in relation to amending the *Australian Capital Territory (Self-Government) Act 1988* to devolve to the Assembly the power to determine the number of Members. The committee recommends that the Chief Minister also seek an amendment of the Self-Government Act to remove the power of the Commonwealth to fix the number of ministers that make up the ACT executive.

2. The committee recommends that the number of Members in the Legislative Assembly for the ACT be increased.

3. A majority of the committee recommends that the Legislative Assembly for the ACT be increased to 21 Members based on three electorates of seven Members each.

The ACT Electoral Commission made a detailed submission to the 2002 inquiry. The Commission's submission can be found at:

www.elections.act.gov.au/resources/uploads/pdfs/sizeofassemblysubmission.pdf

The Commission's submission canvasses factors to consider in determining the appropriate configuration of the number of electorates and Members per electorate. These factors include the following principles:

- Each electorate should have at least 5 Members;
- Each electorate should have an odd number of Members;
- Electorates should each return the same number of Members; and
- The total number of Members should be an odd number – accordingly there should be an odd number of electorates.

Other factors raised in the Commission's submission include:

- The proportionality of the outcome, recognizing that the greater the number of Members to be elected in an electorate, the more proportional is the ratio of the number of seats won by a party to the number of votes won by a party;
- The impact that any change may have on the stability of the Legislative Assembly, recognising that the greater the number of Members to be elected in an electorate, the lower is the quota in percentage terms, potentially making it easier for minor party candidates and independents to be elected;
- The cost of increasing the number of Members to be elected, for both Assembly administration and for electoral administration and the conduct of elections; and
- The impact of any change to the number of Members to be elected on the redistribution process.

For the purposes of the current inquiry into the review of the Self-Government Act, the Commission suggests that the relevant issue is the mechanism by which the number of Members of the Assembly can change, rather than what the ultimate size of the Assembly should be.

Under section 8 of the Self-Government Act, the only way in which the number of Members of the ACT Legislative Assembly can be changed is by the making of regulations by the relevant Commonwealth minister, subject to the passage of an appropriate resolution of the Legislative Assembly. (Note also that regulations made by a Minister could be overturned by a vote of either house of federal Parliament.) Section 8 therefore requires a two-step approval process where both the relevant federal Minister (and ultimately both houses of federal Parliament) and the ACT Legislative Assembly need to be in accord. To date, this has never occurred.

By contrast, every Australian State parliament has the power to change its number of Members by enactment (with New South Wales and Victoria also requiring approval of electors at a referendum in respect of the NSW Legislative Council and both houses of the Victorian parliament). The Northern Territory parliament can alter its number of Members in accordance with section 13(2) of the *Northern Territory (Self-Government) Act 1978* (Cwlth), which provides that "The Legislative Assembly shall consist of such number of Members as is provided by enactment."

The ACT is the only Australian parliament that cannot set its own number of Members (subject in two cases to a referendum as described above), and the only Australian parliament that requires the approval of the federal Government and the federal Parliament to alter its number of Members.

The Commission **recommends** that it would be appropriate to amend section 8 of the Self-Government Act to give the Assembly the power to set its own number of Members, to bring the ACT Legislative Assembly into line with the Northern Territory Legislative Assembly.

The Commission notes that, should this power be given to the ACT Legislative Assembly, it would be entrenched under the Proportional Representation (Hare-Clark) Entrenchment Act. This would effectively require this power to be exercised with multi-party support, given the requirement for a 2/3 Assembly majority if the Assembly was to set its own number of Members without resorting to a referendum.

## Implementation of Part VIII of the Self-Government Act – Elections to Assembly

Part VIII of the Self-Government Act provides for the fundamental requirements for the conduct of elections for the ACT Legislative Assembly. In particular, it requires the Assembly to provide by enactment for a range of electoral matters, including the times of general elections, electoral rolls, qualifications for enrolment, compulsory enrolment, qualifications for candidates and for Members of the Assembly, and redistributions of electoral boundaries.

In most cases, the Self-Government Act is not prescriptive in relation to electoral matters, and simply provides that the Assembly must pass an electoral enactment that provides for the detailed conduct of various aspects of elections. The Assembly has essentially met this requirement by the passage and subsequent amendment of the *Electoral Act 1992*. The Commission suggests that this is an appropriate approach to take in the Self-Government Act, and that there is no apparent need for the Self-Government Act to be more prescriptive in relation to the conduct of elections.

However, there are some matters that are prescribed under the Self-Government Act that could be reviewed. These are discussed in the following sub-sections of this section.

### Compulsory enrolment

Section 67B(c) of the Self-Government Act provides that an electoral enactment is to provide that every person who is entitled to be enrolled and who is resident in the Territory is required to claim enrolment. This section effectively requires the ACT to legislate for compulsory enrolment of all ACT residents entitled to enrol.

Provision has been made in the Electoral Act for compulsory enrolment in section 73. This section makes it an offence (penalty 0.5 penalty units) for eligible persons over the age of 18 and resident in the ACT to fail to enrol. Exceptions are made for Antarctic electors and eligible overseas electors, who by definition are not normally resident in the ACT.

ACT and Commonwealth electoral laws enable 16 and 17 year old eligible persons to enrol as “provisional electors”. This form of enrolment is intended to allow 16 and 17 year olds to apply for enrolment and to vote when they turn 18. Provisional enrolment was originally intended to ensure that people who turned 18 between the close of rolls for an election and polling day were able to enrol and vote when they turned 18. Over time, the ability for 16 and 17 year olds to provisionally enrol has been used to encourage young people to enrol while still at school, through school electoral education programs, so as to increase the participation rate of young people on the electoral roll.

Recognising that it would be inappropriate to make provisional enrolment of young people under voting age an offence, it is not compulsory for 16 and 17 year old people to enrol in both the Commonwealth and the ACT Electoral Acts.

The ACT Electoral Act provides separately for enrolment of eligible people aged 18 and over in section 72 and for provisional enrolment of people aged 16 and 17 in section 75, in order to comply with section 67B(c) of the Self-Government Act.

Separating the enrolment processes for these two age groups enables the Electoral Act to provide for compulsory enrolment for persons aged 18 and over while leaving provisional enrolment optional for 16 and 17 year olds. This mechanism has to date work satisfactorily.

In September 2007, the ACT Legislative Assembly's Standing Committee on Education, Training and Young People published its report into its *Inquiry into the Eligible Voting Age*. This report canvassed issues around lowering the voting age from the current 18 year old level. The report noted that some of the submissions made to the inquiry supported lowering the voting age, subject to providing for non-compulsory enrolment for electors aged under 18. However, the report noted that the operation of section 67B(c) of the Self-Government Act would appear to make this not possible. The report canvassed the issues around whether it would be desirable to amend the Self-Government Act to allow for non-compulsory enrolment for persons aged below 18. After considering these issues, the Committee recommended "that, should a proposal to lower the voting age be pursued, the integrity of the compulsory voting system be preserved." The ACT Government's response to the Committee's report supported this recommendation. The Electoral Commission also agrees with this recommendation.

This same issue may arise in submissions made to the current inquiry into the Self-Government Act. The Commission **recommends** that the existing requirement for compulsory enrolment for all persons eligible to vote, as set out in section 67B(c) of the Self-Government Act, should remain unchanged.

Timing of redistributions

Section 67B(d) of the Self-Government Act states that an electoral enactment is to provide — if the electoral enactment provides for the distribution of the Territory into electorates — that a redistribution of the Territory into electorates is to commence not later than 6 years after the previous distribution or redistribution.

Section 67B(d) was enacted in 1988 when the period between ACT general elections was 3 years; in effect, this section required a redistribution to take place at least after every second election. This section was enacted in the context of then relatively recent changes to the Commonwealth Electoral Act, which were similarly intended to ensure that redistributions occurred automatically within a set period of time, to avoid the possibility that electoral boundaries could become malapportioned through inaction over time.

After the 2004 ACT election, the Assembly moved to 4 year terms. It would be consistent with the original intent of section 67B(d) of the Self-Government Act to increase the maximum allowable time between redistributions to 8 years rather than 6 years. This would bring this section back into line with the general principle that a redistribution should be held at least after every second election.

Such a change would not impact on the current Electoral Act requirement that a redistribution must be held after every election, as the Assembly has chosen to provide for more frequent redistributions than required by the Self-Government Act. However, a future Assembly may wish to adopt a standard of conducting a redistribution after every second election. This could be justified, for example, in the light of the fact that a number of redistributions conducted in the ACT have not led to any boundary changes as population changes from one election to the next

have not been sufficient to require a change in boundaries in order to remain within the required tolerances.

Accordingly, the Commission **recommends** that section 67B(d) of the Self-Government Act be amended to provide that a redistribution of the Territory into electorates is to commence not later than 8 years after the previous redistribution.

If this recommendation is not supported, the Commission would caution against reducing the time set out in section 67B(d) of the Self-Government Act to less than 6 years: to, say, 4 years. It is conceivable that a redistribution could be concluded early in the term of a particular Assembly and for the following redistribution to commence late in the term of the next Assembly, particularly if a redistribution is delayed pending a decision on changing the number of Members in the Assembly. Such a scenario could see more than 4 years elapse between the conclusion of the first redistribution and the start of the second.

Specifying qualifications for electors

Subsection 67C(1) of the Self-Government Act provides that a person is entitled to vote at an ACT election if the person's name is on the Roll of the electors of the Territory for the purposes of general elections and the person would be entitled to vote at an election held on that day to choose a Member of the House of Representatives for the Territory. However, subsections 67C(2) and (3) go on to provide that an electoral enactment can increase or decrease the scope of subsection (1).

Part 6 of the ACT's Electoral Act includes provisions that both add to and subtract from the entitlement to vote for the House of Representatives mentioned in section 67C(1)(b) of the Self-Government Act. For example, section 71 of the Electoral Act excludes from the ACT roll anyone on the Commonwealth roll for the ACT whose address is not in the ACT (such as residents of Norfolk Island or Jervis Bay Territory) and anyone who is a Commonwealth ACT eligible overseas elector who has not indicated an indication to return to live in the ACT; while sections 71A and 72 of the Electoral Act allow the ACT Electoral Commissioner to add to the ACT roll persons serving a sentence of imprisonment who may not be entitled to enrolment in the ACT under the Commonwealth Electoral Act.

It would appear that subsection 67C(1) of the Self-Government Act is in effect a transitional provision intended to provide for the franchise for ACT elections pending the making of franchise provisions in an ACT electoral enactment. Given that the ACT's electoral enactment has now qualified the right to vote from the right set out in subsection 67C(1), it is arguable that the inclusion of the reference to the House of Representatives voting entitlements is now redundant and possibly confusing.

It is noted that section 67 of the Self-Government Act, which provides for qualifications for candidates and Members of the Assembly, included detailed listed qualifications when it was first enacted. However, these detailed provisions were removed from the Self-Government Act by the *Australian Capital Territory Legislation Amendment Act 2003* (Cwlth), which took effect on 23 February 2003.

Section 67 now simply provides that "The qualifications of a person to be elected and take a seat as a Member shall be as provided by enactment."

It would appear to be appropriate to make a similar amendment regarding the qualifications for enrolment and voting. Consequently, the Commission **recommends** that section 67C of the Self-Government Act be amended to provide that the qualifications of a person to be enrolled as an elector and to vote at an election shall be as provided by enactment.

Redistribution requirements

Section 67D of the Self-Government Act provides that redistributions of the Territory into electorates is not to result in any electorate having a number of electors that varies from the average of the total enrolment (the quota) by more than 10% immediately after the redistribution. The section also provides for the method for calculating the quota.

This requirement is one of the factors that must be taken into account when conducting a redistribution of the Legislative Assembly boundaries in accordance with section 36 of the Electoral Act. Section 36 also includes a requirement that the enrolment in proposed electorates should, so far as practicable, be within 5% of the quota at the time of the next general election.

Taken together, these two requirements are intended to ensure that redistributions for the Assembly adhere to the principle of one-vote, one-value, where the aim is to ensure that the total number of electors in each electorate is roughly in the same proportion, so as to ensure that each elector's vote is worth roughly the same as each other elector's.

The requirement to aim for a variation from the quota at the time of the next election of no more than 5% as set out in the ACT's Electoral Act is more onerous than the 10% variation at the time of making the redistribution permitted under section 67D of the Self-Government Act. As a result, a redistribution proposal that meets the 5% tolerance at the time of the next election set out in the Electoral Act will almost inevitably meet the 10% tolerance set out in the Self-Government Act. However, the Commission supports the retention of section 67D in the Self-Government Act as it currently stands, as it provides for a minimum standard for redistributions that could not be watered down by a future Assembly.

## The absence of a requirement that the Assembly should be directly chosen by the people and a requirement that each elector may only vote once

A notable omission from the Self-Government Act is a provision specifying that the Assembly is to be directly chosen by the people.

Section 24 of the Australian Constitution provides that "The House of Representatives shall be composed of Members directly chosen by the people of the Commonwealth … ". This provision has been considered by the High Court in cases related to the exercise of the franchise and freedom of political expression. By contrast, the ACT's Self-Government Act does not contain this expression, or any similar expression. While the Self-Government Act provides for qualifications for electors and for a roll of electors, it does not explicitly provide that the Assembly is to be directly chosen by the people.

Similarly, section 8 (for Senate elections) and section 30 (for House of Representatives elections) of the Constitution provide that each elector may only vote once in an election. The ACT's Self-Government Act does not contain an equivalent provision (although section 130 of the ACT's Electoral Act provides that it is an offence to vote more than once in an election).

Given that the High Court has implied certain rights and freedoms from the Constitutional provisions relating to the conduct of elections to the federal parliament – particularly in relation to the use of the phrase "directly chosen by the people" – there may be benefit to the ACT if similar phrases were included in the ACT's Self-Government Act. It may be that, if these elements related to the conduct of elections in the ACT are not included in the Self-Government Act, courts may find that rights and freedoms that can be implied from the wording used in the Constitution may not be applied to elections for the ACT Legislative Assembly. It may be appropriate for the Committee to seek legal advice on this issue.

Accordingly, the Commission **recommends** that legal advice be sought on the inclusion in the Self-Government Act of a requirement that the Assembly is to be directly chosen by the people, and that each elector may only vote once in an election.

ACT Electoral Commission

13 March 2012