

Submission to Inquiry into the Conduct of the 2024 House of
Assembly General Election and 2024 Legislative Council
elections

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Introduction

I warmly welcome the creation of a Tasmanian Joint Standing Committee into Electoral Matters and hope it will be a lasting success. I believe it is highly desirable for there to be a review after every general election, because there is always something to be learned, and because parliaments become unfamiliar with debate about electoral practice when submissions are only called for in response to proposed legislation.

This is not an especially long submission by my standards but I have identified some areas of concern, especially around the rise in informal voting and ongoing interpretation problems with the hopefully soon to be reformed Section 196 of the Tasmanian Electoral Act.

There may well be other areas related to this election on which my views might be of interest and if so I would be happy to take questions on them at a hearing or otherwise.

The election generally

Some comments about the properties of the election may be of use.

The return to the 35-member system saw an election that had a seat share result remarkably proportional to the primary vote for different parties:

	vote%	seat	seat%
Lib	36.7	14	40
ALP	29	10	28.6
Green	13.9	5	14.3
Ind	9.6	3	8.6
JLN	6.7	3	8.6
SFF	2.3	0	0
AJP	1.5	0	0
LN	0.3	0	0

This is although Hare-Clark is not a purely proportional system and is not necessarily designed to produce this sort of result. If the same votes had been cast at a 25-seat election there would also have been a rather proportional result though slightly better for Labor at the expense of the Greens - I get the most likely seat breakdown as 10 Liberal 8 ALP 3 Green 2 IND 2 JLN, so 40%-32%-12%-8%-8%.

34 of the 35 seats were won by parties that were leading on primary vote quotas or remainders, and these 34 seats were also won by the candidates within those parties that were leading their intra-party rivals. The exception was the seat won by Craig Garland (IND) whose primary vote of 5.1% was the lowest winning primary vote for a lone independent or a party ticket ever, the previous lowest being 7.2% for Benjamin Pearsall in 1934. Garland was able to win by overtaking the Greens ticket by outperforming them on preferences from the

Shooters, Fishers and Farmers and minor independents, and on leakage from party tickets. He then defeated the Liberals on Greens preferences.

No seat was decided by a margin of less than 1%. There was an extremely close exclusion point between the last two Liberals in Braddon but it was irrelevant as whichever Liberal candidate survived would have lost to Garland on Greens preferences.

A more detailed review of statistical properties of the election can be found at <https://kevinbonham.blogspot.com/2024/04/tasmania-2024-is-this-hare-clarks-new.html>

Understanding of the calling of the election

In general there is a very poor understanding of conventions regarding the calling of Tasmanian elections among the “political classes” in this state. Tasmania does not have fixed terms and Premiers are entitled to request elections from the Governor at any time. Conventions then apply to the granting or otherwise of this request but in general a Premier who holds the confidence of the House and requests an election in a circumstance where no legitimate alternative government is possible will be granted one.¹

As in 2021 I encountered many misunderstandings and conspiracy theories, suggesting a need for greater public education about how calling elections in Tasmania works. To summarise these, the misunderstandings are broadly of two types. The first type is the idea that a Premier who cites parliamentary instability as a reason for requesting an early election cannot do so if crossbenchers are agreeing to support the government, i.e. if it has the confidence of the House. Various comments about confidence and supply made by the two ex-Liberal independents in the previous House were so vague that no Premier could be completely sure there was no threat to confidence and supply. Even if there was not, parliamentary instability can come in various forms. A Premier is entitled to seek the judgement of the voters rather than need to carry on in the face of unpredictable voting on the floor of the House and unexpected orders from the Parliament – especially in a situation where those issues are a result of defections of members who were elected on a majority-government platform and have no mandate from voters for their approach.

The second type is the reverse – the idea that a Premier whose confidence of the House might in theory be in doubt cannot call the election without demonstrating the confidence of the House. People misunderstand that the confidence of the House in the Premier is assumed in the absence of a vote or pending vote to the contrary or an active challenge to the Premier’s leadership of their party. The Premier advises an election, not the Parliament.

I do not support fixed terms for Tasmania.² Assuming that Tasmania continues not to have fixed terms, I think it would be beneficial to have a page on the Tasmanian Parliament website explaining the conventions around the calling of early elections and that Tasmania does not have fixed terms.

¹ I strongly recommend Anne Twomey’s “The Veiled Sceptre” for a more detailed discussion of these conventions.

² <https://kevinbonham.blogspot.com/2024/03/why-i-dont-support-fixed-four-year.html>

Informal Voting and exhaust

The informal voting rate at the Assembly election was 6.31%, an increase from 5.13% in 2021. **This informal voting rate is unacceptable.** It is the second highest in Tasmanian history, albeit a long way behind the 10.09% recorded in 1946. The 1946 spike in informal voting was caused by the introduction of ballot columns in company with new instructions that were far from clear. I predicted that the informal voting rate could rise by between 0.5% and 1.0% of turnout as a result of the change alone³; it has actually risen by even more than I feared, although some of the rise may have been caused by deliberate informal voting.

It is possible that the increase won't be entirely a once-off, since four of the seven previous elections in the 35-seat system also had informal voting rates of over 5%. These elections were conducted when Tasmania was a less multicultural society; it may be that the normal rate under the 35-seat system will now be even higher.

The TEC's informal ballot survey, if conducted to its normal excellent standard, will determine to what extent the rise in informal voting since 2021 was a result of unintentional informal voting. It will be interesting to see to what extent the rise can be attributed to votes that would have been formal under the old rules (1-5 without error required) but not the new rules, although I do not know if the TEC's analysis will be this specific. I have long been critical of the state's lack of meaningful savings provisions for voters who make unintended errors in numbering. In the 2024 election unless a voter had the numbers 1-7 once and only once each their vote was not counted.

I did some scrutineering of rechecks of several booths and postal votes in Franklin. During this process I saw votes that were informal under the 1-7 system that would have been formal under the previous 1-5 rules. One example was a voter who numbered every box except for leaving one box blank and omitting the number 7 from the sequence. I did not see any votes that stopped at 5, but other scrutineers said they had seen some.

The increase in informal voting was despite a TEC campaign for greater awareness of the change, though I suspect that campaign would have been more effective had the election not been called early. The campaign did, however, only address the increase in the number of boxes required from five to seven – it did not address other causes of unintended informal voting.

The increase in informal votes resulted from a basic violation of electoral change management principles. In general, when voting laws are changed, a vote that would have been formal under the previous laws should remain formal and be covered under a savings provision. (This was, for instance, the approach taken in Senate ballot reform in 2016 with a savings provision being created for voters who voted 1 above the line as in the previous Senate system.) Failing that, *something* at least should be done to identify and save some of the votes affected by the change of systems. For instance, because of the TEC's instruction ““YOUR VOTE WILL NOT COUNT UNLESS YOU NUMBER AT LEAST 7 BOXES” it

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https://www.parliament.tas.gov.au/_data/assets/pdf_file/0027/55575/no.20920dr20kevin20bonham_redacted.pdf

may have been appropriate to save votes that numbered at least seven boxes but contained unintentional errors at places 6 and 7.

I believe that in general the informal rate for any Australian election should be at most 5% including at most 2.5% unintended informal voting and that anything above that should be considered too high. Informal voting at the 2021 election was already a little too high.

Fortunately, because of the relatively wide margins by which seats were decided at this Assembly election, I am confident that unintended informal voting did not affect the winners of any seat. However, we cannot rely on it not doing so in the future.

I have previously written the following regarding exhaust rates at this election:⁴

“The statewide exhaust rate (the proportion of vote-values ending up leaving the count) was 5.5%, with Bass the highest with 7.4%. As a quota share (0.44 quotas average) this is very similar to 2014 and 2018, but much higher than 2021 which had very low exhaust rates (3.7% or 0.22 quotas average). The structure of the preference distributions can have a large effect on exhaust rates, since major party voters often vote for their own party then stop, and contests that end up between candidates from the same party often see a lot of voters not numbering that column. It's important to bear in mind that 5.5% of vote values exhausting does not mean 5.5% of voters' votes left the count entirely - exhaust includes votes coming from surpluses where part of a voter's vote value had helped elect somebody but part of it had later left the count. “

There appears to be resistance to savings provisions in Tasmania based on a belief that it would increase exhaust rates and lead to more candidates being elected short of quota. That is, however, a lesser evil than not counting people's votes at all.

My experience is that it takes many electoral cycles for voters to fully grasp that a voting system has changed. I frequently encounter voters on social media who believe that Group Ticket Voting still exists (at least in effect) for Senate elections despite it being abolished in 2016.

Recommendation: That savings provisions for the House of Assembly be introduced in one of the following forms or similar:

- Any vote that was formal under the old 1-5 system will still be formal. (This may require a change to the ballot paper instructions to ensure they do not become false.)
- Any vote where the voter has numbered at least 7 boxes with a unique 1 be considered formal and exhaust at the point of the first error.

Section 196 and the Juice Media incident

From an electoral law standpoint one of the most significant incidents of the campaign involved a satirical mock advertisement by Juice Media.⁵ Juice Media creates mock tourism

⁴ <https://kevinbonham.blogspot.com/2024/04/tasmania-2024-is-this-hare-clarks-new.html>

⁵ Original version with image of Premier Rockliff blurred <https://www.youtube.com/watch?v=EfcqCdGqjWQ>, follow-up version <https://www.youtube.com/watch?v=K64JNg4Nwqk>

and other similar ads and uses them to attack politics in the areas covered. The commentary is typically left-wing/environmentalist and the videos are rather heavy-handed and contain frequent swearing. These items have a large social media following, mostly outside Tasmania. The Juice Media video issued on 15 March briefly contained an image of Premier Rockliff over a headline referring to him pledging a “government with heart”. Juice Media received an email from the TEC stating that the video was “likely an advertisement” and requesting that the photo of Rockliff be removed, as it was used without his permission.

In my view this was a mistake by the TEC as the video was obviously a mock advertisement, not an electoral advertisement as normally understood, and was produced as political commentary on the election. Whatever the case, the episode exposed Tasmanian electoral laws to ridicule in a follow-up video that at latest count has had over 306,000 views.

Section 196 has been long overdue for review as it not only unnecessarily and probably unconstitutionally limits free speech, but also does so in a way that the TEC has struggled to interpret clearly. The interpretation problem arises from the section’s outdated references to “advertisement, “how to vote” card, handbill, pamphlet, poster or notice” in an Act that supposedly applies to online publications. It does not appear that the TEC is able to determine what the concepts “advertisement” and “notice” should be taken to mean in the internet age.

During debate in 2023 the Legislative Council resisted amending Section 196 without replacing it with some form of truth in electoral advertising law. I have concerns about “truth in electoral advertising” law proposals, especially in the Tasmanian context⁶ and I think it is most important that Section 196 be reformed irrespective of whether truth in electoral advertising can be passed. It is unsatisfactory that political actors involved in a Tasmanian election are subject to a law that is impossible to understand. It exposes Tasmania to the risk of an election result being affected by an incorrect decision by the TEC.

Recommendation: The Committee should ask the TEC to explain what its legal and factual basis was for considering the Juice Media video to be “likely an advertisement” and if it still considers this to be the case.

Recommendation: That the Legislative Council pass the *Electoral Amendment Bill 2024(25 of 2024)* without amending it to include “truth in electoral advertising” provisions.

Legislative Council/House of Assembly interplay

The holding of Legislative Council and Assembly elections in close proximity creates issues with the Legislative Council’s strict spending caps. When an Assembly election is held directly before a Council election, a candidate who runs unsuccessfully for the Assembly then runs for the Council will have gained publicity from running for the Assembly (where there is currently no expenditure cap) for their run for the Council (where there is a quite strict

⁶ See https://www.parliament.tas.gov.au/_data/assets/pdf_file/0020/83450/13-Dr-Kevin-Bonham.pdf and also transcript of verbal evidence at https://www.parliament.tas.gov.au/_data/assets/pdf_file/0030/83685/HA-GAB-26-July-2024-Final-transcript.pdf

expenditure cap). At this election two Legislative Councillors resigned to run for the Assembly. Had either not succeeded they would then have been able (albeit narrowly based on the timeframe for the return of writs) to recontest their Legislative Council seat in the by-election.

The problem was more acute in 2021 when Legislative Council candidates who were endorsed by a political party were able to benefit from that party's general publicity for the state election, while independent candidates had no such benefit.

My general view is that the expenditure caps for the Council are on the strict side, and especially so if some candidates are benefiting from background advertising of their party while others are not. While I don't have a specific solution, I think the impact of overlapping Assembly elections should be considered in any review of the expenditure limits for Legislative Council candidates.