



**PARLIAMENTARY
ELECTIONS,
REPRESENTATION
AND THE LAW**

Caroline Morris

remained in force until 1969, when it was repealed as being an 'unnecessary enactment'.¹⁹¹

Election Commissioners were barristers of at least seven years' standing, appointed by the monarch following an address by both Houses of Parliament. They were permitted to use 'such lawful means as they think best' to inquire into the election in question; they also had powers to summon evidence and take evidence from witnesses under oath, and enjoyed the same powers as an Election Court with respect to the obligations on witnesses. Where their orders to attend were not complied with, they could certify this to the High Court, whereupon the court could proceed as if its own orders had been flouted. Persons not complying with the Commissioners' other requirements were deemed to be in contempt of the Commissioners. The report of the Election Commissioners was to be laid before Parliament and, if evidence of corrupt or illegal practices had been found, passed to the Attorney-General for his views on prosecution.

The investigatory powers were done away with as corruption declined, but the evidence today points to a resurgence of electoral corruption in the last decade.¹⁹² In addition to the high-profile cases of local election fraud in Birmingham, Slough and Bradford, in research undertaken by the Electoral Commission in 2008, it was reported that 29 per cent of respondents believed that electoral fraud was generally a problem in the UK.¹⁹³

The Election Court can refer information about corrupt practices to the Director of Public Prosecutions if it is unearthed during the petition process, but this of course requires a petition to be brought in the first place. The Political Parties and Elections Act 2009 has created new and strengthened powers for the Electoral Commission in its role in monitoring party finances. Under this Act, the Commission has the power to require the disclosure of documents, and where the request is unreasonably refused, the power to enter premises and inspect, obtain and retain copies of documents relating to party finances.¹⁹⁴ The Commission will also be able to impose a fixed monetary penalty for non-compliance with certain requirements, impose discretionary requirements (to pay money, to take steps to ensure the activity does not reoccur or to restore the previous position) on persons it is satisfied have committed offences under the Act, issue stop notices and secure enforcement undertakings from people not to continue activities that contravene the Act.¹⁹⁵

¹⁹¹ Representation of the People Act 1969.

¹⁹² R Price, 'Election Fraud has increased since postal ballot reforms, says watchdog', *The Telegraph*, 9 February 2009, reporting the views of Sir Christopher Kelly, chair of the Committee on Standards in Public Life, that postal voting on demand has made 'it easier for those individuals who want to manipulate the electoral system for their own ends'. These concerns may be somewhat assuaged by the introduction of individual voter registration in the Political Parties and Elections Act 2009.

¹⁹³ Electoral Commission, 'Allegations of electoral malpractice at the 2008 elections in England and Wales' (Electoral Commission, London, April 2009) 4. The Commission reported that 103 cases of electoral malpractice were recorded at the 2008 local elections: *ibid.*, 16.

¹⁹⁴ Political Parties and Elections Act 2009, s 2, inserting new Sch 19B into the Political Parties, Elections and Referendums Act 2000 (PPERA 2000).

¹⁹⁵ Political Parties and Elections Act 2009, s 3, inserting new Sch 19C into PERPA 2000.

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: <http://www.isbs.com>

© Caroline Morris 2012

Caroline Morris has asserted her right under the Copyright, Designs and Patents Act 1988,
to be identified as the author of this work.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system,
or transmitted, in any form or by any means, without the prior permission of Hart Publishing,
or as expressly permitted by law or under the terms agreed with the appropriate reprographic
rights organisation. Enquiries concerning reproduction which may not be covered by the
above should be addressed to Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84946-147-4

Typeset by Hope Services, Abingdon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall



PARLIAMENTARY ELECTIONS, REPRESENTATION AND THE LAW

Parliamentary elections are the foundation of the democratic State, providing legitimacy to government and an opportunity for citizens to participate in the democratic process. But despite the crucial role of elections in government and society, the law governing them is fragmented, both conceptually and in terms of the legal framework.

This book examines each stage of the electoral process from the perspective of the candidate seeking to become an MP: eligibility and qualification, the candidate selection process, nominations, disputed elections and then, lastly, disqualification or exit from the House of Commons. Each stage of the process is considered in light of developments in political practice and human rights jurisprudence, and an argument is made for the rethinking and reform of the law of parliamentary candidacy and membership.

The book takes into account the reforms ushered in by the parliamentary expenses scandal of 2009, and also looks to the new electoral era that may eventuate under the Liberal Democrat–Conservative Coalition Government.

ACKNOWLEDGEMENTS

This book had its beginnings in 2003 when Harry Duynhoven, a Member of the New Zealand House of Representatives, made an application for a Dutch passport and inadvertently triggered his disqualification from Parliament as a result. Although Mr Duynhoven was saved by a retrospective suspension of the offending law, the episode sparked my interest in just how members of the legislature not only obtain their seats and remain there: how would the representative's entry to and exit from Parliament be decided, and what sort of people do we want as our representatives?

The bulk of this work was completed as my doctoral thesis at King's College London, where I benefited from the kind and expert supervision of Professors Robert Blackburn and Keith Ewing. In addition Dean Knight, David Monks, Graeme Orr and Bob Posner read various chapters and contributed valuable comments and insights. Of course any errors that remain are my own. Richard Hart and Rachel Turner of Hart Publishing were enthusiastic and efficient as my thesis metamorphosed into this book: the perfect combination in an editorial team.

I am also grateful to my former colleagues in the legal team of the UK Electoral Commission: Bob Posner, Elizabeth Morrow, Rosie Sidey and Michelanne Calhoun Wilson, with whom I spent a very enjoyable six months in 2008–2009 at the electoral law coalface. None of the views expressed here should be taken to have the endorsement of the Electoral Commission.

My thanks too to Yana Geary of Victoria University of Wellington and Katelyn Schoop of Queen Mary, University of London, for their meticulous and patient work in formatting and re-formatting the manuscript, hunting down my typographical errors, and generally correcting the errors of my word-processing ways.

And lastly, to my husband, Richard Searle: thanks – for everything.

The law is stated, as closely as possible, to 1 May 2011.

Caroline Morris
Queen Mary, University of London

TABLE OF CASES

<i>A v UK</i> [2002] ECHR 811.....	144
<i>Absalom v Gillett</i> [1995] 1 WLR 128.....	88
<i>AEC v Bamblett</i> [2004] FCA 755.....	94
<i>AEC v Gordon</i> (unreported, 5 September 1994, BC 9400065)	94
<i>AEC v Lalara</i> (unreported, 27 September 1994, BC 9405064)	94
<i>AEC v Landy</i> (unreported, 22 December 1994, BC 9405696)	94
<i>AEC v Wilson</i> [2003] FCA 434.....	94
<i>AG v Jones</i> [1999] EWHC Admin 377.....	90, 92
<i>Ahmed v United Kingdom</i> (2000) 29 EHHR 1	37
<i>Amalgamated Society of Railway Servants v Osborne</i> [1910] AC 87.....	31, 103
<i>Anisminic v Foreign Compensation Commission</i> [1969] 2 AC 147	107
<i>Armstrong v Budd</i> [1969] 1 NSW 649	133
<i>ASLEF v UK</i> [2007] ECHR 184	128
<i>Baker v Jones</i> [1954] 1 WLR 1005.....	107
<i>Baker v Liberal Party</i> (1997) 68 SASR 366	109
<i>Baldwin v Everingham</i> [1993] 1 Qd R 10.....	118, 119
<i>Barnardiston v Soame</i> (1674) Pollex 470; 86 ER 615.....	79
<i>Belknappe v Barkeley</i> (1512) CP 40/1001	73
<i>Bodenham v Scudamore</i> (1554) CP 40/1157	73
<i>Bordesley Green</i> [2005] All ER (D) 15	98
<i>Bradley v The Jockey Club</i> [2004] EWHC 2164	123, 126
<i>Breen v Amalgamated Engineering Union</i> [1971] 2 QB 175	119, 122
<i>Broadmoor Special Health Authority v Robinson</i> [2008] QB 775	96
<i>Buckley v Thomas</i> (1554) 1 Plowden 118; (1554) 75 ER 182	73
<i>Burdett v Abbott</i> (1811) 4 East 1	133
<i>Cameron v Hogan</i> (1934) 51 CLR 358.....	117, 118, 119
<i>Case of the Sheriff of Middlesex</i> (1840) 11 A & E 273	133
<i>Castells v Spain</i> (1992) 14 EHHR 445	38
<i>Channon v Moghan</i> (1555) CP 40/116.....	73
<i>Clarke v Australian Labor Party</i> (1999) 74 SASR 110	120
<i>Coleman v Liberal Party</i> [2007] NSWSC.....	120
<i>Conservative and Unionist Office v Burrell</i> [1982] 1 WLR 522.....	106
<i>Corbet v Talbot</i> (1485) Rast Ent 446a; Vet Lib Int (1545).....	73
<i>Crittenden v Anderson</i> (1977) 51 ALJ 171	53
<i>Daley v Newnham</i> [2005] Vic Sup Ct 303.....	120
<i>Donaldson v Empey</i> [2004] NIJB 1	110, 113
<i>Duke of Newcastle v Morris</i> (1870) LR 4 HL 661	132

<i>Finnigan v NZ Rugby Football Union</i> [1985] 2 NZLR 159	123
<i>Fountaine v Chesterton</i> (1968) 112 Sol J 690.....	112
<i>Galt v Flegg</i> [2003] Qd Sup Ct 290.....	120
<i>Ganchev v Bulgaria</i> (1996) App 28858/95 (unreported).....	36, 127
<i>Gitonas v Greece</i> (1998) 26 EHHR 691.....	37
<i>Godwyn v Sydnam</i> (1549) CP 40/1143.....	73
<i>Goodwin v Fortescue</i> (1604) St Tr 91	77–79
<i>Greek Case</i> (1969) 12 Year Book 1	34
<i>Greenway-Stanley v Paterson</i> [1977] 2 All ER 663	63, 64
<i>Gunter v Welshe</i> (1548) CP 40/1137	73
<i>Hampshire County Council v Beer</i> [2003] EWCA Civ 1056	123, 124
<i>Harford v Linskey</i> [1899] 1 QB 852	61, 64, 65
<i>Harrison v Gupta</i> (unreported, LB of Brent, 4 May 2006).....	42
<i>Hirst v United Kingdom (No 2)</i> (2006) 42 EHRR 41	57
<i>Hobbs v Morey</i> [1904] 1 KB 74	64
<i>Hopkinson v Marquis of Exeter</i> (1867) LR 5 Eq 63.....	106
<i>Hudson v GMB</i> [1990] IRLR 67	112
<i>Hussein v Khan</i> [2006] EWHC 262	88, 93, 98
<i>In Re MacManaway and In Re The House of Commons</i> [1951] AC 161	47, 131, 132
<i>In Re Melton Mowbray</i> [1969] 1 QB 192.....	62
<i>In Re Samuel</i> [1913] AC 514.....	131
<i>Ishaq v McDonagh</i> (2000) 45 EOR Discrimination Case Law Digest 5.....	114
<i>Jepson and Dyas-Elliott v The Labour Party</i> [1996] IRLR 116.....	101, 104, 109, 114, 115, 126
<i>John v Rees</i> [1970] 1 Ch 345.....	112, 122
<i>Lee v Mitton</i> (1554) CP 40/1159.....	73
<i>Lee v Showmen's Guild of Great Britain</i> [1952] 2 QB 329.....	107
<i>Lewis v Heffer</i> [1978] 1 WLR 1061	110, 112
<i>Liberal Party v United Kingdom</i> (1981) 21 DR 211.....	35
<i>London Borough Council of Bromley v Greater London Council</i> [1983] 1 AC 768	32, 107
<i>Lykourazos v Greece</i> (2008) 46 EHRR 7	37
<i>M v United Kingdom</i> (1984) App 10316/83	37, 46
<i>MacLean v Attorney-General of Nova Scotia</i> (1987) 35 DLR (4th) 306	134
<i>Mann v Secretary of State for Scotland</i> (15 November 2000, Edinburgh ET).....	114
<i>Mathieu-Mohin and Clerfayt v Belgium</i> (1988) 10 EHHR 1.....	34, 35, 36, 48
<i>McDonagh v Ali</i> [2002] IRLR 489	115
<i>McGuinness v United Kingdom</i> (8 June 1999) Application 39511/98 (ECtHR)	38, 134
<i>McKinnon v Grogan</i> [1974] 1 NSWLR 295	118, 124
<i>Melnychenko v Ukraine</i> (2006) 42 EHRR 784 (Section II).....	36, 56, 127
<i>Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders</i> [2004] ZACC 10.....	57

<i>Modahl v British Athletic Federation Ltd</i> (Court of Appeal, 28 July 1997)	126
<i>Mortimer v The Labour Party</i> 2000 Westlaw 538 (Ch)	109
<i>New Testament Church of God v Stewart</i> [2007] EWCA Civ 1004	117
<i>Oxford Case</i> (1924) 7 O'M & H 49	70
<i>Patterson v Merrick</i> (2 November 1988) unreported, CA	63
<i>Percy v Board of National Mission Church of Scotland</i> [2005] UKHL 73	117
<i>Peters v Collinge</i> [1993] NZLR 554	107, 110, 111, 125, 127
<i>Podkolzina v Latvia</i> [2002] ECHR 405	36, 39, 127
<i>Prebble v Awatere Huata</i> [2005] 1 NZLR 289	107, 111
<i>Prideaux v Morrice</i> 7 Mod 14; (1702) 87 ER 1065	80
<i>Pritchard v Mayor of Bangor</i> (1888) 13 App Cas 241	62, 66
<i>Radclyffe v Wyngfeld</i> (1483) CP 40/883	73
<i>R (Cart) v Upper Tribunal</i> [2010] EWCA Civ 859	90
<i>R (De Beer) v Balabanoff</i> [2002] EWHC 670	61
<i>R v Boundary Commission ex p Foot</i> [1983] 1 QB 600	107
<i>R v Cripps ex p Muldoon</i> [1984] QB 68	90
<i>R v Election Court ex p Sheppard</i> [1975] 2 All ER 723	62
<i>R v Legal Aid Board ex p Donn</i> [1996] 3 All ER 1	120, 124
<i>R v Panel on Takeovers and Mergers ex p Datafin</i> [1987] QB 815	123
<i>R v Returning Officer for Barnet and Finchley ex p Bennett</i> (3 June 1983) unreported, CA	63
<i>R v Taylor</i> (1895) 59 JP 393	61
<i>R v Waltham Forest Borough ex parte Baxter</i> [1988] 2 WLR 257	32, 107
<i>R (Securiplan) v Security Industry Association</i> [2008] EWHC 1762	96
<i>R (Woolas) v Parliamentary Election Court for Oldham East and Saddleworth</i> [2010] EWHC 3169	68, 90
<i>R (Woolas) v Parliamentary Election Court for Oldham East and Saddleworth</i> (CO/11578/2010, 8 November 2010)	68
<i>Re Bennett</i> (1993) 2 HRNZ 358	57
<i>Sadak v Turkey</i> (2003) 36 EHHR 396	35, 38
<i>Sanders v Chichester</i> [1995] 92(3) LS Gaz R 37	63, 64, 65, 66
<i>Sauve v Canada (A-G) (No 2)</i> (2002) DLR 218 (4th) 577	57
<i>Sawyer v Ahsan</i> [1999] IRLR 609	114, 115
<i>Scarth v Amin</i> (unreported, Bradford, 1 May 2008)	93
<i>Scott v Gray</i> (1999) HREOC H98/76	115, 117
<i>Simmons v Khan</i> [2008] EWHC B4 (QB)	93
<i>Stockdale v Hansard</i> (1839) 9 A & E 1	133
<i>Stowe v Joliffe</i> (1874) LR 9 CP 734	56
<i>Sue v Hill</i> (1999) 165 CLR 178	58
<i>Sukhovetskyy v Ukraine</i> [2006] ECHR 265	37
<i>Sullivan v Della Bosca</i> (1999) NSW Sup Ct 136	119
<i>Sykes v Cleary</i> (1992) 176 CLR 77	58
<i>Thornley v Heffernan</i> (1995) NSW Sup Ct BC 9505091	119
<i>Tucker v MacDonald</i> [2001] Qd Sup Ct 6735	120

<i>United Communist Party of Turkey v Turkey</i> (1998) 26 EHHR 121	34
<i>Watkins v Woolas</i> [2010] EWHC 2702	68
<i>Watson v Ayton</i> [1946] KB 297	62, 64
<i>Watt (Carter) v Ahsan</i> [2007] UKHL 51	115
<i>Weir v Harmon</i> [2001] NIJB 260 Ch D	111, 113
<i>YL v Birmingham City Council</i> [2008] UKHL 27	127
<i>Zdanoka v Latvia</i> [2006] ECHR 231	35, 37

SUMMARY CONTENTS

<i>Acknowledgements</i>	v
<i>Table of Cases</i>	xv
1 Parliamentary Comings and Goings	1
2 Mapping out Representation Theory and the Law	7
3 Candidate Eligibility Laws	41
4 Controverted Elections	68
5 Challenging Candidate Selection in the Courts	101
6 Removal from Parliament	130
7 Reconceptualising and Reforming Electoral Law	150
<i>Bibliography</i>	159
<i>Index</i>	169

TABLE OF CONTENTS

<i>Acknowledgements</i>	v
<i>Table of Cases</i>	xv
1 Parliamentary Comings and Goings	1
I. THINKING ABOUT ELECTORAL LAW	3
II. THE CHAPTERS	5
2 Mapping out Representation Theory and the Law	7
I. SOME DEFINITIONS	8
II. POLITICAL THEORIES OF REPRESENTATION	10
A. Early Theories	11
B. The Representative as Delegate or Trustee?	15
C. Identity Representation	18
D. Party Representation	22
E. Which Theory Prevails?	24
III. JURISPRUDENCE OF REPRESENTATION	26
A. The Medieval Writs	27
B. Three Common Law Jurists	29
C. The Views of the Courts and Parliament	31
D. Human Rights Law	34
<i>The Legal Background to the Candidature Right</i>	35
<i>Case Law on Representation</i>	36
IV. CONCLUSION	39
3 Candidate Eligibility Laws	41
I. WHO MAY BE A CANDIDATE?	41
A. The Legal Focus of Candidacy	41
B. The Eligibility Provisions	43
C. Recent Developments in Eligibility Legislation	46
II. WHAT IS THE BASIS OF CANDIDATE ELIGIBILITY?	47
A. Diversity, Choice and Rights	48
B. Competency, Conflicts and Integrity	50
<i>Competency</i>	50
<i>Conflicts</i>	50
<i>Personal and Systemic Integrity</i>	51

III. THE HISTORY OF ELIGIBILITY LAWS	52
A. The pre-1700s Era	52
B. 1700 and After	53
<i>The Position of Officeholders</i>	53
C. The Second World War Reforms	54
IV. SHOULD THE LEGAL BASIS OF CANDIDATURE BE CHANGED?	56
A. Lessons from the Commonwealth?	58
V. THE MOMENT OF ELIGIBILITY	60
A. Statutory Refusal of Nomination	61
B. A Common Law Power of Refusal of Nomination?	63
VI. CONCLUSION	67
4 Controverted Elections	68
I. INTRODUCTION	68
II. CHALLENGING EARLY ELECTIONS	71
A. County Court Elections	71
B. Multiple and Concurrent Jurisdictions	73
<i>The Sovereign</i>	73
<i>Chancery</i>	74
<i>Star Chamber</i>	74
<i>The House of Commons</i>	75
III. THE STRUGGLE BETWEEN THE COURTS AND PARLIAMENT FOR CONTROL OVER ELECTIONS	76
A. The Composition Privilege	76
<i>The Tudor Period: the Emergence of the Composition Privilege</i>	77
<i>The Post-Tudor Period: The Establishment of Privilege</i>	77
IV. THE EXCLUSIVE JURISDICTION OF THE HOUSE OF COMMONS	80
A. Election Committees	80
B. The Grenville Act	81
V. THE VICTORIAN REFORMS	82
A. The Early Decades of Change	82
B. The 1860s: from the House to the Courts	83
C. Reform after 1868	85
VI. MODERN PERIOD	86
A. Are Petitions Still Relevant?	86
B. Election Petitions	87
<i>The Grounds for a Petition</i>	87
<i>The Parties to a Petition</i>	88
<i>The Election Court</i>	88

<i>Remedies</i>	89
<i>Judicial Review</i>	90
C. Petitions Reform	91
<i>Standing</i>	91
<i>Access to Justice</i>	97
<i>An Alternative Legal Process for Administrative Errors?</i>	99
VII. CONCLUSION	99
5 Challenging Candidate Selection in the Courts	101
I. INTRODUCTION: MR JEPSON GOES TO COURT	101
II. WHY IS CANDIDATE SELECTION INCREASINGLY IMPORTANT?	102
III. THE LEGAL STATUS OF POLITICAL PARTIES	105
IV. MODELS OF CANDIDATE SELECTION CHALLENGE	109
A. The Club Law Model	109
B. The Employment Law Model	114
<i>Conclusion</i>	116
C. The Quasi-public Law Model	117
V. PARTIES AND PUBLIC LAW IN THE UK	120
A. Statutory Incorporation in the UK	120
B. The Public or Private Nature of Political Parties?	122
C. The Implications of Quasi-public Status	126
VI. CONCLUSION	128
6 Removal from Parliament	130
I. TRADITIONAL MEANS OF REMOVING REPRESENTATIVES	130
A. Statutory and Common Law Grounds of Disqualification	130
B. Disqualification under Parliamentary Privilege	132
<i>Expulsion from Parliament</i>	133
<i>The MPs' expenses scandal and the Government response</i>	137
<i>The Parliamentary Standards Act</i>	143
II. ADDRESSING UNWORTHY CONDUCT IN OTHER WAYS	144
A. The Recall Election	144
B. The Practice of the Recall	145
C. Issues with the Recall	146
III. CONCLUSION	149
7 Reconceptualising and Reforming Electoral Law	150
I. THE NATURE OF ACHIEVING PARLIAMENTARY REPRESENTATION THROUGH LAW	150

II. NEW DIRECTIONS FOR CANDIDACY AND MEMBERSHIP LAW?	153
A. A new Speaker's Conference	154
<i>Consolidation/systematisation of electoral law</i>	155
<i>Consolidation of eligibility law</i>	155
<i>The Role of the Electoral Commission</i>	155
C. Other reforms	156
<i>Nominations</i>	156
<i>Candidate selection litigation</i>	156
<i>Petitions</i>	156
<i>Bibliography</i>	159
<i>Index</i>	169

Parliamentary Comings and Goings

We are not acquainted with the learning of elections,
and there is a particular cunning in it . . .

Gould J, *Ashby v White* (1703)

This book is about a certain small part of the 'learning of elections' and its 'particular cunning'. As Mr Justice Gould reminds us in the great voting rights case of *Ashby v White*, the law of elections is unique. Its political nature and the attendant consequences at stake mean that it has long been the subject of a fierce battle for control between the judiciary and Parliament. Eventually jurisdiction went to the courts in the form of election petitions, and Parliament contented itself with very occasional reforms of eligibility law. The great election law contests of the past were seen largely as settled. And, for most of the last century electoral law was not often challenged, revised, or even much thought about. Electoral law concerned few and was studied by even fewer.

But in the last decade or so, the law relating to one aspect of elections in particular has begun to feature much more often in statute books and law reports. A flood of litigation was triggered by an unhappy unsuccessful party candidate who had missed out on selection because he was not female; Parliament enacted a series of amendments making it easier to stand for election; and election petitions burst back into prominence after nearly 100 years as electoral fraud was increasingly unmasked.

The point of electoral law is generally understood to be the creation and then regulation of the means for translating the popular choice of representatives into a working legislature and representative government. In short, elections are a necessary precondition for democracy.

Underpinning this functionalist yet aspirational conception of electoral law is the view that it also serves to legitimate the exercise of state power. As Graeme Orr has put it:

Public or state power in a mass democratic state . . . ultimately rests [on,] and owes its legitimacy not just to motherhood notions of the sovereignty of the people, but to the detailed mechanisms and regulations by which elections are conducted and managed.¹

¹ G Orr, 'The Cinderella Status of Electoral Law as a Field of Study in Australia' (1998) 7(2) *Griffith Law Review* 166, 167.

Electoral law, or the law of making and unmaking representatives, is fundamental to our constitution – this field of law provides the framework within which political conflict is channelled into constructive legislative results. Indeed, electoral law can in large part provide the foundation for the operation of the constitutional system: determining how many representatives there are, their respective proportions in the legislature, affecting the formation of government and whether it be single-party or coalition. All these factors which affect the exercise of public power can rest on the technicalities of election law.

Despite its importance and long history, electoral law is but a newly-established field of legal inquiry. Although it has overcome the doubts expressed by Austin as to whether, with regard to the law concerning candidates' eligibility to stand, it is properly constitutional law at all,² at the present time, the law of elections has few scholars devoted to figuring out its puzzles, a small number of specialist texts and is rarely offered as a subject for legal study in the universities.³

But even within that context, 'electoral law' is usually understood to be the law relating to participation in the electoral system – texts on electoral law discuss the legal aspects of boundary drawing, the voting system in use and its alternatives, the law relating to who may or may not vote, the development and delineation of electoral offences, and the regulation of political expenditure.

In this book we look at electoral law from a different perspective, taking it to mean the law of being elected to Parliament. This process involves a series of steps, each of which involves some aspect of legal regulation.

Before entering Parliament, those hoping to become members must pass through three stages of election regulation. First, they must, if they hope to represent a political party, be chosen and nominated by that party as its representative. Secondly, after selection but before the election is held, they must then have their nomination accepted by the appropriate electoral official, having satisfied him or her that they possess the qualifications prescribed by law (or have not incurred the disqualifications) for candidates. Thirdly, they must win the electoral contest, and survive any challenge to their win in the form of an election petition. Having then taken their seat in Parliament, the journey is not yet over. Members of Parliament (MPs) may yet find themselves disqualified and removed from Parliament, either by incurring one of the statutory disqualifications or through the exercise of Parliament's privilege of regulating its own composition.

² See FW Maitland, *Constitutional History of England* (Cambridge University Press, Cambridge, 1908) 531.

³ See DH Lowenstein, 'Election law as a subject – a subjective account' (2002) 32 *Loyola of Los Angeles Law Review* 1199, tracing the evolution of interest in election law from academics and practitioners in the US.

I. Thinking About Electoral Law

This book examines three related questions in the field of representation and electoral law. The first is: What are the concerns of the law in the field of representation? The second is: What is the nature of the law on representation? The third is: How should it be reformed? Taken together, these interlinked questions cover the little-investigated field of determining entries to and exits from Parliament, that is, how parliamentary representation is achieved and maintained through law.

As to the first question, we must recognise that achieving (and retaining) the goal of election to Parliament is not a matter of a single closed transaction. Rather, it is better conceived as a series of steps from aspiring candidate to fully-fledged MP. Along the way, those hoping to become representatives must overcome the hurdles of eligibility, nomination, selection, any petition and avoidance of disqualification or expulsion. As these are examined, the opportunity has been taken to subject to critique some aspects of electoral statutes and the common and parliamentary law dealing with election matters.

As we look at each of these stages, a theme will begin to emerge: the thread which runs through these stages is a question about the nature of electoral law. How has it been conceived of throughout history, and more importantly, how should it be conceived of? Is it best seen as a form of private law, outwith the State and its concerns, or is the opposite the case?

In *The Idea of Public Law*, Loughlin wrote that public law is a singular and distinct field of inquiry with its own peculiar attendant concerns.⁴ Loughlin claims that what sets public law apart is that it is concerned with the activity of governing the State.⁵ While this may seem trite, he notes, it is because this context is 'taken as a given rather than treated as an issue of inquiry'.⁶

This book seeks to apply Loughlin's insight to a sub-field of public law: the law of election. Thus, the thread that binds this investigation into the different stages of the process of becoming an elected representative and maintaining that status is the view that electoral matters are quintessentially public law matters. As with the comments about public law itself writ large above, this may seem obvious, especially when we consider the political background against which electoral law plays out and the political result it is designed for; but surprisingly, it is not the assumption upon which electoral law has often rested. A peculiar feature of the law's approach to the questions which crop up at the various stages of the electoral journey is a reluctance at times to acknowledge their public nature. Certain aspects of the electoral experience are characterised as private events: action over candidate selection is seen as akin to a private club dispute; the challenge to an election outcome, a contest between two private individuals.

⁴ M Loughlin, *The Idea of Public Law* (Oxford University Press, Oxford, 2004) 153.

⁵ *Ibid.*

⁶ *Ibid.*