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Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005

Jerome Davidson
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Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005

Date Introduced: 18 December 2005

House: House of Representatives

Portfolio: Special Minister of State

Commencement: Sections 1–3 and schedules 3 and 4 commence on the day the Act receives Royal Assent. Details of the commencement of the individual provisions of schedules 1 and 2 appear in the table in section 2 of the Bill.

Purpose

The purpose of the Bill is to amend the *Commonwealth Electoral Act 1918* (the Act), the *Referendum (Machinery Provisions) Act 1984* (the Referendum Act) and the *Income Tax Assessment Act 1997*, so as to implement government policy on electoral reform.

Background

Major Issues

Disclosure thresholds

The Bill proposes to increase the thresholds for disclosing gifts to parties and candidates from $1500 to $10 000. The threshold will also be CPI indexed. This proposal has long been Liberal Party policy. The case put forward by Senator Abetz in favour of this is that the threshold:

- was introduced 20 years ago at $1000 and has been 'eroded by inflation.'
- was 'much too low when originally set.'
- 'adds nothing to Australia's democracy other than unnecessary red tape'.[1]

The issue is a highly controversial one. An attempt to increase these thresholds from $1500 to $3000 failed in 2004.[2] Senator John Faulkner, Michael Danby MP and Laurie Ferguson MP said of the proposal to increase the thresholds to $3000 that it had 'no policy merit and will only diminish the transparency of the disclosure laws and allow further donations to parties and candidates to go undisclosed.'[3]

This issue will be considered in greater detail in a forthcoming Parliamentary Library Research Note on political finance disclosure.

Early closure of the rolls

The 'close of rolls' refers to the time by which electors must enrol or change enrolment details prior to an election. Currently, the time is seven days after the election writs are issued. The election writs are usually issued the next working day after the announcement of an election but this is not always the case. The last election was announced on Monday 29 August 2004, and the writs issued 31 August. The proposal in the Bill is to close the electoral rolls at 8 pm on the third working day after the issue of the writ. Note, however, that the practical effect of this is to close the rolls at 8 pm on the day of the issue of the writ, because persons not on the roll between that time and 8 pm on the third day will not be added with two exceptions – 17 year-olds who turn 18 between the day the writ is issued and polling day, and those who are granted citizenship between those times. A similar proposal was rejected by the Senate in 2004.[4]

According to Senator Abetz, the problem with the current seven day period is that:

> During the rush to enrol in the week following the announcement of a general election, incredible pressure is placed on the Australian Electoral Commission's ability to accurately check and assess the veracity of enrolment claims received.[5]

It stands to reason, says Senator Abetz, that:

> in this rush to get on the roll after the calling of an election, the level of scrutiny of applications simply cannot be what it is during a non-election period when the AEC receives enrolments at a much more steady pace.[6]

Senator Abetz's view is not, however, shared by the Australian Electoral Commission (AEC), which noted, in its submission to the Joint Standing Committee on Electoral Matters (JSCEM) in 2002:

> The AEC is on record repeatedly expressing its concern at suggestions to abolish or shorten the period between the issue of the writs and the close of the rolls. That period clearly serves a useful purpose for many electors, whether to permit them to enrol for the first time (tens of thousands of electors), or to correct their enrolment to their current address so that they can vote in the appropriate electoral contest (hundreds of thousands of electors). The AEC considers it would be a backward step to repeal the provision which guarantees electors this seven day period in which to correct their enrolment.[7]

The JSCEM report on the 2001 election recommended against any change in the close of the rolls period. In the JSCEM report on the 2004 election there was a split on this issue between the majority of government members and the minor party and opposition party

members. The majority recommended that the rolls be closed early. The majority's view was that:

> Whilst acknowledging the efforts made by the AEC in attempting to ensure that the electoral roll is updated with integrity during the close of rolls period, the Committee considers that the volume of transactions which takes place during that period limits the AEC's ability to conduct the thorough and appropriate checks required to ensure that integrity.[8]

The minority report took the opposite view, citing repeated evidence from the AEC supporting the current seven day close of rolls period.[9]

Another argument used in favour of this amendment is that it is a requirement under current legislation to enrol to vote as soon as eligible and to advise the AEC of changes to address within one month and twenty one days after the change.[10] If people comply with these requirements, so the arguments runs, there should not be a problem at the time an election is called. The problem here is that, despite the current requirements, only 40% of people advise the AEC in the first instance of enrolment entitlements or changes in accordance with the Act.[11] As the AEC notes, the calling of an election remains a catalyst for the notification of changes to the roll and new enrolments.

Associated entities

The Bill makes provision to extend the definition of 'associated entity' so that it applies to entities with membership of a political party and entities with voting rights in political parties. In his speech to the Sydney Institute, Senator Abetz indicates that this provision is directed at including trade unions amongst organisations required to furnish annual returns under s. 314AEA of the Commonwealth Electoral Act.[12]

Third parties

The Bill also proposes that 'third parties' will be required to furnish annual returns under the Commonwealth Electoral Act. In explaining the logic behind this provision Senator Abetz has asserted that organisations like the Wilderness Society and the RSPCA, when they spend money on campaigns which coincide with policies of the ALP, are 'effectively campaigning in favour of the ALP.'[13] According to Senator Abetz, such organisations should be made accountable by a requirement that they lodge annual returns in addition to the current requirement that they lodge election returns.

Prisoner disenfranchisement

The Bill contains a proposal seeking to deny the vote to any person serving a sentence of imprisonment. This represents a change from the current provision which allows prisoners

serving sentences of less than 3 years to vote.[14] Persons released on parole and other similar release schemes will be entitled to vote.

According to the Australian Bureau of Statistics (ABS), there were 24 171 prisoners in Australia on 30 June 2004.[15] The number of sentenced prisoners was 19 236.[16] The ABS has advised that the number of prisoners serving a sentence of imprisonment of 3 years or more (as at 30 June 2004), was 9 861. That figure is for those actually in custody and does not include those released on parole.

As the proposal in this Bill is to remove voting rights from all prisoners, the total amount of people disenfranchised under the new provision will be 19 236 – the total amount of people *serving sentences* (that is, excluding those on remand). The amount of people who will be disenfranchised under the new provision who were not affected by the old provision is, therefore, 9375 (on the June 2004 figures).[17] That number will be dispersed throughout the electoral boundaries because prisoners are enrolled according to their address prior to entering custody – not the address of the prison. The impact will further be affected by considerations such as how many prisoners actually exercise their right to vote.

This is a controversial issue which divides politicians and the community. Some argue that all prisoners should be allowed to vote, some that all prisoners should be denied the vote, and others for some middle ground, such as the existing provision. For an outline of the history and similar provisions in Australia see Jerome Davidson *Inside Outcasts: prisoners and the right to vote in Australia*.[18]

Views on this issue are also divided around the world. In the United States 48 states deny the right to vote to serving prisoners, 33 disqualify those on parole, and 8 deny the vote not only to those in prison, but even to convicted persons after their release.[19] Eighteen European countries, including Ireland, the Netherlands and Spain, have no restriction on prisoner voting. Eight European countries have some prisoner voting restrictions, and some countries, such as France and Germany, allow courts to impose disenfranchisement as a punishment. Nine European countries prohibit all sentenced prisoners from voting, they are Armenia, Bulgaria, Czech Republic, Estonia, Hungary, Luxembourg, Romania, Russia and England.[20] Some of these bans are likely to be affected by the recent judgement of the Grand Chamber of the European Court of Human Rights in *Hirst v United Kingdom (No. 2)*. That case was concerned with the interpretation of Article 3 of the First Protocol to the European Convention of Human Rights, which reads:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The United Kingdom has a provision to the effect that: ‘A convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election.’ The validity of

that provision was challenged. When the matter was heard at first instance in the domestic English court, Lord Justice Kennedy held that the effect of Article 3 of the Convention was that, if a prisoner was to be disenfranchised, it must be 'in the pursuit of a legitimate aim'. His Lordship found that the question of the legitimacy of the aims in the case was best left to the legislature. When the matter proceeded to the European Court of Human Rights, the court, comprising seven judges, agreed that the right to vote was subject to exceptions that were imposed in pursuit of a legitimate aim, but held that the English disenfranchisement provision violated Article 3. The judges took the view that:

> removal of the vote in fact runs counter to the rehabilitation of the offender as a law-abiding member of the community and undermines the authority of the law as derived from a legislature which the community as a whole votes into power.[21]

The UK government appealed to the Grand Chamber. Lord Filkin, Parliamentary Under-Secretary of State at the Department of Constitutional Affairs, echoed the view held by Senator Abetz and other Australian proponents of this provision when he told the UK Parliament that:

> It has been the view of successive governments, including this government, that persons who have committed crimes serious enough to warrant a custodial sentence should forfeit the right to have a say in how the country is governed while they are detained. The judgment of the European Court of Human Rights in the Hirst case challenges this position. We wish to ensure that the issues in relation to this important and long-standing policy are fully considered.[22]

The British Government appeal was, however, unsuccessful. By a majority of 12:5, the Grand Chamber held that the British law violated Article 3 of the Convention.[23] The Court emphasised that the entitlement to vote was a right and not a privilege. Whilst there was room for limitations on the right to vote they had to be in pursuit of a legitimate aim and be proportionate. The principle of proportionality required a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. A provision indiscriminately banning all prisoners from voting could not be shown to be in pursuit of a legitimate aim, or to be proportionate.

Whilst Australia has no equivalent to the European Convention on Human Rights, provisions placing restrictions on voting by Australian prisoners are arguably in breach of Australia's obligations under article 25 of the International Covenant on Civil and Political Rights. Article 25 provides that:

> Every citizen shall have the right and the opportunity, ……..without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

Prisoner disenfranchisement provisions are also arguably in breach of the Constitution, which requires that members of the Australian Parliament be 'chosen by the people'.[24] If a provision of this nature was successfully challenged in the High Court on this basis it would be rendered invalid and of no effect.

Increased requirements for identification on enrolment

Under the current provisions of the Act, people seeking to enrol, to transfer their enrolment or to claim age 17 enrolment must submit a signed enrolment form witnessed by an elector or person entitled to enrolment.[25] Those requirements were to be amended by *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004*. That Act required regulations made for the purpose of checking enrolment identity to:

- require the applicant for enrolment to provide documentary evidence of their name and address by providing their driver's licence number; or
- where the applicant does not possess a driver's licence, the application must be countersigned by two persons on the electoral roll who can confirm the applicant's identity and current residential address. The counter-signatories must have known the applicant for at least one month or have sighted identification showing the applicant's name and address.

The intention of the Government is for this Bill to supercede the 2004 changes (which are yet to come into effect) and to introduce a stricter requirement. The nature of the proposed requirements is summarised in the second reading speech as being to:

> introduce a proof of identity requirement for people enrolling or updating their enrolment by requiring that they provide their driver's licence number on their enrolment application. If they do not have a driver's licence, the elector can show a prescribed identity document to a person who is in a prescribed class of electors and who can attest to the identity of the applicant. If an elector does not have a driver's licence or a prescribed identity document, then they must have their enrolment application signed by two referees who are not related to the applicant, who have known the applicant for at least one month and who must provide their driver's licence number.

The changes broadly accord with the recommendation of the majority in the JSCEM report on the 2004 election.[26] The minority were opposed to that recommendation on the basis that:

> No evidence has been produced which would justify the Committee Majority's contention that this provision, enacted only last year and not yet put into operation, is now inadequate and must be replaced by a more stringent requirement.
>
> We also point out that the extra time which would be required for the AEC to process applications substantiated with a range of verifying documentation would create a

> backlog of applications in the period prior to the closing of the rolls, particularly if the Majority recommendation to close the rolls on the day of the issuing of the writs were to be put into effect.[27]

Deregistration of parties – party names

The Bill proposes an elaborate scheme of deregistration and re-registration of parties. The purpose of the scheme is primarily to give effect to government concern over misleading party names, or, more specifically, the name of the party 'Liberals for Forests'.[28] The scheme adopted was recommended by the majority of the JSCEM report on the 2004 election. The concerns of the majority are outlined extensively in Chapters 4 and 5 of the report. They are, essentially, that significant numbers of voters at the 2004 election were misled by Liberals for Forests' how-to-vote cards. The minority disagreed, calling the majority's allegations regarding Liberals for Forests 'nothing more than a political stunt on behalf of the Coalition'.[29]

Removal of requirement for publishers and broadcasters to furnish returns on electoral advertisements

The Electoral Act currently requires publishers and broadcasters to lodge returns with the AEC disclosing details of pre-election political advertising including the identity of the advertiser, the authority for the advertisement, the times it was broadcast or published and the amount charged.[30] The Bill proposes to remove these requirements from the Act. This is a 'government-initiated' amendment.

No explanation is offered in the Explanatory Memorandum but when a previous attempt was made to repeal these requirements the rationale offered was that: 'These provisions place an administrative burden on publishing and broadcasting businesses that is not required because expenditure on electoral advertising is already disclosed by individuals and organisations that authorise the advertisements as required under other sections of the Electoral Act.'[31] A contrary view is that the requirement for broadcasters and publishers to furnish returns provides a means of checking that information received by other parties is accurate and complete.

Main Provisions

Schedule 1

Amendment of the Commonwealth Electoral Act 1918

Item 14 repeals the existing provision governing prisoners' voting entitlement. **Item 15** repeals the existing **subsection 93(8AA)** and substitutes a new section of the same number that makes any person serving a sentence of imprisonment not entitled to vote at federal elections.

Item 29 inserts new **section 98AA** which requires that any regulations made in relation to identification for enrolment must require an applicant to:

- provide their drivers' license number, or, if they do not possess a license
- show to a prescribed elector an identification document of a prescribed kind or otherwise
- have their application countersigned by two electors who can confirm the applicant's name and have known the applicant for at least one month.

Item 36 inserts new **section 99B** into the Act. The new section provides for provisional enrolment for non-citizens who will be granted citizenship between the issue of the election writ and the date of the election. The application must be made between the announcement of an election and 8pm on the third working day after the electoral writs are issued. A 'declaration vote' can then be lodged provisionally until proof of citizenship and identity are provided by the Friday after polling day.

Item 74 inserts the new definition of 'associated entity' into **subsection 287(1)** of the Act. The new definition effectively adds to the existing one:

- an entity that is a financial member of a registered political party; or
- an entity on whose behalf another person is a financial member of a registered political party; or
- an entity that has voting rights in a registered political party; or
- an entity on whose behalf another person has voting rights in a registered political party.

Item 75 repeals the definition of 'broadcaster' from **subsection 287(1)** consistent with the intention to remove the requirement for broadcasters to lodge returns.

Item 79 repeals the existing subsections **305A(1)**, **(2)** and **(3)** and inserts new subsections **305A(1), (1A), (2), (2A)** and **(3)**. These are the provisions which give effect to the policy decision to increase disclosure thresholds for gifts to amounts above $10 000.

Item 82 repeals section **310** and **311** of the Act. These are the sections requiring broadcasters and publishers to furnish returns relating to political advertising.

Item 84 inserts new **sections 314AEB** and **314AEC** into the Act. These sections require that persons other than political parties and candidates (i.e. 'third parties') are required to furnish annual returns relating to gifts received and expenditure incurred in amounts above $10 000.

Item 87 inserts **section 328A** into the Act. This provision extends the requirement for the name and address of persons sponsoring political advertisements to appear at the end of such advertisements to internet advertising.

Items 102 to 139 make amendments to the *Referendum (Machinery Provisions) Act 1984*, that essentially apply the same changes made to the Electoral Act to the Referendum Act.

Schedule 2 Amendments to thresholds

Items 1 to 26 make the changes necessary to implement government policy to increase disclosure thresholds to amounts above $10 000.

Item 27 inserts new **section 321A** which provides a formula for the indexation of the new thresholds amounts.

Schedule 3 Deregistration of certain political parties

Item 2 provides that political parties registered under the Act are deregistered, unless they come within certain exceptions specified in **item 3**.

Item 3 provides for three exceptions to deregistration.

- Paragraph (1) provides that a party is not deregistered if it is a Parliamentary party (i.e. if it has at least one member who is a member of the Parliament of the Commonwealth: s. 123(1) of the Act), and the AEC has determined that it is an 'eligible political party' for the purposes of section 138A of the Act.
- Paragraph (2) provides that a party is not deregistered if it is a Parliamentary party and the AEC determines that the party is an eligible party under section 138A after the party complies with the AEC's request to provide information.
- Paragraph (3) provides that a party is not deregistered if the party claims, within three months of item 3's commencement, that it should not be deregistered and the AEC is satisfied that a member of the party was a candidate for the party at an election and was elected to the Commonwealth Parliament. Paragraph (4) outlines other conditions prerequisite to a claim to avoid deregistration.

Item 4 provides for a waiver of the fee for reregistration for parties deregistered under **item 2**.

Schedule 4 Donations to political parties and independent candidates (tax deductibility)

Schedule 4 inserts new **subdivision 30-DA** into the *Income Tax Assessment Act 1997*. The new subdivision increases the tax deductible threshold for political donations from $100 to $1500 for an income year.

Concluding Comments

This Bill contains a number of proposals which have proven controversial in the past. Many of the provisions have been introduced to previous Parliaments but have been rejected by the Senate. The provisions are unlikely to be any less controversial on this occasion.

Endnotes

1 Senator Eric Abetz, 'Electoral reform: making our democracy fairer for all', Address to the Sydney Institute, 4 October 2005.

2 Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004

3 Joint Standing Committee on Electoral Matters, *The 1998 Federal Election*, Minority Report, p. 158.

4 Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004.

5 Address to Sydney Institute, op. cit., p. 13

6 ibid.

7 AEC, Supplementary Submission, Inquiry into the 2001 federal election, p. 10 http://www.aph.gov.au/house/committee/em/elect01/subs/sub174.pdf

8 Joint Standing Committee on Electoral Matters, *The 2004 Federal Election*, p. 34.

9 ibid., pp. 359–363.

10 *Commonwealth Electoral Act 1918*, s. 101.

11 Australian National Audit Office, Audit Report No. 42, 2001-2002, paragraph 2.4.

12 Address to Sydney Institute, op. cit., pp. 15-16.

13 ibid., p.17.

14 *Commonwealth Electoral Act 1918* s. 93(8).

15 ABS, *Prisoners in Australia 2004*, p. 3.

16 ibid.

17 This is arrived at by subtracting the amount already disenfranchised (9861) from the total amount affected by the new provision (19 236).

18 http://www.aph.gov.au/library/pubs/CIB/2003-04/04cib12.htm

19 BBC News http://news.bbc.co.uk/1/hi/uk_politics/vote_2005/frontpage/4490701.stm

20 Prison Reform Trust and Unlock, 'Barred from voting: The right to vote for sentenced prisoners', March 2005.

21 ibid.

22 ibid.

23 A summary of the judgement is available at: http://www.echr.coe.int/Eng/Press/2005/Oct/GrandChamberJudgmentHirstvUK061005.htm

24 For a detailed consideration of this argument see Jerome Davidson, 'Inside Outcasts: Prisoners and the right to vote in Australia' op. cit.

25 *Commonwealth Electoral Act 1918*, s. 98.

26 *The 2004 Federal Election*, op. cit. Recommendation 3.

27 ibid., p. 359.

28 Senator Eric Abetz, Address to Sydney Institute, op. cit., pp. 20-21.

29 *The 2004 Federal Election*, op. cit., p. 369.

30 *Commonwealth Electoral Act 1918*, sections 310, 311.

31. Explanatory Memorandum, *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004* par. 115.

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