

CHAPTER 2: STANDARDS, QUALITIES AND EXPECTATIONS

This chapter outlines sources of standards for electoral systems, including national and international standards and community expectations. It also proposes a list of the key principles of an Australian electoral system.

SOURCES OF STANDARDS

- 2.1 Standards for electoral systems may be derived from a range of sources, including national and international law, evolving international discourse and practice, and community expectations.

National and international standards

The Australian Constitution

- 2.2 Standards, qualities and expectations for Australia's federal election system primarily derive from the Australian Constitution. As noted in chapter 1, the Australian Constitution contains particular provisions to establish, at the federal level, a system of representative government.²⁸ However, as noted in chapter 3, the Constitution leaves important features of our system of representative democracy, such as compulsory voting, election of members of the House of Representatives by preferential voting, and proportional representation in the Senate, to be set by Parliament. The High Court of Australia has noted that the Constitution provides for the evolutionary nature of representative government as a dynamic rather than purely static institution.²⁹ Throughout the evolution of representative government, successful constitutional challenges brought before the High Court have been few in number.³⁰ These cases are discussed in more detail in future chapters.

International standards

- 2.3 Since 1948 another source of influence in the evolution of electoral laws in Australia has been the development of international standards relating to democratic participation. The *Universal Declaration of Human Rights*, proclaimed by the United Nations (UN) General Assembly on 10 December 1948, states that:

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

²⁸ Australian Constitution, section 1 together with sections 7, 8, 13, 24, 25, 28 and 30.

²⁹ *McGinty v Western Australia* (1996) 186 CLR 140 at 279-280; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 213-214.

³⁰ For example, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 the High Court overturned the complete ban on political broadcasting during election campaigns set out in the *Political Broadcasts and Political Disclosures Act 1991* on the basis that this law infringed a freedom of political communication implied from the Constitution, as there were other less drastic means by which the objectives of the law could be achieved. *Roach v Electoral Commissioner* (2007) 233 CLR 162 overturned provisions banning all prisoners from voting on the basis that they over-reached the constitutional requirement that federal Parliament be 'directly chosen by the people'. The issues arising from these cases are discussed further in chapter 10 (which discusses the implied freedom of political communication) and chapter 4 (which discusses the franchise for prisoners).

Article 21

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives...

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

- 2.4 While the Declaration is non-binding, its provisions have been further elaborated upon in binding international agreements including the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR, to which Australia is a party, provides that:

Article 2

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant...

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

To take part in the conduct of public affairs, directly or through freely chosen representatives;

To vote and to 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...

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- 2.5 International standards relating to electoral democracy are now embodied in a wide range of documents. One useful source of these standards is the *Declaration on Criteria for Free and Fair Elections* (the IPU Declaration), which was adopted by the Inter-Parliamentary Council of the Inter-Parliamentary Union on 26 March 1994 with the unanimous support of the delegations present, including Australia. The Inter-Parliamentary Council is the governing council of the Inter-Parliamentary Union (IPU), which was established in 1889 as an international organisation of parliaments of sovereign states; the IPU website states that it is the 'focal point for world-wide parliamentary dialogue'.³¹ Whilst the IPU Declaration is not legally binding on members of the Inter-Parliamentary Council, including Australia, it has been argued to have significant

³¹ Further information on the IPU is available at www.ipu.org/english/whatipu.htm.

authority and moral persuasiveness as it is founded in principles of 'international law and in the practices of states and international organizations'.³²

2.6 The IPU Declaration recommends principles and standards including that:

- no eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law;
- every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote;
- the right to vote in secret is absolute and shall not be restricted in any way whatsoever;
- everyone has the right to join a political party or organisation for the purposes of competing in an election;
- everyone individually and together has the right to express political opinions without interference; and
- states should take the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law.

The full IPU Declaration is provided at [Annex 2](#).

2.7 The standards set out in the IPU Declaration have since been explored or elaborated in specific research relating to elements of the election process,³³ and by various guidelines developed by intergovernmental organisations.³⁴ These standards, or variants of them, have been used not only to guide election observers, but also for the formal international certification of an electoral process.³⁵

Community Expectations

2.8 In addition to the national and international standards that have affected the evolution of the federal electoral system, this system is also influenced by the expectations of the community. At one level, elections may be characterised as a mechanism for the community to have input to decisions about matters of concern to it. The community can reasonably expect more from Australia's electoral systems than the mere satisfaction of the most basic standards.

³² G S Goodwin-Gill, *Free and Fair Elections: International Law and Practice*, Inter-Parliamentary Union, Geneva, 2006, p. 3.

³³ Relevant research documents include N Steytler, J Murphy, P de Vos and M Rwelamira (eds.), *Free and Fair Elections*, Juta & Co, Ltd, Kenwyn, 1994; J Elklit and P Svensson, 'What Makes Elections Free and Fair?', *Journal of Democracy*, vol. 8, no. 3, 1997, pp. 32-46; J Elklit, 'Free and Fair Elections' in R Rose (ed.), *International Encyclopedia of Elections*, CQ Press, Washington, 2000; and J Elklit, 'Electoral Institutional Change and Democratization: You Can Lead a Horse to Water, But You Can't Make it Drink', *Democratization*, vol. 6, no. 4, Winter 1999, pp. 28-51. More detailed benchmarks identifying quality have been explored in J Elklit and A Reynolds, 'A framework for the systematic study of election quality', *Democratization*, vol.12, no. 2, April 2005, pp. 147-162 (some of the work underlying this study was undertaken in cooperation with the AEC).

³⁴ Key documents include Commonwealth Secretariat, *Good Commonwealth Electoral Practice: A Working Document*, London, June 1997; International Institute for Democracy and Electoral Assistance, *Code of Conduct for the Ethical and Professional Administration of Elections*, Stockholm, 1997; and International IDEA, *Guidelines for reviewing the legal framework of elections*, Stockholm, 2002.

³⁵ For example, in 2007 the UN, at the request of the Government of East Timor, deployed an 'Electoral Certification Team' which assessed the parliamentary and presidential elections in the country against 52 'benchmarks' rooted to a significant extent in the IPU Declaration.

- 2.9 The community may contribute to the evolution of the federal electoral system by participating in public debate, presenting suggestions to elected representatives, and making submissions to the Joint Standing Committee on Electoral Matters (JSCEM).³⁶ In addition, this Green Paper invites the community to make submissions on the question of appropriate standards for the Australian electoral system.

KEY PRINCIPLES OF AN AUSTRALIAN ELECTORAL SYSTEM

- 2.10 Taking into account the standards and expectations that have guided the evolution of our federal electoral system, the following principles might be regarded as the basic principles of an electoral system for Australia. They are proposed as a starting point for consideration rather than an exhaustive or definitive list, and it is noted that some may overlap or inter-relate.
- Representation: Elected legislative bodies should reasonably reflect the voting preferences of the Australian electorate. Representatives from the diversity of the Australian community should be able to stand for election to legislative bodies. Balloting processes should enable voters to truthfully express their choices between candidates or parties.
 - Responsiveness: Elected legislative bodies should be able to be changed by a vote of the people. Significant changes in voter preference from one election to the next should be reflected in election results.
 - Universality: Qualifications for voting should be universal and non-discriminatory, and all persons qualified to vote should have equitable access to enrolment and to voting, without undue difficulty or inconvenience. Appropriate processes and facilities should be devised to cater for electors whose specific needs would make ordinary voting unduly burdensome.
 - Neutrality: Elections should be administered impartially, by politically neutral and independent bodies. Election management bodies should perform their functions in a way which promotes public trust in them, and in the election process. Voters should be able to vote in politically neutral venues. There should be protections against the inappropriate use of the resources of the state for political benefit.
 - Transparency in electoral administration: Participants in electoral processes should have access to adequate information about the basis for decisions on the operation of the electoral machinery.
 - Integrity: Appropriate mechanisms should be put in place to:
 - guarantee a secret ballot;
 - ensure that campaigning and voting is free of any fear or intimidation;
 - preclude voting by persons not qualified to do so;
 - preclude anyone from voting more than once;
 - provide for external scrutiny of electoral processes;
 - ensure that votes are not bought or sold; and
 - enable votes to be counted and tabulated quickly and accurately, without any fraudulent interference.
 - Rule of law: Electoral processes should be governed by clear and unambiguous laws and procedures, providing genuine opportunities for complaints about the process to be lodged and dealt with in an even-handed and transparent way. Electoral processes should be appropriately open to scrutiny and challenge by parties, candidates and voters.
 - Civic culture: Voters should be encouraged to feel a sense of ownership of, and responsibility for the success of, electoral processes, and should be able to obtain accurate information about them. Voters should be sufficiently informed about electoral processes and systems.

³⁶ Further discussion of JSCEM and its role is contained in chapter 3, at paragraphs 3.11–3.14.

- Open political environment: Freedom of political expression (including freedom of the media), and freedom of legitimate political activity should be guaranteed.
- Effectiveness and Efficiency: Electoral processes should be implemented in a timely way, using effective systems. In particular, election results should be accurately and promptly determined. Cost considerations should be appropriately borne in mind in the design of electoral processes.
- Flexibility: Within appropriate boundaries, there should be mechanisms in place to enable prompt adjustments to be made to processes and procedures to reflect changes in societal expectations, and to take advantages of opportunities arising from technological change. This should be balanced against the need to ensure sufficient stability to maintain public trust and confidence in electoral systems.

DISCUSSION POINTS

- 2.11 The standards and key principles discussed in this chapter may provide suitable criteria for an evaluation of options for reforming Australian electoral systems.
- 2.12 These principles are reflected, to varying degrees, in Australia's existing electoral systems. For instance, it might be argued that the principles of 'universality', 'representation', and 'civic culture' are embodied in our system of compulsory voting.
- 2.13 Different principles may be relevant in considering different aspects of the electoral process: for example, 'representation' and 'responsiveness' are particularly relevant to a consideration of voting systems in Australia, while 'neutrality' is particularly relevant to a consideration of electoral administration bodies.
- 2.14 Emphasising particular principles over other principles may result in different outcomes. For example, emphasising 'rule of law' over 'flexibility' might result in very rigid and prescriptive laws and procedures, while emphasising 'flexibility' over 'rule of law' could leave greater discretion in certain areas to electoral administrators.
- 2.15 The principle of 'effectiveness and efficiency' is likely to be particularly relevant to a consideration of the reform options proposed in other chapters of this paper. Given that resources are not unlimited, cost-benefit considerations should be borne in mind when considering what sort of package of reforms might be recommended for Australia's electoral systems. For example, some reform options (such as automatic or online processes for enrolling or updating enrolment) may result in savings which could be directed towards other electoral reforms that might be considered to be a priority. Other reform options might entail a consideration of how best to utilise or redirect existing resources towards programs, processes or activities that will more effectively achieve their objectives, or assessment of priorities having regard to relative costs and benefits. It might also be argued that a balance between efficiency and effectiveness will need to be found, to ensure that electoral standards do not deteriorate.
- 2.16 There are likely to be differing views about which principles should be given priority in Australia's electoral systems, and about the best ways to ensure that particular principles are given effect. Alternatively, it might be argued that all principles are essential and that it is not appropriate to raise any one principle above others. In addition to the principles discussed above, there may be additional principles which might be considered to be important for Australia's electoral system. Comments are invited on these issues. In particular, submissions are invited on the following questions:
- Which of the principles discussed above are the most important to you, and why?
 - Are there any other principles that you consider to be key principles for an Australian electoral system?