



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

GEORGE WILLIAMS

ANTHONY MASON
PROFESSOR
AUSTRALIAN RESEARCH
COUNCIL LAUREATE FELLOW
FOUNDATION DIRECTOR,
GILBERT + TOBIN CENTRE OF
PUBLIC LAW

20 October 2009

Electoral Reform Secretariat
Department of the Prime Minister and Cabinet

By email: electoralreformsecretariat@pmc.gov.au

Dear Sir

Submission on *Electoral Reform Green Paper: Strengthening Australia's Democracy*

Thank you for the opportunity to make a submission on the *Electoral Reform Green Paper: Strengthening Australia's Democracy*. We make the attached submission in our capacity as members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

1. The Franchise

The franchise should be fashioned around the concept of citizenship. We support removing the right to vote in federal elections from 'British subjects' and extending the right to vote further when it comes to expatriate Australian citizens.

'British subject' voters¹

British subjects should lose their right to vote in Australian elections.² British subjects on the electoral roll should be given a final chance to become Australian citizens. If they decide not to take up the invitation, they should lose their Australian voting rights.

¹ Green Paper [4.29] to [4.35].

² See George Williams, 'Time to take away their right to vote', *Sydney Morning Herald*, 30 June 2009.

The report into the 2007 federal election by the Federal Parliament's Joint Standing Committee on Electoral Matters did not take a position on whether British subjects who are not Australian citizens should still be able to vote. This was addressed in supplementary remarks by the chair of the committee, Daryl Melham MP. Melham noted that British subjects eligible to vote in Australian federal elections come from 48 Commonwealth and former Commonwealth countries, such as the United Kingdom, India, Malaysia, New Zealand, Jamaica and Zimbabwe. Collectively, they make up 1.2% of the Australian electoral roll. Wakefield, a seat in South Australia, has nearly 4,000 British subjects enrolled. Many other seats, including several marginal seats, also have a high number of such voters.

It no longer makes sense to preserve the Australian voting rights of British subjects. Since their voting rights were frozen in 1984, Australia has severed its final legal ties to the United Kingdom by enacting the Australia Acts of 1986 (though, it must be said, we have yet to sever our final symbolic ties to the British Empire as represented by our head of state being the monarch of the United Kingdom). In *Sue v Hill* (1999) 199 CLR 462, the High Court even found British citizens to be ineligible to stand for election to Federal Parliament because they owe allegiance to a 'foreign power'.

There are now no sound arguments for granting a select group of foreign citizens the right to vote for Australian representatives and law-makers. The fact that British subjects have voted in the past is not a good reason for them to continue to do so when they have the option to signal their commitment to the nation by adopting Australian citizenship. Changes made in 2002 mean that, under Australian law, foreign citizens can take up Australian citizenship without giving up their citizenship of another nation.³ They should be welcomed if they take up citizenship, but if they choose not to do so it is time that they ceased to be able to vote for members of the Australian Parliament.

*Australian expatriate voters*⁴

Voting should be made easier for Australian citizens living abroad.⁵ At any given time, a significant proportion of the Australian population is overseas, the majority of whom are young, more educated Australians employed in professional, administrative and managerial occupations. The current 'Eligible Overseas Elector' regime impedes many overseas Australians from participating in the electoral process.

In a world connected by many and by new forms of communication, it is important to recognise the many Australians who, for whatever reason, are living abroad as part of a global Australian community. Australians living overseas may still form reasoned opinions on Australian issues and make an informed decision at the polling booth.

The current rules pertaining to Australian expatriates have developed in an ad hoc fashion into a complex and unwieldy body of law. They are in need of reform.

To achieve higher participation rates in the electoral process among expatriates, Parliament should relax the restrictions currently placed on overseas voters. Section 94A(1) of the

³ *Australian Citizenship Legislation Amendment Act 2002* (Cth).

⁴ Green Paper [4.36] to [4.41].

⁵ See Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2004) 32 *University of Western Australia Law Review* 1.

Commonwealth Electoral Act 1918 (Cth) should be amended so that expatriate Australians applying for ‘Eligible Overseas Elector’ status are no longer be required to state the reason why they left Australia. There is no acceptable reason for denying ‘Eligible Overseas Elector’ status to citizens enrolling from overseas who did not relocate for career or employment purposes (or for those of their spouse). In addition, subsection 94A(2) of the *Commonwealth Electoral Act* should be amended so that the current two year cut off point for application for ‘Eligible Overseas Elector’ is extended to three years. While the prior cut-off of one year could conceivably have been inserted to encourage citizens to enrol as soon as possible after departing Australia, the selection of a two-year cut off was a seemingly arbitrary date. An amendment extending the timeline to three years, or a full election cycle, seems more appropriate.

Further changes should include extending the period that Australians living overseas can continue to vote to ten years (the United Kingdom, for example, does not prevent its overseas citizens from voting until they have been abroad for 20 years). The law might also be changed (to be like that in New Zealand) such that an elector is not disenfranchised so long as he or she has returned to Australia at least once during the prior three years

2. Enrolment and Participation

The ‘free and fair’ nature of Australian elections is underpinned by the ‘participation principle’, which requires that all citizens enjoy an equal opportunity to participate in the electoral process and to access the ballot box.⁶ The fact that 1.2 million eligible Australians are not on the electoral roll is unsatisfactory. In order to achieve increased participation in Australia’s democracy, we support the following three reforms referred to in the Green Paper:

Closure of the rolls⁷

Changes to our electoral laws should be judged, among other things, according to how well they contribute to the greatest number of eligible Australians having their say at the ballot box. The 2006 close of the roll amendments compromised the integrity of our electoral system. These amendments required that the electoral roll close at 8pm on the same day that the writ for the election is issued, with people wanting to change their details given a further three days to do so.

According to the Australian Electoral Commission, in the seven days before the close of the rolls for the 2004 federal election, 423,000 people either enrolled for the first time or changed their details. At the 2007 election, the roll increased by only 1,466 new voters during the shortened period. As stated in the Green Paper, 100,370 Australians missed the close of rolls deadline for enrolling or changing their enrolment details at the 2007 election, meaning that the number of disenfranchised voters was greater than the average total enrolment in an electoral division.⁸ They were either not on the electoral roll or were listed with incomplete

⁶ Bryan Mercurio and George Williams, ‘Australian Electoral Law: Free and Fair?’ (2004) 32 *Federal Law Review* 365.

⁷ Green Paper [7.12] to [7.18], and [7.83] to [7.92].

⁸ *Ibid* [7.84].

or incorrect details. The effect was disastrous in disenfranchising thousands of people who were entitled by law to vote.⁹

The pressure placed upon the Australian Electoral Commission to accurately check and assess the veracity of enrolment claims received is a real issue, but it should be dealt with by providing the commission with the resources it needs to do the job properly. This issue is not a justification for disenfranchising people.

The seven days that had been provided before the close of the rolls should be restored. Alternatively, an even better solution would be to move to a system of automatic enrolment.

Automatic Enrolment¹⁰

An eligible elector should be added to the electoral roll or an elector's enrolment details should be updated based on data obtained from other reliable government sources, subject of course to a rigorous quality assurance process. A system of automatic enrolment is consistent with the legal requirement of compulsory enrolment.

People should be entitled to 'opt out' of automatic enrolment. The converse, an 'opt in' system, would be counter-productive in terms of maximising voter enrolment because many of the people who currently do not enrol would be the same people who would not take the necessary steps to 'opt in' to the new system. A right to 'opt out' strikes the right balance between maximising participation and safeguarding privacy and other rights.

3. Eligibility for Federal Parliament¹¹

The purpose behind section 44 of the Australian Constitution is obscure and anachronistic. Moreover, the provision has been interpreted in such a way that hampers Australian democracy. The leading High Court decision on ss 44(i) and (iv) is *Sykes v Cleary* (1992) 176 CLR 77. It demonstrates that both ss 44(i) and (iv) should be amended. Of course, s 44 can only be altered in accordance with s 128 of the Constitution.

Section 44(i): 'allegiance to a foreign power'

The operation of s 44(i) lacks clarity and precision. For example, the wording of the provision does not make it clear that it is insufficient that prospective candidates go through an Australian citizenship ceremony. In fact, a person is incapable of being chosen unless he or she also takes the further step of divesting him or herself of nationality under the law of the other country. While there are some important policy reasons for a provision such as s 44(i), it, like s 44(iv), has a potentially draconian impact that should be remedied. Given that almost one in four Australians were born overseas, s 44(i) prevents almost five million Australians from being a candidate for Federal Parliament.¹² Either the wording of s 44(i) should be amended to make its scope more clear, or it should allow persons to stand for Parliament where they have gone through an Australian citizenship ceremony.

⁹ George Williams, 'Time to take away their right to vote', *Sydney Morning Herald*, 30 June 2009 at 11. George Williams, 'Missing out on a vote', *Herald Sun*, 24 May 2007.

¹⁰ Green Paper [7.38] to [7.46].

¹¹ Green Paper [8.47]-[8.60].

¹² Green Paper [1.25].

Section 44(iv): ‘office of profit under the Crown’

The operation of s 44(iv) is unsatisfactory in that it discriminates against the ability of public servants and other public officials to run for public office. In order to do so, such people must resign their position before any indication of whether they have been successful in the ballot. While there are strong policy reasons for a sitting member of Parliament not holding ‘an office of profit under the Crown’, this should not operate to force candidates out of public sector employment before their actual election. Resignation by public servants should be required at the time of the declaration of the poll, rather than at the point of nomination. Section 44(iv) cuts in too early.¹³ The words ‘of being chosen or’ in s 44 should be deleted.¹⁴

4. Truth in Political Advertising¹⁵

As the Green Paper makes clear, there is relatively little regulation of campaign advertising in Australia. False political advertising should be better regulated. The provision of accurate information to voters goes to the heart of the ‘knowledge principle’ which underpins ‘free and fair’ elections in Australia.¹⁶

Even though there is not a high likelihood of many prosecutions under any such a provision, it would stand as a clear statement that the law does not tolerate campaigning of this type. The provision would be useful as a deterrent, and might help to curb the cynicism of the electorate towards the political process. It should also be seen as part of improving ethical standards in electioneering.

Legislation restricting political advertising will need to be carefully drafted so as not to fall foul of the implied constitutional freedom of political communication. The High Court has stated that there is no absolute right to engage in political speech, including political advertising. Accordingly, political advertising might be regulated on the basis of meeting some other significant public interest. The public interest of proscribing false political advertising would be such an interest.

The boundaries of what is ‘political advertising’ are obviously imprecise. Nevertheless, it would be possible to draft a definition capable of encompassing most forms of political advertising, and not other advertising such as commercial advertising. Such a definition might focus upon the purpose of political advertising, that is, that the advertising is directed at influencing a voter as to how he or she should cast his or her vote at an election.¹⁷ The definition might be further restricted to only encompass advertising occurring during an election period.

¹³ *Sykes v Cleary* (1992) 176 CLR 77.

¹⁴ Note that this change will apply to s 44(i)-(v).

¹⁵ Green Paper [10.53] to [10.66].

¹⁶ Bryan Mercurio and George Williams, ‘Australian Electoral Law: Free and Fair?’ (2004) 32 *Federal Law Review* 365.

¹⁷ See the definitions of ‘political advertisement’ and ‘political matter’ in *Political Broadcasts and Political Disclosures Act* 1991 (Cth), ss 95B, 95C, and 95D.

In imposing any restriction, Parliament should err on the side of caution and draft a narrower rather than a broader restriction. The law should proscribe political advertising that makes an assertion of fact that can be proven to be false.

It should also be a defence if the person:

1. Was unaware of the falsity of the material published;
2. Did not publish the material recklessly, that is, not caring whether the material was true or false; and
3. The publication was reasonable in the circumstances.

There should be no sanctions imposed on third party publishers unless it can be shown that such a publisher was itself aware that the political advertisement was false. A third party publisher should not be required to undertake onerous enquiries as to the truth or falsity of any political advertisement.

Where a breach occurs, there should be the possibility of a significant fine. Consistent with the public interest, the law should also provide for the withdrawal of advertisements, injunctions and the publication of corrections.

Yours sincerely



Professor George Williams



Mr Ben Teeger
Social Justice Intern