

Submission

on the

Electoral Reform Green Paper: Strengthening Australia's Democracy

to the

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27 November 2009

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1. Introduction

The Australian Government is conducting a consultation on electoral reform. The *Electoral Reform Green Paper: Donations, funding and expenditure* was released in December 2008 and public comment sought on the issues raised in that paper.¹

In September 2009 the *Electoral Reform Green Paper: Strengthening Australia's Democracy* was released.² The purpose of this second green paper is “to invite comment on a range of matters relevant to strengthening our national electoral architecture and processes generally. In developing this Green Paper, the Australian Government has consulted the states and territories. This Green Paper is intended to provide a basis for identifying possibilities for coordinated reform to Commonwealth, state and territory electoral systems.”³

Public comment has been invited on the issues raised in the Green Paper. Submissions are due by 27 November 2009.

FamilyVoice Australia is a national organisation which, among other things, has a longstanding interest in democracy, the rule of law, constitutionalism and the separation of powers. It is independent of all political parties.

2. Democratic principles

The following principles are of central importance to a well-functioning representative democracy and should be given particular attention in any proposed reforms.

2.1 Individual freedom

As Professor Lumb points out in his book *Australian Constitutionalism*, the roots of the modern Australian system of government lie in the debates and battles in earlier centuries over providing a system of effective constraints on government power.⁴ The idea of the rule of law, or limited government, overturned the earlier doctrine of unlimited sovereignty under which people were subject to the arbitrary will of the ruler.

The core idea of the Australian system of government is recognition of the right of the citizen to freedom under the law. This fundamental freedom is expressed in many ways, including the right to stand for election and vote, and also through the right of a citizen to use his financial resources to further his political objectives. Any constraint on these activities needs to be fully justified.

This recognition of individual freedom emerges from the Judaeo-Christian understanding of mankind being made in the image of God and therefore being entitled to respect and dignity.⁵

2.2 Freedom of association

Another central element of the dignity of mankind is the recognition that people are inherently relational and naturally join with others in groups of various kinds.

In a political context this involves “recognition of the fact that between the ruler and the mass of the citizenry there are a variety of groups to which the citizens belong. They may be occupational (guild, union, association), religious (church), educational (school, university), cultural and social. Certainly, in earlier periods, battles over authority and allegiance were often fought between an overweening

State (Monarch) and the Church anxious to preserve the rights of its members but also at times encroaching on such rights. The concept of limited sovereignty recognises that claims to allegiance or obedience may arise from a number of groups...”⁶

Political parties are among the kinds of association which citizens should have the freedom to form or to join.

Restrictions on the activities of political parties need to be fully justified.

2.3 Civil society

Freedom of association provides the basis for civil society, which has been defined by the London School of Economics Centre for Civil Society as follows:

*Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.*⁷

The links between civil society and democracy were explored by Alexis de Tocqueville and developed by 20th century theorists like Gabriel Almond and Sidney Verba, who identified civil society as having a vital role in a democratic order.⁸ They argued that many civil society organisations facilitate better awareness and a more informed citizenry, who make better voting choices, participate in politics, and hold government more accountable as a result. Such organisations also accustom participants to the processes of democratic decision making.

Consequently, electoral laws should facilitate, not hinder, the organisations which constitute civil society, including political parties, trade unions, business associations and advocacy groups.

2.4 Representative democracy

Australia's system of representative democracy must be distinguished from direct democracy on the one hand and totalitarian democracy on the other.

Representative democracy is characterised by elected representatives who form a parliament charged with the responsibility of making decisions and acting in the public interest – without direct consultation with the electorate. This enables swift and resolute action in the face of changing circumstances.

Direct democracy involves decisions being made either by referendum or by delegates to a ruling body bound to vote in accordance with decisions made by a majority of their electors. Such a system is inherently slow and can be dominated by sectional interests.

In a totalitarian democracy, elected officials are bound to support an ideology independently of the views of the electorate. The ideology may be considered beyond the understanding of the electorate. The duty of the officials is to ensure that any inconsistent public or private activities are eliminated.⁹

Representative democracy works best when elected representatives maintain a close relationship with their constituents. While not being bound by their electorate, representatives are then able to take the views of the electorate into consideration when decisions are made in parliament.

Electoral laws should not hamper the development of a close working relationship between representatives and their constituents.

2.5 Integrity

Central to the conduct of a free and fair election is the integrity of the electoral roll. The integrity of the electoral roll must not be compromised and all Australians should have confidence in the accuracy of the roll.

Similarly, the integrity of the actual process of voting is vital to a healthy democracy.

The voting process can be considered to have integrity if two conditions are satisfied. Firstly, the identity of each voter should be correct, ie the person voting should be the elector whose name is marked as having voted. Secondly, each voter should vote only once.

3. Legal framework for elections

3.1 Harmonisation

While there would be many obvious advantages to greater harmony between jurisdictions in certain matters of electoral procedure, this should not be pursued at the expense of a proper respect for federalism.

As the Green Paper rightly observes: “One advantage of a federal system is that there are opportunities for innovation and experimentation, because various jurisdictions are able to act independently of the others.”¹⁰

Any pursuit of harmonisation must work through the proper federalist channels and fully respect the independent political processes in each jurisdiction.

3.2 Prescriptiveness

The Green Paper notes that “one advantage of highly prescriptive electoral laws is that they encourage political consensus by requiring the Parliament to agree to more of the details of electoral processes. They may also leave fewer matters open to the interpretation of the courts. In addition, highly prescriptive laws may heighten public trust in the electoral system, and may also serve as a mechanism for deflecting criticism from the electoral administration, which can point to a legislative basis for particular decisions or processes.”¹¹

These are good reasons to keep the detailed provisions for electoral processes in statute law rather than encouraging a shift to subordinate legislation, which is less subject to parliamentary debate. Subordinate legislation can be disallowed but cannot be amended. This is not a satisfactory means to deal with electoral law, which by its very nature, is of fundamental concern to our elected representatives.

Recommendation 1:

Electoral law should continue to be defined in statute law, not subordinate legislation. This would ensure that electoral matters are subject to full and robust parliamentary debate, including possible amendment of the enabling bill.

4. Franchise

4.1 Prisoners

The current exclusion from the right to vote of prisoners serving a sentence of three years or more is appropriate.

Those who are convicted of breaking the law in a serious manner should not, while serving a custodial sentence for this breach, be able to participate in electing those who make the laws.

The restriction is balanced in that it neither excludes those serving lesser sentences nor fails to restore the right to vote once the sentence is complete.

Recommendation 2:

That the current restrictions on the right to vote for certain prisoners be maintained.

4.2 Citizens living overseas

Citizenship is the status of being a full political member of a nation. Australian citizens living overseas retain the privileges and responsibilities of citizens who live in Australia. They are entitled to Australian consular assistance, can travel on an Australian passport and, in the event of conscription could be subject to military service in defence of Australia.

In considering the right to vote, there is a need to balance the continued formal connection of Australian citizens living overseas with Australia with the reality that, after a certain period of time, and in the absence of an intention to return to Australia, such citizens' stake in the governance of Australia may diminish.

While there may be no perfect formula, the current arrangements seem reasonable and in the absence of any pressing difficulties should be left unamended.

Recommendation 3:

That the current provisions for voting for Australian citizens who live overseas be maintained.

4.3 Permanent residents

Granting permanent residents the right to vote would create a disincentive for such persons to seek citizenship. Citizenship requires the passing of a test to establish capacity in the English language and a basic knowledge of Australia and its shared values. It also requires the taking of an oath or affirmation of allegiance.

Each of these things is a fitting prerequisite before the right to vote is conferred.

Recommendation 4:

That no change be made to the electoral law to allow permanent residents or other non-citizens the right to vote.

4.4 Persons of unsound mind

The current provisions seem to provide an appropriate balance between the right (and duty) of every citizen to vote and the burden that this may place on persons of unsound mind given their inability to give due consideration to the decision-making process involved in voting.

Recommendation 5:

That there be no change to the provisions in electoral law for persons of unsound mind.

4.5 Children aged 16 or 17

Under Australian law persons aged under 18 are still considered to be children or minors.

Recent developments in psychology and neurobiology indicate that the adolescent brain does not complete its development until the early twenties. This lack of full brain maturity is linked to risk taking behaviour and to emotional immaturity.¹²

There is no serious case for extending the franchise to 16 or 17 year olds.

Recommendation 6:

That no consideration be given to extending the franchise to 16 or 17 year olds.

5. Representation and voting systems

5.1 Current system

The House of Representatives, like all lower houses in Australia except for Tasmania's, is composed of members elected from single-member electorates. This system favours large political parties and generally results in a party or coalition having a clear majority in the lower house, thereby enabling the formation of a strong government. This is a desirable outcome.

However, in the absence of a strong upper house, however, an unfettered government may become effectively an elected dictatorship.

A government having no effective checks on its power can become crudely 'majoritarian' and ignore the views even of substantial minorities in the community. In contrast to majoritarianism, a healthy democracy, according to John Stuart Mill, includes a 'willingness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views'.¹³

For an upper house to provide an effective check on such majoritarian rule it is desirable that it is not usually controlled by any major party or coalition. Rather, the composition of the upper house should reflect a broader range of community opinion than the lower house. This is best achieved with multi-member electorates and proportional representation as the voting system.

Another positive contribution that upper houses can make to good government is stability. When the government formed in the lower house changes, a new and inexperienced government may make hasty decisions and introduce ill-conceived legislation. An upper house elected by rotation, with only half of the members facing re-election each time, provides greater continuity of experience and stability.

Governments formed in the lower house are rightly accountable to the people at elections every three years. However this can lead to short-term thinking and planning which may not be in the best interests of the nation. A longer term for upper house members has the advantage of encouraging a longer-term perspective when government legislation is reviewed. Even members of a major party are encouraged to think more independently when they don't have to face an election so frequently.

The Australian Senate reflects these strengths of multi-member electorates, proportional representation and a rotation system of re-election.

Recommendation 7:

The current electoral system for the House of Representatives and the Senate should, subject to the detailed recommendations below, be maintained.

5.2 Optional preferential voting for the House of Representatives

Optional preferential voting effectively disenfranchises those voters who may not fully understand the consequences of not expressing an order of preference for all the parties or groups contesting the election. In particular votes for minor parties or independents which fail to indicate a preference for either of the major party candidates would frequently be exhausted before the final determination of a ballot.

The current system of preferential voting for the House of Representatives ensures that the person elected is at least not the last preferred candidate of more than 50% of those who cast valid votes.

Under an optional preferential system a candidate who did not even attract a preference vote from more than 50% of those who cast valid votes could still win the election.

Full preferential voting is the appropriate way to determine which candidate should represent a single member electorate.

Recommendation 8:

Optional preferential voting for the House of Representatives would produce undesirable outcomes and effectively disenfranchise some voters. It should not be introduced.

5.3 Senate above the line preferential voting

The current system provides for “above the line” voting for the Senate by voters putting a “1” in the box next to their party or group of choice. The effect of this vote is determined by a ticket (or tickets) lodged by the party or group with the AEC allocating preferences.

Although these tickets are available on the AEC website, at AEC offices and on display at polling booths, it seems apparent that most voters pay little if any attention to the tickets. This means, that unlike the House of Representatives where voters determine the preference flow of their vote, the preference flow of Senate votes is essentially determined by political parties.

The option of numbering each candidate “below the line” is, given the number of candidates, daunting to many voters.

This problem could be resolved by requiring voters to indicate their own preferences either for parties and groups above the line or for individuals below the line. Under this proposal, below the line voting would remain the same, but when voting above the line, the voter would be required to number all boxes in order of preference.

The privilege of a group being listed above the line should be restricted to registered parties. Independent candidates or groups of candidates from an unregistered party should be listed only below the line. The ballot paper would then list the parties above the line and the individual candidate or candidates below the line.

Preferences marked above the line would first flow to candidates within the party in the order they are printed on the ballot paper. The preference would then flow to candidates in other parties in the order indicated by the voter. Preferences marked above the line should not flow to candidates listed only below the line.

This system would suit voters who find allocating preference to some fifty candidates too daunting but who would have no trouble in allocating preferences to about seven party groups. This system would also eliminate the need for the AEC to collect, print and distribute preference tickets from all the parties taking part in the election. Wall charts or booklets showing preference allocations would not be needed.

Recommendation 9:

The Senate voting system should be changed to require voters to indicate their own preference order, either:

- *by parties above-the-line, or*
- *by candidates below-the-line.*

Preferences given to parties above the line would flow to candidates below the line in the order printed on the voting form, and then to the candidates of the second preference party in order printed on the voting form, etc. Preferences given to parties above the line would not flow to candidates listed only below the line.

6. Electoral management bodies

No comment on this topic.

7. Enrolment and participation

7.1 Close of the electoral roll

Following changes to the electoral law the electoral roll was closed to new enrolments from 8pm on the day the writs were issued.

The change was recommended by the by the Joint Standing Committee on Electoral Matters in its report on the 2004 federal election.

Concerns were raised that this change would result in a significant under enrolment of 18 year olds. For example, Labor MP Mr Michael Danby wrote:

Last year, according to the AEC, only 126,000 of Australia's 260,000 18-year-olds, or 48%, were enrolled to vote. That is, 134,000 18-year-olds would not have been enrolled to vote if we had had a federal election last year.

This is part of a larger problem of under-enrolment in Australia. Despite compulsory enrolment, and despite strong population growth, we have 50,000 fewer enrolments in April 2006 than we had in April 2005. This is because the AEC has been more aggressively removing people from the roll when they change address and fail to re-enrol at their new address.

This problem will become acute when we reach the election. Not only has the Howard government made it more difficult to enrol, it has also reduced the ability of voters to enrol once an election is announced. The "period of grace" for enrolment of five working days after the issuing of the writs has been cut to one day.

Tens of thousands of people will find themselves not on the roll when the election is called – and of course under our system of non-fixed terms, the Prime Minister can call an election any time he likes.¹⁴

It is useful to compare the percentage of 18 year olds enrolled to vote for the 2004 election with those enrolled to vote for the 2007 election.

The Australian Bureau of Statistics gives the estimated population aged 18 years as at June 30 as 279,637 for 2004 and 287,924 for 2007.¹⁵ The Australian Election Commission (AEC) gives the number of 18 year olds enrolled to vote at the close of rolls for the 2004 election as 186,409¹⁶ and for the 2007 election as 205,645¹⁷. This represents an increase from 66.66% in 2004 to 71.42% in 2007.

It appears that the advertising campaign conducted by the AEC, as well as the publicity about the closure of the rolls on the day the writs were issued generated by community groups, including those opposed to this change, resulted in a more successful enrolment of 18 year olds than the old system with its seven day grace period for enrolments after the writs were issued.

Recommendation 10:

The current provisions for the closing of the rolls should be maintained.

7.2 Proof of identity

The evidence cited above also indicates that concerns about 18 year olds failing to enrol due to new proof of identity requirements were unfounded.

Recommendation 11:

The current provisions for proof of identity when enrolling should be maintained.

8. Party registration

No comment on this topic.

9. Civics education

Basic education in civics, including electoral processes should be part of the curriculum in all schools. These matters should be addressed thoroughly during the years of compulsory schooling to ensure all future voters have received relevant information.

As education curriculum is a state matter, the Commonwealth should encourage civics education through the appropriate Commonwealth-State forums.

Recommendation 12:

The Commonwealth should encourage all States and territories to ensure that civic education including an understanding of electoral processes is provided to all students during the years of compulsory schooling.

10. The campaign

10.1 Truth in advertising

Proposals for truth in advertising laws to apply to electoral campaigning have a superficial appeal. However, such laws would be likely to trespass on the implied right to freedom of political speech. The existing robust methods of democracy give ample opportunity for defeated political parties to expose inaccuracies or dishonest promises made by a successful political party in an election campaign. The next election is always just three years away!

Recommendation 13:

Truth in advertising laws for election campaigns are unworkable and undesirable and should not be pursued.

10.2 Section 351 of the Commonwealth Electoral Act 1918

This provision makes it an offence for an organisation to recommend, even by implication, that electors vote for a particular candidate without having the express permission in writing of that candidate.

This provision, if fully enforced, would significantly hamper the democratic process during election campaigns.

Why shouldn't an environmental group be able to recommend a vote for whichever candidate they think would best advance their policy concerns regardless of whether the candidate authorises them to do so?

Many community groups from across the political spectrum engage in making these kinds of recommendations to their supporters.

Examples given to justify this section usually involve the making of false claim that a candidate's views are in line with those of the organisation recommending a vote for the candidate.

However, the provision does not only penalise false or misleading claims. It also prohibits truthful communications from organisations about the voting record or stated views of candidates. There is no justification for this draconian measure.

Recommendation 14:

That Section 351 of the Commonwealth Electoral Act 1918, which wrongfully prohibits civic organisations from recommending a vote for a particular candidate or party, be repealed.

10.3 Media blackout

The current provisions regarding a media blackout in the final period of an election campaign draw the appropriate balance between the freedom of political communication and the danger that a new matter detrimental to the success of a party or candidate could be raised in the mass media in the period immediately before or as an election is actually taking place with limited opportunity for the affected party or candidate to respond.

Recommendation 15:

That the current provisions for a media blackout in the final stage of an election campaign be maintained.

10.4 How to vote cards

The familiar scene of several volunteers offering how to vote cards, each recommending a vote for a particular candidate or party, to electors as they approach the polling booth is a vibrant part of a robust democracy in action.

For many of these volunteers this is the only overt political activity they may engage in. The ability of parties and candidates to recruit volunteers for this purpose is a sign of a healthy democracy with a pleasing level of civic engagement.

Those who have engaged in this activity almost universally remark on the mutual respect exhibited towards volunteers handing out the how to vote cards of rival candidates and parties.

How to vote cards play a significant role in assisting voters complete their ballot papers in such a way as to ensure a formal vote by the numbering of all squares as well as by advising voters on the recommendations for preferences by the candidate or party who attracts their first preference vote.

Any proposal to curtail this process by banning the handing out of how to vote cards at polling booths is ill-conceived and unworthy of support.

Recommendation 16:

That the current provisions for handing out how to vote cards at polling booths be maintained and that no steps be taken to curtail this democratic activity.

11. Polling

11.1 Integrity of the Voting Process

The process of voting can be considered to have integrity if two conditions are satisfied. Firstly, the identity of each voter should be correct, ie the person voting should be the elector whose name is marked as having voted. Secondly, each voter should vote only once.

Consider the federal electorate with 50 polling places. Suppose John knows the full name and address of Bill who also lives in this electorate and the polling booth at which Bill intends to vote.

Currently, John can go to the same polling place as Bill to cast his own vote, and then go to the other 49 polling booths and vote under Bill's name, thus voting 50 times in the election, in a marginal electorate. If several people did this, the extra votes could have a significant effect on the outcome of the election.

The current AEC processes will quickly identify that Bill has voted multiple times when the lists of voters at each polling booth are compared after voting closes. However that will only lead the AEC and the Australian Federal Police to Bill, who has done nothing wrong and is completely unaware of John's dishonest voting.

Although the number of extra votes could be identified, they could not be removed from the count because there is no way of knowing which candidate gained the invalid votes. If the number of extra votes were sufficient to change the result of the election, the best that the losing party could hope for is an appeal to the Court of Disputed Returns, which may or may not order another election. The process of having another election is time and resource consuming, and a hassle for everyone involved. The hassle may also affect the voting of the electorate, which may prejudice the party that sought another election.

In a close election such a disputed outcome could affect which party had the numbers to form a government. It is not prudent to wait until after this occurs to improve the integrity of the voting system.

11.2 Voter identity

The integrity of the voting system requires that a person vote only once, and as themselves. Bank tellers routinely verify the identity of customers by requiring them to produce adequate personal identification, such as a driver's licence. A similar procedure for verifying the identity of voters at polling booths should be feasible.

With such a requirement enforced, it would be very difficult for one person to claim to be someone else and vote as that person. With a requirement to show adequate personal identification in place, a person could only vote multiple times as themselves, and would be identified by existing AEC processes.

Recommendation 17:

To prevent a person from voting either multiple times or under another name, each person should be required to provide adequate personal identification to the AEC officials at polling booths prior to casting their vote.

11.3 Voting locations

An alternative solution to the problem of multiple voting is to limit each voter to one polling place, as advised by the AEC. The AEC, which already mails information regarding the election to each household, could include a card assigning the electors at that address to a designated polling place.

If a person were unable to attend that polling booth, they would still be able to use absentee voting, but their vote would not be counted immediately. The counting of those votes could then wait until there has been a comparison with other absentee votes and the electoral roll in the polling booth to ensure that a person has neither voted normally, nor tendered multiple absent votes.

Recommendation 18:

As an alternative to adequate personal identification of voters on the day of the election, to prevent a person from voting either multiple times or under another name, each person should be required to vote either at a polling booth assigned by the AEC or use an absentee vote.

11.4 Compulsory voting

Every Australian citizen who is above the age of 18 years on the date of a federal election is legally required to enrol and to vote. Compulsory voting, which was introduced for Australian federal elections in 1924 and first used in the 1925 elections, is relatively unusual among world countries.

While it could be argued theoretically that true democracy demands the right to refuse to vote, the practical reality is that compulsory voting produces a better indication of the opinion of the people than voluntary voting.

Other constitutional democracies which have voluntary voting, such as Britain and the United States of America, have much lower participation in elections than Australia. The United States of America spends huge sums of money on encouraging people to vote, regardless of which party they vote for. Voluntary voting also creates the possibility that some areas could be ignored in attempts to encourage voting if the residents seem likely to vote in the opposite manner to those organising the “encourage people to vote campaigns”. The number of UK votes cast to elect the European Parliament was reported to be less than the number of votes cast in the British version of the television show Big Brother.¹⁸

Recommendation 19:

Compulsory voting should be retained to ensure that Australian governments are determined by most of Australia’s adult population.

12. Scrutiny of ballots

12.1 Same electoral roll for a re-election

In the event of a re-election following a successful challenge to an election result, in order to avoid any attempt at fraudulent enrolments the same electoral roll used for the election should be used for the re-election.

Recommendation 20:

In the event of a re-election being ordered followed a disputed return then the same electoral roll used for the original election should be used for the re-election.

13. Endnotes

1. *Electoral Reform Green Paper: Donations, funding and expenditure*, December 2008; http://www.pmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf
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