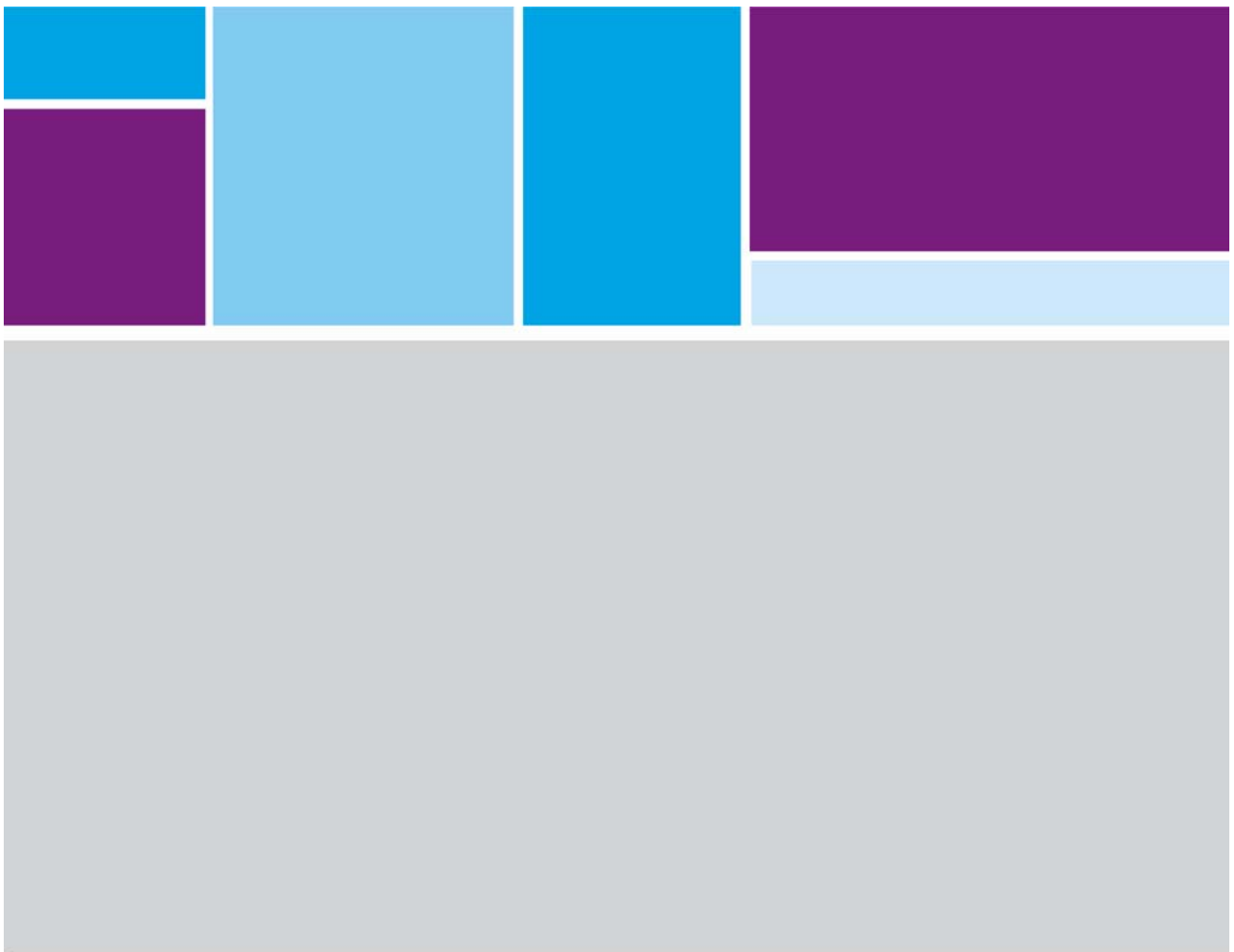


# AEC Submission to the Government's *Electoral Reform Green Paper – Strengthening Australia's Democracy*

27 November 2009



**AEC**

Australian Electoral Commission

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# 1: Introduction

1.1 On 23 September 2009, the Special Minister of State released the Australian Government's second *Electoral Reform Green Paper – Strengthening Australia's Democracy* (the Green Paper) for public consultation. This submission is provided by the Australian Electoral Commission (AEC) in response.

1.2 This submission seeks to provide an AEC perspective on the most significant challenges faced in delivering best practice electoral services that meet the needs of the community both now and into the future. The AEC is of the strong view that urgent action needs to be taken to modernise the manner in which the electoral franchise is delivered. Modernisation, especially as it relates to electronic forms of interaction, will reflect community expectations and allow electors to interact with the AEC in the same way that they increasingly interact with government and the private sector in the course of their normal day-to-day activities.

1.3 In respect of the many specific issues which have been raised in the Green Paper, the AEC reiterates the tenor and thrust of its submissions and evidence to the Commonwealth Joint Standing Committee on Electoral Matters (JSCEM) during the current and previous Parliaments.

1.4 The AEC is of view that many of the measures contained in the JSCEM's *Report into the conduct of the 2007 federal election and matters related thereto* are urgently required to address barriers that are faced by eligible electors in accessing and maintaining their franchise.

1.5 These measures, once operational, will immediately assist the AEC to address low participation levels currently evident in the Commonwealth electoral system despite the compulsory nature of enrolment and voting. Some of these issues are discussed in parts 2 and 3 of this submission.

1.6 Unless electoral processes are modernised the AEC will remain unable to make full use of emerging technologies and process efficiencies to deliver the innovative and elector-centric services that the wider community increasingly expects.

1.7 At present, modernisation and innovation at the Commonwealth level are hampered by overly-specific, restrictive and complex electoral legislation. These barriers to change mean that the AEC is rarely able to match innovations pursued by its counterparts in the States and Territories.

1.8 Medium to longer term measures to improve the electoral process should include moving towards 'principles-based legislation' designed to provide the levels of

responsiveness and flexibility required to enable the AEC to provide accessible electoral services that meet the evolving needs of the community, and are delivered where, when and how they are required.

1.9 Such legislation should provide sufficient flexibility to allow the AEC to share in and adopt innovations in a timely way, wherever they are appropriate and practicable for use at Commonwealth elections. Further medium and longer term issues are discussed in part 4.

## 2: Participation - a burning platform?

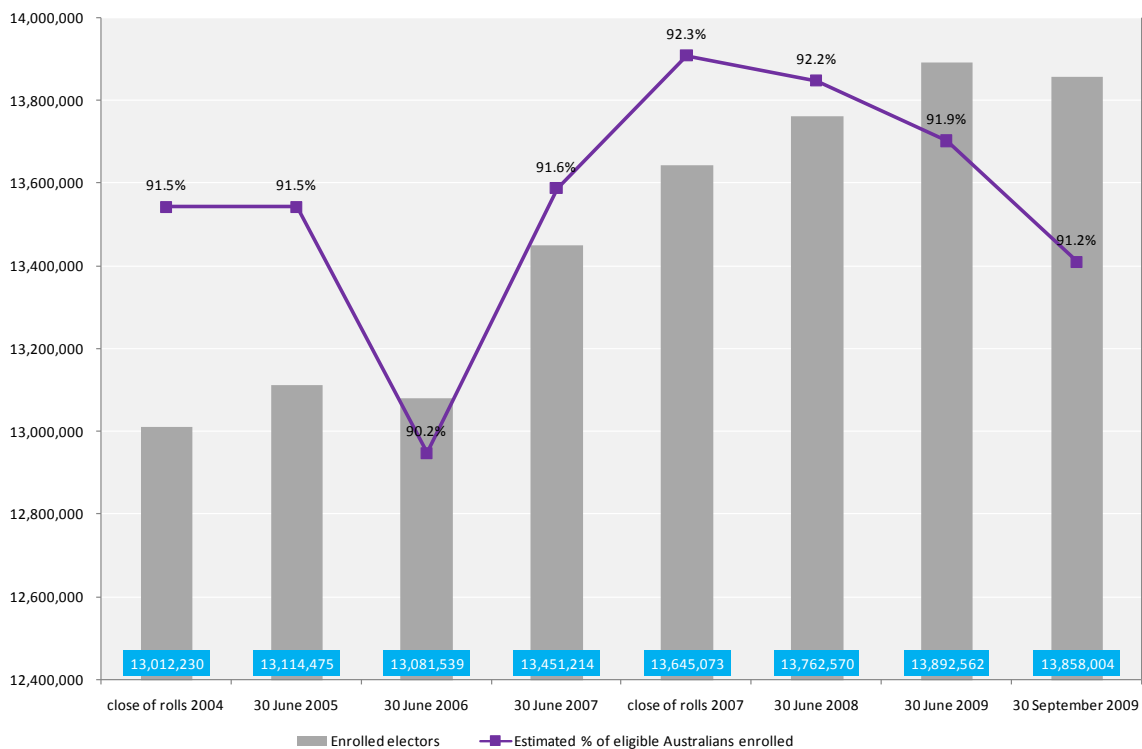
### Challenges in maintaining and increasing participation in the electoral process

2.1 One of the biggest challenges currently facing the AEC is that of ensuring that all eligible Australian citizens are able to exercise their key democratic right - their franchise.

2.2 There is currently a legitimate expectation on the part of stakeholders, particularly State and Territory electoral authorities, that the electoral roll should be as accurate and complete as possible at *all* times, reflecting the fact that the roll is also used for State, Territory and local government elections on an ongoing basis.

2.3 The number of electors on the Commonwealth electoral roll at the close of rolls for the 2007 federal election was 13,645,073 (estimated as 92.3% of eligible electors) and at 30 September 2009 there were 13,858,004 (estimated as 91.2% of eligible electors) on the Commonwealth roll.

**Figure 2.1 Number of enrolled electors and estimated eligible enrolled population, close of rolls 2004 to September 2009**



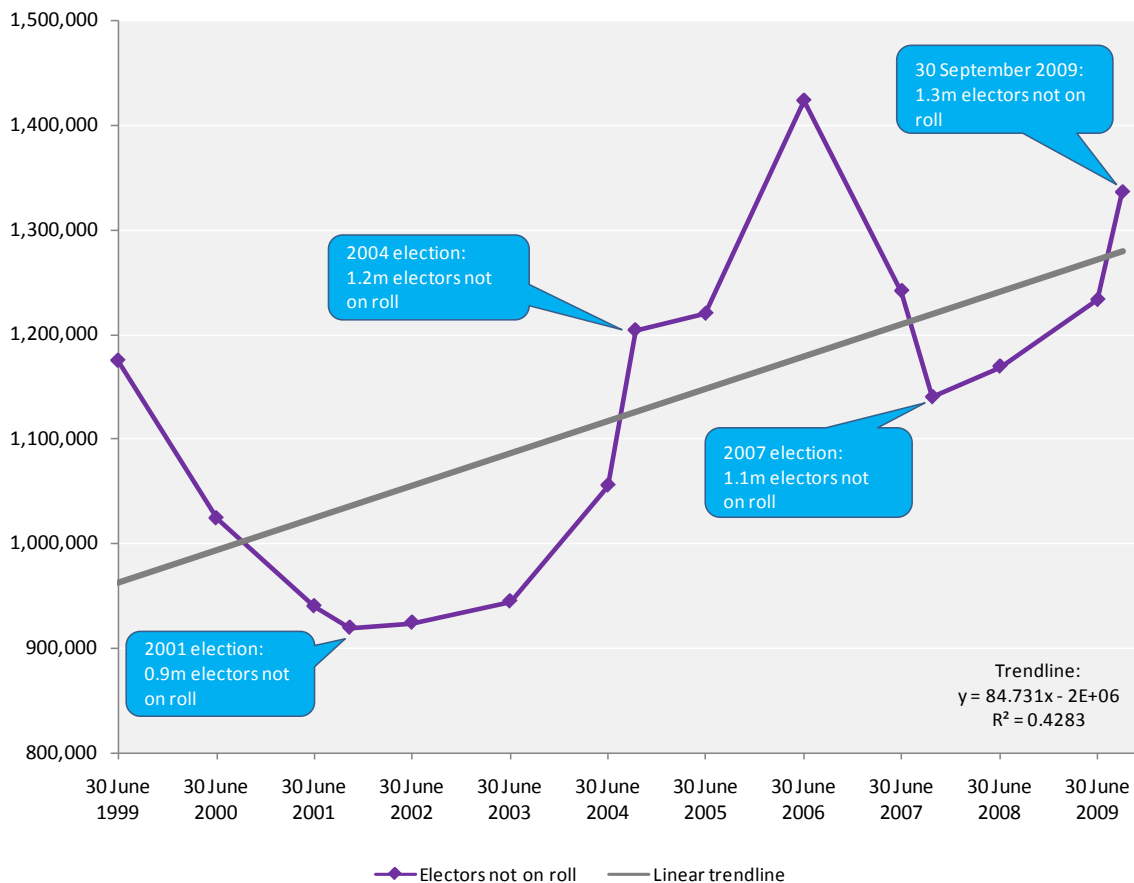
2.4 Whilst the number of enrolled electors generally continues to increase over time, growth of the electoral roll has not matched growth in the number of eligible electors in the

community. The percentage of enrolled electors as a proportion of those eligible has in fact been in general decline for nearly a decade.

2.5 The significant downward trend in the percentage of enrolled electors as a proportion of the eligible population since the 2007 election is evident in Figure 2.1 above and has occurred despite enrolment stimulation and roll maintenance activities undertaken in this period.

2.6 Figure 2.2 below shows the decline in participation in another light, indicating that the number of eligible electors not on the electoral roll has trended upward from June 1999 to September 2009.

**Figure 2.2 Number of electors not on roll showing trend line, 30 June 1999 to 30 September 2009**



2.7 As can be seen above, although federal elections usually generate increases in enrolment (and a corresponding fall in electors not on the roll), this effect does not consistently translate into ongoing enrolment growth. Since 2001 there have been two federal elections (October 2004 and November 2007), but the upward trend in the number of electors not on the roll has continued.

2.8 In the AEC's view, declining participation rates, in part caused and perpetuated by enrolment processes resulting from overly prescriptive legislation, present the most serious threat to Australia's democratic model. As at 30 September 2009 an estimated 1.3 million eligible Australians (equivalent to 15 Commonwealth electoral divisions) are effectively excluded from our democratic processes.

2.9 Strict formality rules which apply to House of Representatives elections and require the elector to indicate a consecutive preference for every candidate, further disadvantage particular sectors of the community. AEC studies have demonstrated the highest levels of informality occur in electorates with the highest proportion of citizens from non-English speaking backgrounds. High levels of informality means that significant numbers of Australians who are in fact motivated to participate are prevented by the operation of current rules from casting an effective ballot.

2.10 If not addressed, the combination of low participation and high informality has the potential to diminish public confidence in the ongoing validity and credibility of election results.

2.11 As indicated in the introduction to this submission, enrolment decline is not only a Commonwealth issue but one which affects every Australian jurisdiction. To address this, the New South Wales (NSW) Government has recently introduced a Bill to give effect to a 'Smart Roll' concept which has been developed in that State.

2.12 Amongst other things, the NSW Bill proposes introducing a system of automatic enrolment for the purposes of NSW elections. It will allow the NSW Electoral Commissioner to enrol eligible NSW voters, and to update the details of voters who are already enrolled, based on reliable data held by other government agencies. Electors will be notified by the Electoral Commissioner before their details have been added or changed on the NSW roll, and will be given an opportunity to raise objections before they are enrolled or their details are updated.

2.13 The Bill contains a range of checks and balances designed to ensure that the NSW electoral roll is up-to-date and accurate, that there is no weakening of integrity, and that elector privacy is balanced against electors' obligation to be enrolled.

2.14 Under the proposed legislation, NSW will be the first jurisdiction in Australia to give voters the opportunity, on provision of photographic identification, to enrol or update their enrolment details up to and including polling day and still be able to cast a vote.

2.15 Importantly, this means that NSW will no longer rely on the AEC to prepare and maintain rolls for NSW elections. Rather, the NSW Electoral Commissioner will use enrolment data supplied by the AEC and information obtained from NSW State

Government agencies to create a comprehensive list of NSW electors from which electoral rolls will be generated for State and local government elections.

2.16 The Bill provides for a new Joint Roll Arrangement to accommodate the new enrolment procedures. Regrettably, this has the potential to undermine cooperative arrangements which have delivered benefits to the Commonwealth, States and Territories through the development of complementary enrolment processes which allow electors to enrol for Commonwealth, State/Territory and local government elections using a single enrolment form.

2.17 Unless and until the *Commonwealth Electoral Act 1918* (the 'Electoral Act') is amended to facilitate automatic enrolment for federal elections, NSW voters who are enrolled automatically or whose details are updated by the NSW Electoral Commission in accordance with the new legislation will still be required fill out a Commonwealth enrolment form in order to be enrolled for Commonwealth elections, notwithstanding that they have already been enrolled for State and local government elections.

2.18 Obviously this will lead to significant elector confusion regarding their enrolment status. Significant divergence between the Commonwealth roll and NSW roll (with the NSW roll likely to be more up-to-date and accurate than the Commonwealth roll) is inevitable should Commonwealth legislation not be amended in a similar fashion.

2.19 In addition, the NSW Bill contains provisions to modernise and improve postal voting, pre-poll voting and mobile polling. Many of these reflect recommendations of the NSW Joint Standing Committee on Electoral Matters and a number are largely reflective of AEC-supported recommendations in the Commonwealth JSCEM's report on the 2007 federal election. These include provisions allowing for online application for postal votes, and for home division pre-poll votes to be cast as ordinary votes.

2.20 The AEC is deeply concerned that in the absence of timely amendments to the Electoral Act, the implementation of the NSW legislation will impact negatively on the Commonwealth electoral roll; with the problem being magnified if the NSW initiative results in other States and Territories adopting like arrangements, including measures similar to those proposed by the JSCEM following the 2007 federal election.

## 3: The immediate challenge

3.1 Against the background provided in the previous two parts, in the short term the AEC considers there is a need to progress a number of reforms which were the subject of the JSCEM recommendations. Even if some of these cannot be implemented until after the next federal election, the AEC considers the legislation to enact them should be introduced as soon as possible.

### Enrolment reforms

3.2 In relation to electoral enrolment provisions, the AEC supports those JSCEM recommendations that would:

- simplify the evidence of identity requirements and modernise enrolment processes by permitting electors to submit enrolment information on-line;
- allow for direct update of enrolment details based on information from ‘approved sources’;
- permit the automatic enrolment of new citizens;
- permit enrolment forms to be tailored to the needs of the community;
- permit the AEC to conduct enrolment transactions at the initial point of receipt; and
- reduce the minimum age for provisional enrolment from 17 years of age to 16, to potentially capture a greater number of young people while they are still at school.

3.3 The requirement in the Electoral Act that the elector sign his or her enrolment form means that electors cannot enrol (or update their enrolments) online. The AEC recently introduced a ‘smart’ enrolment application form, or ‘smart form’. This allows electors to complete their enrolment forms online. However, for the changes to take effect, the elector must still print the form, sign it by hand, and deliver it to the AEC. Early statistics indicate that almost 40% of electors who have used the smart form have not subsequently submitted a signed enrolment form, preventing the AEC from updating their details.

3.4 Providing a facility for electors to update their details online would bring the AEC into line with other government agencies and the private sector by offering services that focus on client convenience.

3.5 In relation to evidence or proof of identity for enrolment purposes, the JSCEM recommended that proof of identity be required for each elector once only, and that an identity should be able to be established by provision of a driver’s licence number, Australian passport number, or the signature of another person enrolled on the

Commonwealth electoral roll who can attest to the identity of the applicant. The essential integrity of the electoral roll is preserved when subsequent updates to enrolment can be readily tied back to the original proof.

3.6 This, combined with the ability to update the roll based on written advice (for example, information provided by electors in response to correspondence from the AEC or on declaration vote envelopes) in cases where electors have already met proof of identity requirements, would also assist in improving the accuracy of the roll.

3.7 Another JSCEM recommendation supported by the AEC would enable the direct update of the electoral roll based on information provided to the AEC from an agency approved by the Minister as an agency that performs adequate proof of identity checks, where that agency has provided the information to the AEC for roll update purposes, and where the elector has clearly consented to the use of the information for the purpose of updating the roll.

## Polling reforms

3.8 In relation to polling provisions, measures to mitigate the effects of increases in the take-up of early voting services are needed. Early voting services enable eligible citizens to address other time commitments whilst meeting their compulsory voting obligations. Nearly two million early votes were issued at the 2007 election representing almost 15% of the total votes issued. These votes are more resource intensive to issue and count than ordinary votes. In the main, the existing additional steps involved in the preliminary scrutiny of these votes mean that they cannot be counted on polling day.

3.9 The JSCEM recommended that where electors cast pre-poll votes in their home division they should be cast as ordinary votes and counted on polling night. If applied at the 2007 election, this measure would have enabled an extra 667,000 votes (equating to an additional 5% of the vote) to be counted on polling night. It should be recognised that issuing pre-poll votes as ordinary votes is already in place in number of State and Territory jurisdictions (Victoria, Queensland, Australian Capital Territory (ACT) and Northern Territory). This has resulted in a significant reduction in the number of declaration votes issued, faster finalisation of results, resource savings and reduced staff costs.

3.10 Allowing for the use of electronic certified lists in polling places and pre-poll voting centres would provide greater efficiency and accuracy in the issuing of votes. Additionally, if the electronic devices held national or whole of State/Territory roll information, consideration could be given to allowing a greater range of declaration votes to be issued as ordinary votes. Further benefits of electronic certified lists would be the

ability to accurately track voter flow patterns, and, if the lists were centrally networked, to potentially prevent multiple (ordinary) voting.

3.11 Changes to allow postal vote applications to be accessed and lodged electronically will facilitate earlier dispatch of postal voting material to electors, and the earlier return of postal voting material to the AEC. This would be of particular benefit to electors who live in remote areas with limited mail delivery services, or those who are overseas. It should be noted that an online postal vote application facility was implemented at the ACT Legislative Assembly elections in October 2008, with no issues arising.

3.12 Changes to the preliminary scrutiny rules will allow those postal votes which are currently lodged in the mail in accordance with electoral rules, but which are postmarked after polling day by Australia Post (and which are currently rejected), to be included in the count.

3.13 Removing the requirement for provisional voters to provide evidence of identity would eliminate the disenfranchisement of electors whose names actually appear on the certified list of voters but cannot be found by the polling official, and who do not subsequently provide evidence of identity. To address any concerns regarding integrity, where any doubts exist as to the *bona fides* of the elector, the Divisional Returning Officer could compare the signature on the provisional vote envelope to the elector's signature on a previous enrolment record before deciding whether the vote should be admitted or rejected.

3.14 Repealing the provisions that require the rejection of provisional votes cast by electors who have been removed from the roll on the grounds of non-residence would ensure that electors who are otherwise eligible, but have simply neglected to update their address details, are not disenfranchised.

3.15 Mobile polling provisions should be amended to provide for greater flexibility in the locations in which mobile polling is conducted and the persons who may utilise mobile polling.

3.16 The AEC does not consider that the measures proposed above will diminish electoral integrity. Instead, these measures will enable citizens who are entitled to enrol and vote to do so more conveniently, and with minimal confusion.

## 4: Beyond 2010

4.1 Administering the electoral system in a way which meets the needs of the Australian community, while maintaining the trust and confidence of the community, is the long term challenge for the AEC.

### A flexible and responsive framework

4.2 A comprehensive examination of the Electoral Act, which among other things would consider how it could be made principles-based, is now appropriate. The *Referendum (Machinery Provisions) Act 1984* should also be incorporated into the Electoral Act.

4.3 In considering a model for a principles-based Electoral Act, where the legislation may set out the desired outcome but not the process for achieving it, it would be necessary to address the issue of how the detail of the procedures that were previously covered by the legislation would be specified (for example in regulations, or Electoral Commissioner's directions), noting that this issue would undoubtedly be of great interest to stakeholders.

4.4 Such an Electoral Act would enable the AEC to exercise greater flexibility in the way in which it enables electors to enrol, delivers polling services, and manages its counting processes. It would also enable the AEC to incorporate technologies in enrolment processes and polling services, as they become available and are proven to be robust and effective tools in assisting voters to exercise their franchise. Importantly, the AEC would continue to remain effectively accountable to the Parliament, through the JSCEM, for the way in which it delivers these services and ensures the integrity of these electoral processes.

### Harmonisation and collaboration

4.5 The AEC also considers that any review should consider areas where harmonisation of Commonwealth electoral legislation with State/Territory electoral legislation would be appropriate. This would require consultation with State/Territory counterparts. In this regard, the AEC is seeking to work cooperatively with its State and Territory counterparts through the Electoral Council of Australia (ECA)<sup>1</sup>.

4.6 The ECA is currently preparing a 'Future Directions Framework' which establishes a framework for cooperation and the sharing of knowledge that preserves and enhances the franchise of all Australians. It sets out the ECA's continuing commitment to the issues

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<sup>1</sup> The ECA is a consultative council of the Electoral Commissioners from the electoral authorities of the Commonwealth, States and Territories.

surrounding the development and maintenance of the electoral roll across all jurisdictions, and matters of electoral administration which have implications for all Australian electoral authorities. It identifies shared challenges and key directions for focus. It also provides a framework for working in a spirit of cooperation and coordination to ensure that electoral services continue to be responsive to the needs of the Australian community.

4.7 The guiding principles underpinning the framework are integrity, transparency, accessibility, protection of the franchise, responsiveness and an ‘elector-centric’ outlook. The acknowledged shared challenges are the extent of disenfranchisement, legislative differences between jurisdictions, and highly prescriptive legislation in some jurisdictions governing elections and roll management.

4.8 The key directions that will guide activities are the need to keep pace with the Australian community’s changing expectations regarding service delivery; cooperation and coordination across jurisdictions, where possible, to enhance the delivery of electoral services; and informing the community and other political stakeholders of the implications of electoral changes consistent with the challenges outlined above.

4.9 The five focus areas identified for ECA activities over the next five years are consistency, convenience, accessibility, cooperation and coordination.

4.10 The AEC considers that the areas which should be a priority for harmonisation are those that directly impact on the elector and have the potential to confuse electors to the extent that it may impact on their ability to exercise the franchise – such as qualifications for enrolment, enrolment processes, voting services for electors with special needs (e.g. culturally and linguistically diverse audiences, the blind and persons with low vision), postal voting processes, and ballot paper formality rules.

## Ensuring the independence of the AEC

4.11 Using the typology established by the International Institute for Democracy and Electoral Assistance,<sup>2</sup> the following measures would enhance the AEC’s ability to meet community expectations that it conduct its functions in an independent and transparent manner.

- Explicitly spell out in the Electoral Act that the AEC is to be independent, not subject to ministerial direction in the conduct of statutory functions.<sup>3</sup>

<sup>2</sup> See Australian Government, *Electoral Reform Green Paper – Strengthening Australia’s Democracy*, 2009, p. 77.

<sup>3</sup> As is noted at paragraph 6.22 of the Green Paper, section 10 of the Tasmanian *Electoral Act 2004* states that the Tasmanian Electoral Commission ‘is not subject to the direction or control of the Minister in respect of the performance or exercise of its functions or powers’. Paragraph 6.22

- Spell out more clearly in the Electoral Act that the AEC's obligations under paragraph 7(1)(d) of the Act include both the provision of factual information, and the provision of advice as to courses of action which could or should be followed.
- Include a purpose clause stating that the AEC is an institution of governance charged with ensuring, within law, the conduct of free and fair elections in Australia, and the exercise by voters of their political rights.
- Make explicit in the Electoral Act the convention followed up to now that the Australian Statistician will be the non-judicial appointee to the Commission.
- Provide for the AEC to have a corporate seal and a power to enter contracts. (See for example, section 79 of the South Australian *Constitution Act 1934*, by which the Electoral Districts Boundaries Commission is incorporated.)
- Amend paragraph 44A(1)(a) of the *Financial Management and Accountability Act 1997* so that it does not apply to the AEC.
- Repeal the requirement in the Electoral Act that the Minister must approve any proposal to locate a divisional office outside the divisional boundaries.
- Amend the Electoral Act to make it clear that the AEC may, notwithstanding any provision in any other Act, adopt employment policies and practices which protect its political neutrality.
- Write into the Electoral Act standing appropriations to cover the cost of elections and roll maintenance.
- Make the JSCEM a statutory committee, and enable the JSCEM to make recommendations to Parliament after examining draft budget estimates for the AEC – similar to the arrangements in place between the Joint Committee of Public Accounts and Audit and the Australian National Audit Office set out at paragraph 6.37 of the Green Paper.

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also notes that New Zealand and South Africa specify the independence of their electoral management bodies in legislation.