



## Electoral and Referendum Legislation Amendment Bill 2006

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## Electoral and Referendum Legislation Amendment Bill 2006

**Date introduced:** 30 November 2006

**House:** House of Representatives

**Portfolio:** Special Minister of State

**Commencement:** Most of Schedules 1, 2 and 3 commence on Royal Assent, however Schedule 3 Part 1 commences on a day to be fixed by Proclamation or six months after Royal Assent

### Purpose

To amend the *Commonwealth Electoral Act 1918* (CEA) and the *Referendum (Machinery Provisions) Act 1984* (RMPA) to:

- extend some provisions for postal voting, including the range of AEC officers who may receive postal votes,
- to allow for trials of electronic voting for the sight-impaired and overseas serving defence personnel,
- to extend the capacity of the Australian Electoral Commission to establish pre-poll voting offices, and
- to make miscellaneous changes to the CEA.

Note that this Bill has already been passed into law. This Bills Digest has been prepared to complete the historical record.

### Background

#### Basis of policy commitment

This Bill is the second in a number of Government amendments to electoral legislation. The first Bill, the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005, was discussed in Bills Digest No. 95, 2005-06.<sup>1</sup> That Bill contained amendments which brought forward the closure of the electoral roll after the issuing of writs, introduced new requirements regarding identity for provisional voters, changed the rules governing donations to political parties and excluded certain prisoners from voting. It was a contentious Bill which elicited a significant degree of opposition and controversy. This Bill, in contrast, is likely to be non-contentious and receive widespread support. It contains measures arising out of the Joint Standing Committee on Electoral Matters report on the inquiry into the conduct of the 2004 federal election.<sup>2</sup>

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The proposal to remove criminal defamation provisions in Part 3 is not so immediately clear in its implications as other proposals in the Bill, so some background is provided here.

In its submission to the enquiry to the 2001 election, the Australian Electoral Commission (AEC) recommended that the current provisions regarding criminal defamation be removed.<sup>3</sup>

Section 350 currently provides that there is an offence committed if false or defamatory statements are made about a candidate. There is a defence if the person making the statement believed, on reasonable grounds, that it was true. There are also provisions for restraint by injunction to stop the repetition of a defamatory statement.

The AEC argued that the provisions were unnecessary, in part because according to ‘the Director of Public Prosecutions’ (DPP’s) records, there has not been any prosecution for defamation under section 350 of the Act.’ It is to be noted that there had been complaints made to the DPP under the section, but none had been found to be sustainable (partly because the offence, as a criminal defamation provision, attracts a higher burden of proof).

The AEC argued that two cases had made s. 350 even more difficult to utilise. *Dow Jones & Company Inc v Gutnick*<sup>4</sup> was a case in which a Victorian court found that defamation had occurred in Victoria because of material published in the US. The broadening of the traditional understanding of jurisdictional issues has concerned the AEC regarding s. 350, because additional material, which would be difficult to ‘police’, would fall within the provision. They were also concerned by the case of *Roberts v Bass*,<sup>5</sup> which had given a broader protection to political speech by finding that material published during an election period would effectively be covered by the implied freedom of political communication. Given this outcome, the Commission argued that the provisions of s. 350 would be even less likely to be used.

It should be noted that Senator Murray ‘supported the removal of the section, *or its amendment* to include a clause making it clear that defamatory material had significantly affected the outcome of an election. This might facilitate prosecution of defamatory political comment on the internet through the Court of Disputed Returns, which handles allegations of corruption of the electoral process.’<sup>6</sup> [emphasis added]

This alternative proposal was not pursued. While the removal of the section would not seem to have many practical implications, according to the AEC’s analysis, the amendment may be less productive than some alternative solutions, such as that possible alternative proposed by Senator Murray. The issue has, however, received the attention of two Joint Standing Committees on Electoral Matters, both of which have recommended the removal of the section.

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## Main provisions

### Schedule 1— Postal Voting

**Items 1–4** insert various definitions that will subsequently provide a legislative basis to enable Australian Federal Police (AFP) members and members of the defence forces or ‘defence civilians’ (civilians who are serving with the Australian Defence Force (ADF) and are bound by Defence Force discipline) to be given particular rights to vote overseas. Under changes made by **items 8–10** this would include a capacity to enrol as a postal voter before leaving Australia. **Items 5 and 11** insert provisions that would ensure that their service overseas is not information given out by the AEC.

**Item 6** brings forward the time by which an application for a postal vote must be made (from 6pm on the Friday to 6pm on the Thursday before polling day), but this more restrictive provision is explained as being necessary to ensure that the applicant can be more likely to receive the voting papers. **Item 6** also introduces new provisions which require the AEC to do its best to ensure that those who did not meet the Thursday deadline know that they are not eligible for a postal vote and will need to make alternative arrangements to vote.

**Items 14–24** expand the range of AEC officers who can receive postal votes, and make consequential amendments.

**Items 29–35** mirror the amendments made to expand the range of AEC officers who can receive postal votes in the *Referendum (Machinery Provisions) Act 1984*.

### Schedule 2 – Trials of electronic voting methods

This Schedule introduces a **new Part XVA** to the CEA which will allow for two trials of electronic voting methods. One of these is a trial of ‘electronically assisted voting for sight-impaired people’ (**Division 1**) and the other is for defence personnel serving outside Australia (**Division 2**). In recognition of the ‘pilot’ nature of these arrangements, and in order to allow for flexibility in these matters, there are broad provisions for the making of regulations. There are also specific provisions recognising that the Minister may decide that the electronically assisted voting trials are ‘not to proceed’ (**proposed sections 202AF and 202AM**). The new Parts do specify certain minimum provisions, such as the need to keep a record of who has voted in this way and the need to keep a printed record of the vote, in the case of the sight-impaired trials, and the need to transmit electronic votes to the AEC, in the case of the defence force trials. Mirror provisions inserting **Part IVB** are proposed for the RMPA.

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## Schedule 3 – Other amendments

### Part 1 – Proof of identity for people enrolling from outside Australia

The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* introduced additional requirements for those applying to be added to the electoral roll. These amendments recognise that it may be more difficult for overseas applicants to utilise an Australian driver’s license and consequently that a passport may be used in the alternative (**proposed subsection 98AA(1)**).

### Part 2 – Pre-poll voting offices

The proposed amendments to both the CEA and the RMPA would allow the AEC to establish pre-poll voting offices more easily. Under **proposed s. 200BA** of the CEA the AEC would need to let candidates know as soon as possible after establishing a pre-poll voting office and, in their discretion, publish the information in a relevant newspaper. Under **proposed s. 73AA** of the RMPA the need to alert people is modified (there being no candidates in a referendum) and the AEC must alert registered political parties.

### Part 3 – Removal of provision relating to defamation of candidates and false statements

This Part contains a single item proposing to remove section 350 of the CEA. This section currently provides that a person is guilty of an offence ‘if the person makes or publishes any false and defamatory statement in relation to the personal character or conduct of a candidate.’ This provision does not apply if the person proves that he or she had a reasonable ground for believing, and did believe, the statement to be true. The section further provides that

any person who makes a false and defamatory statement in relation to the personal character or conduct of a candidate in contravention of this section may be restrained by injunction at the suit of the candidate aggrieved, from repeating the statement or any similar false and defamatory statement.

The implications of removing the section are discussed above in the ‘Background to the Bill’.

## Concluding comments

The Bill does not contain provisions likely to attract controversy.

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## Endnotes

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1. Jerome Davidson, 'Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005', *Bills Digest*, no. 95, Parliamentary Library, Canberra, 2005–06, <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd095.pdf>.
2. Joint Standing Committee on Electoral Matters, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, September 2005, <http://www.aph.gov.au/house/committee/em/elect04/report.htm>, accessed on 23 March 2007.
3. AEC, '[Fifth Submission in Response to Questions on Notice](#)', Submission No. 198 to the Joint Standing Committee on Electoral Matters Inquiry into the 2001 Federal Election, 24 April 2003, pp. 4–7.
4. *Dow Jones Company Inc v Gutnick* [2001] VSCA 249 (21 September 2001) <http://www.austlii.edu.au/au/cases/vic/VSCA/2001/249.rtf>, accessed on 21 March 2007.
5. *Roberts v Bass* (2003) 194 ALR 161, <http://www.austlii.edu.au/au/cases/cth/HCA/2002/57.html>, accessed on 23 March 2007.
6. Joint Standing Committee on Electoral Matters, *op. cit.*, p. 282.

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